Governmental Liability Under Section 1983 and the Fourteenth Amendment After Monell

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NOTES & COMMENTS

GOVERNMENTAL LIABILITY UNDER SECTION 1983 AND THE FOURTEENTH AMENDMENT AFTER MONELL

INTRODUCTION

Section 1 of the Civil Rights Act of 1871¹ (the Act), codified at 42 U.S.C. § 1983, was enacted to combat persistent southern lawlessness during the post-Reconstruction Era.² Specifically, the Act was intended to open the doors of the federal courts to individuals deprived of federally secured rights by persons acting “under color of” state law.³ For many years, however, the remedial purposes of

¹ Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. The Act of April 20, 1871, has been termed variously the Civil Rights Act of 1871, the Ku Klux Klan Act and the “third force bill.” Throughout this Note, it will be referred to simply as the “Act.”
² During the debates on the Act, numerous congressmen adverted to the state of lawlessness widely believed to be prevalent in the southern states. See, e.g. CONG. GLOBE, 42d Cong., 1st Sess. 332 (1871) [hereinafter cited as GLOBE] (remarks of Rep. Hoar); id. at 428 (remarks of Rep. Beatty); id. at 460-61 (remarks of Rep. Coburn); id. at 504 (remarks of Sen. Pratt). Others, however, were openly skeptical of assertions that the problem was widespread and questioned whether lawlessness existed at all. See, e.g., id. at 365 (remarks of Rep. Arthur); id. at 462 (remarks of Rep. Roberts).
³ 42 U.S.C. § 1983 (1976). Section 1 of the Act was first codified in 1875 as R.S. §§ 563, 629, 1979 (2d ed. 1878). The first two sections embodied the jurisdictional provisions of the Act, while the third contained the Act’s substantive protections. R.S. § 1979 was later incorporated in Title 42 of the United States Code.

As codified, the substantive component of § 1 of the 1871 Civil Rights Act provides:

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


The jurisdictional grant of § 1 of the Act is now embodied in 28 U.S.C. § 1343 (1976) which states:

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.

Although it has been noted that § 1343(3) affords the jurisdictional basis for the § 1983 cause of action, see Aldinger v. Howard, 427 U.S. 1, 16 (1976); Examining Bd. of Eng’rs v. Flores de Otero, 426 U.S. 572, 583-84 (1976); Lynch v. Household Fin. Corp., 405 U.S. 538,
section 1983 went largely unfulfilled because of narrow judicial interpretations of its provisions. It was not until 1961, when the Supreme Court in *Monroe v. Pape* interpreted “under color of” state law in a broad manner, that section 1983 again became a potentially significant vehicle for redressing deprivations of civil rights. At the same time, however, the Court held that municipalities are absolutely immune from liability under section 1983. Ultimately, this latter development provided the impetus for individuals who had been deprived of their civil rights by local government activities or policies to seek redress directly under the fourteenth amendment. The need for such a cause of action may have been obviated,

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543 (1972), it is not clear whether § 1343(3) affords federal courts power to adjudicate all claimed deprivations of federal statutorily derived rights.

While a claim for redress of rights “secured by the Constitution and laws” is embodied in § 1983, § 1343(3) jurisdiction is afforded for suits to vindicate rights created by federal statute only to the extent that such enactments “provid[e] for equal rights of citizens.” 28 U.S.C. § 1343(3) (1976). Despite the difference in statutory language, most commentators have argued that § 1343(3) should be interpreted to grant jurisdiction to all § 1983 claims. See, e.g., Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 112-13 (1967); Note, *Lynch v. Household Finance Corp.: Jurisdictional Ramifications*, 24 STAN. L. REV. 1134, 1145 (1972). The circuits, however, currently are split. Compare *Andrews v. Maher*, 525 F.2d 113 (2d Cir. 1975), and *Randall v. Goldmark*, 495 F.2d 356, 359 (1st Cir.), *cert. denied*, 419 U.S. 167 (1961). The *Monroe* Court determined that “under color of” state law encompassed action in violation of state law as well as that pursuant to, or authorized by, state law. *Id.* at 184-85; see note 28 and accompanying text infra. In addition, the Court held that the existence of state-created remedies does not affect the availability of federal relief. 365 U.S. at 187, 192; see notes 22-33 and accompanying text infra. Subsequent judicial interpretations of “persons” liable under § 1983 built upon this doctrinal foundation to restrict § 1983 liability to natural persons. See notes 36 & 41 infra.

8 365 U.S. at 187, 192; see notes 22-33 and accompanying text infra. Subsequent judicial interpretations of “persons” liable under § 1983 built upon this doctrinal foundation to restrict § 1983 liability to natural persons. See notes 36 & 41 infra.

9 See notes 97-117 and accompanying text infra.
however, as the Supreme Court, in Monell v. Department of Social Services,10 recently overruled Monroe and stripped municipalities of their absolute immunity from section 1983 liability.11

This Note will first review judicial interpretation of the scope of section 1983 with respect to the question of municipal liability. It will be suggested that the Monell Court’s inclusion of municipalities as “persons” for purposes of section 1983 will, in all likelihood, foreclose resort to the constitutionally derived remedy. In contrast, Monell should provide the impetus for renewed use of the doctrine of pendent jurisdiction in the section 1983 context. Finally, it appears that Monell, read in conjunction with modern Supreme Court analysis of the interplay between the eleventh and fourteenth amendments, will terminate the absolute immunity from section 1983 liability that to date has been accorded state governments.

Municipalities and § 1983: An Overview

Following passage of the post-Civil War amendments, numerous attempts were made by the federal government to guarantee the civil and political rights of those recently freed from slavery.12 Yet, ratification of the thirteenth and fourteenth amendments and passage of the first three Civil Rights Acts had done little to halt widespread persecution of emancipated blacks and others sympathetic to the Union.13 Particularly egregious were the much-publicized “outrages,” attributed to extremist organizations such as the Ku Klux Klan.14 In response to this situation, President Grant, in 1871, recommended immediate passage of a bill designed to combat the

11 Id. at 2035.
12 Five major civil rights acts were enacted between 1866 and 1875: Act of April 9, 1866, ch. 31, 14 Stat. 27 (outlawing “Black Codes”); Act of May 31, 1870, ch. 14, 16 Stat. 140 (protecting voting rights); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (protecting voting rights); Act of April 20, 1871, ch. 22, 17 Stat. 13 (providing means to suppress civil disorders); Act of March 1, 1875, ch. 114, 18 Stat. 335 (prohibiting racial discrimination in public accommodations).
14 During the debates, a massive compilation of accounts of Klan activities was available to the participants. See S. Rep. No. 1, 42d Cong., 1st Sess. 1 (1871). The debates are replete with reference to the Klan’s depredations. See, e.g., Gloss, supra note 2, at 429 (remarks of Rep. Beatty); id. at 448 (remarks of Rep. Butler); id. at 459 (remarks of Rep. Coburn); id. at 504 (remarks of Sen. Pratt). Further, it was acknowledged by Congress that local law enforcement agencies and the courts acquiesced in this situation. See, e.g., Gloss, supra note 2, at 368 (remarks of Rep. Sheldon); id. at 459 (remarks of Rep. Coburn); id. at 477 (remarks of Rep. Dawes); id. at 505 (remarks of Sen. Pratt).
lawlessness then existing throughout most of the South. This bill, H.R. 320, containing what is now 42 U.S.C. § 1983, was enacted less than 1 month later.

Despite its promise as a tool for protecting and enforcing individual civil rights, section 1983 was utilized sparingly for a period of 90 years. One reason for this was that courts narrowly construed the "rights, privileges and immunities" protected by the statute.

Further, the phrase "under color of" law, contained in the statute, was interpreted to apply only in situations where state law authorized the state or local official's conduct. By the middle of the...
twentieth century, however, judicial interpretation of this phrase as it appeared in the criminal counterpart to section 1983\(^2\) became less restrictive. An action was considered to have been taken "under color of" state law where it involved the "[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."\(^2\) Finally, in 1961, the Supreme Court applied this concept in the context of a section 1983 suit.

In *Monroe v. Pape*,\(^2\) thirteen Chicago police officers, acting without a warrant, allegedly forced their way into the plaintiffs' home in the predawn hours.\(^2\) James Monroe and his family were awakened at gunpoint and made to stand naked in their living room.\(^2\) After a destructive search of the premises and the physical abuse of members of the family, Monroe was taken to a police station where he was detained and interrogated for 10 hours without the benefit of counsel.\(^2\) Following Monroe's release without criminal charges being preferred against him,\(^2\) the plaintiffs brought a section 1983 damage action against the city and the individual officers alleging deprivations of their constitutional right to be free from unreasonable searches and seizures.\(^2\) The Supreme Court, broadly

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\(^3\) Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27. It was reenacted in substantially similar form in the Civil Rights Act of 1870. Act of May 31, 1870, ch. 114, § 17, 16 Stat. 140.

\(^4\) *Id.* at 203 (Frankfurter, J., dissenting).

\(^5\) *Id.* at 169.

\(^6\) *See id.* at 169, 171.
construing the phrase "under color of" law, reversed the dismissal of the Monroes' complaint as to the individual defendants. Significantly, however, the Monroe Court affirmed the dismissal as to the city, finding that Congress intended to exclude municipalities from the scope of section 1983. Justice Douglas, writing for the majority, noted that during debates on the Act, Senator Sherman had offered an amendment which would have held "the inhabitants of the county, city, or parish" liable to injured persons for specified acts of violence. When this proposal was twice rejected by the House of Representatives, it was replaced by a new section omitting any provision for municipal liability. Relying on congressional antipathy to the Sherman amendment, the Court could not "believe that the word 'person' was used in this particular Act to include [municipalities]."

The absolute immunity from section 1983 damage liability ac-

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28 Id. at 187. The Monroe Court initially considered whether conduct made illegal by state law was "under color of" law for purposes of § 1983. Id. at 191. The defendants argued that since Illinois prohibited the actions of the policemen, an adequate state law remedy was available to the plaintiffs which in turn foreclosed resort to federal court. Id. at 172. Based on an extensive review of the applicable legislative history, see id. at 171, 173-83, 185, Justice Douglas, writing for the majority, rejected this approach to § 1983. Id. at 183-85. Justice Douglas found that the three principal purposes of the Act were to "override . . . state laws" which infringed upon the rights or privileges of citizens of the United States, to afford "a remedy where state law was inadequate," and "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." Id. at 173-74. In summary, Justice Douglas believed it 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.

Id. at 180.

In contrast, taking a narrow view of the liability of the individual defendants under § 1983, Justice Frankfurter stated that Congress intended to create "a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom or usage' sanctioned the grievance complained of." Id. at 237 (Frankfurter, J., dissenting). In addition, he posited that the Court's expansive interpretation of "under color of" law would have deleterious consequences for federal principles "long regarded as critical to the most effective functioning of our federalism." Id. at 241-42 (Frankfurter, J., dissenting).

29 Id. at 190-92.
30 Id. at 188.
31 Id. at 188-89 & nn.40, 42.
32 Id. at 189-90.
33 Id. at 191. Justice Douglas principally relied on a statement by Representative Poland, one of the amendment's opponents, that "the House had . . . decided that . . . Congress had no constitutional power to impose any obligation upon county and town organizations." Id. at 190 (quoting Glose, supra note 2, at 804 (remarks of Rep. Poland)).
corded municipalities by the Monroe Court was strictly adhered to in subsequent Supreme Court decisions. For example, in City of Kenosha v. Bruno, the Court rejected the argument that the Monroe limitation applied only to actions for damages, and thereby foreclosed the possibility of obtaining equitable relief against a municipality under section 1983. As a result of this seemingly absolute limitation placed on the reach of section 1983, more circuitous approaches to municipal liability were essayed. In Moor v. County of Alameda, 42 U.S.C. § 1983 was used in an attempt

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35 Id. at 513.
36 In Kenosha, several “dram shop” proprietors commenced a § 1983 action against the cities of Racine and Kenosha alleging that their due process rights had been infringed when the cities denied their liquor license renewal applications. Id. at 508. The Court held that the declaratory and injunctive relief requested was foreclosed by its holding in Monroe. Id. at 513. Raising the jurisdictional issue sua sponte, id. at 511 (citing Louisville & Nash. R.R. v. Mottley, 211 U.S. 149, 152 (1908)), the Court found that municipalities were “outside of [§ 1983’s] ambit for purposes of equitable relief as well as for damages.” 412 U.S. at 513. Significantly, however, the Kenosha Court had no occasion to reach the issue whether equitable relief under § 1983 was possible when sought against individual municipal officers sued in their “official” or “representative” capacities. This “loophole” in Kenosha, see Levin, supra note 3, at 1496-1504, was soon detected by lower federal courts. See id. at 1500-01 & n.67 (collecting cases). The practical importance of permitting official-capacity suits seeking injunctive relief is significant, since the effect of any ordered relief on the governmental employer is indistinguishable from that which would result from allowing the remedy to run directly against the governmental entity. See id. at 1502 n.76, 1504-18.

The significance of the Monroe-Kenosha determination that local government entities could never be § 1983 defendants, regardless of the relief sought, was eroded still further when monetary awards, such as backpay, were allowed as an element of equitable relief. See, e.g., Burt v. Board of Trustees, 521 F.2d 1201, 1205 (4th Cir. 1975) (backpay); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 288 (6th Cir. 1974) (attorney’s fees). Even where equitable relief is granted, the costs of compliance can be substantial. See Frug, The Judicial Power of the Purse, 126 U. Pa. L. Rev. 715 (1978). See generally Levin, supra note 3, at 1504-18. This paradox, whereby the costs of relief ordered in “official-capacity” suits would be paid by local government entities, despite Monroe and Kenosha, was avoided by other lower federal courts. These courts relied on Edelman v. Jordan, 415 U.S. 651 (1974), where the Court refused to award monetary relief in the nature of equitable restitution against state officials sued in their official capacities, see note 50 infra, and, by analogy, refused to approve relief involving monetary compensation ultimately payable from the treasury of a local government entity. See, e.g., Muzquiz v. City of San Antonio, 528 F.2d 499, 501 (5th Cir. 1976) (en banc), vacated and remanded, 98 S. Ct. 3117 (1978); accord, Monell v. Department of Social Servs., 532 F.2d 259, 265-67 (2d Cir. 1976), rev’d, 98 S. Ct. 2018 (1978).

The jurisdiction in civil . . . matters conferred on the district courts by [the Civil Rights Acts] . . . , 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 . . . , the common law, as
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to incorporate California’s waiver of governmental immunity, and its imposition of vicarious liability on counties for the acts of their employees, into the law of section 1983. 39 This device failed, however, as the Court found unpalatable the “wholesale importation” of state law into federal law under section 1988. 40 The Supreme Court further manifested its reluctance to empower the federal courts to adjudicate section 1983 claims against municipalities when it held that, absent an independent basis of federal jurisdiction over a municipal corporation, the doctrine of pendent jurisdiction could not be utilized to confer jurisdiction on a federal court to hear a state cause of action against the corporation. 41

39 Id. at 698.

40 Id. at 703-04. Moor arose out of the “police riot” which occurred during the infamous People’s Park confrontations in Berkeley, California in the spring of 1969. Under Cal. Gov’t Code § 815.2(a) (Deering 1973), the county could have been subjected to damage liability for the unconstitutional acts of its employees on a respondeat superior basis. 411 U.S. at 696, 710 n.27. The Court determined that § 1988 is not an independent “‘Act of Congress providing for the protection of civil rights’” within the meaning of 28 U.S.C. § 1343(4). Instead, the Court found that § 1988 merely was “intended to complement the various [civil rights] acts which do create federal causes of action.” 411 U.S. at 702.

41 Aldinger v. Howard, 427 U.S. 1, 18 (1976). In the post-Monroe era, the lower federal courts consistently held that states were not “persons” for § 1983 purposes. To some extent this was based upon the eleventh amendment bar to suits against states in the federal courts. See notes 168-192 and accompanying text infra. See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW ch. 3, §§ 3-34 to -38 (1978) [hereinafter cited as Tribe]; Tribe, INTERGOVERNMENTAL IMMUNITIES IN LITIGATION, TAXATION, AND REGULATION: SEPARATION OF POWERS ISSUES IN CONTROVERSIES ABOUT FEDERALISM, 89 Harv. L. Rev. 682 (1976) [hereinafter cited as INTERGOVERNMENTAL IMMUNITIES]. In addition, some courts reasoned that since municipalities are immune from § 1983 liability and are political subdivisions of the states, then a fortiori states must also be immune. See, e.g., Cheramie v. Tucker, 493 F.2d 586, 587 (5th Cir.), cert. denied, 419 U.S. 868 (1974); United States v. County of Philadelphia, 413 F.2d 84, 86 n.2 (3rd Cir. 1969), cert. denied, 396 U.S. 1046 (1970); cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976) (since Monroe held municipalities were not § 1983 “persons,” states similarly could not be liable under § 1983).


Courts disagreed, however, whether “independent agencies” were § 1983 persons. Compare Muzquiz v. City of San Antonio, 520 F.2d 993, 996-1001 (5th Cir. 1975), and Forman v. Community Servs., Inc., 500 F.2d 1246, 1255-56 (2d Cir. 1974), rev’d on other grounds sub
In 1978 the Court took the opportunity to fully reconsider the Monroe decision. In Monell v. Department of Social Services, the plaintiffs brought suit under section 1983, alleging that written municipal policies violated their constitutional rights. Specifically, the plaintiffs challenged the pregnancy leave policies of their employers, the City of New York and the New York Board of Education, that forced pregnant employees to take unpaid leaves of absence regardless of their ability to continue to work. Although


In resolving this question the courts typically inquired whether the agency performed a "vital government function," possessed independent powers in carrying out its function, and determine how its funds would be spent (or to what extent it would be funded in the first instance). See, e.g., Monell v. Department of Social Servs., 532 F.2d 259, 263-64 (2d Cir. 1976), rev’d, 98 S. Ct. 2018 (1978); Forman v. Community Servs., Inc., 500 F.2d 1246 (2d Cir. 1974), rev’d on other grounds sub nom. United Hous. Foundation, Inc. v. Forman, 421 U.S. 837 (1975). Also, the courts analyzed the agency’s status under local or state law and whether it, or a local or state government, would pay a judgment. Monell v. Department of Social Serv., 532 F.2d 259, 263-64 (2d Cir. 1976), rev’d, 98 S. Ct. 2018 (1978). See also Developments, supra note 13, at 1194-95 & nn.35-36.

Both the District of Columbia, see, e.g., District of Columbia v. Carter, 409 U.S. 418 (1973), and the Commonwealth of Puerto Rico, see, e.g., Carreras Roena v. Camara de Comerciantes Mayoristas, Inc., 440 F. Supp. 217, 218-19 (D.P.R. 1976), aff’d mem., 559 F.2d 1201 (1st Cir. 1977), were found to be outside the scope of "person" under § 1983.

Individual city and board officials, in this case the department’s commissioner, the board’s chancellor and the city’s mayor, although sued in their official capacities, have always been considered “persons” within the meaning of § 1983. See, e.g., Greene v. City of Memphis, 535 F.2d 976, 979 (6th Cir. 1976); Wright v. Chief of Transit Police, 527 F.2d 1262, 1263 (2d Cir. 1976) (per curiam); Bramlet v. Wilson, 495 F.2d 714, 716-17 (8th Cir. 1974). Individual government officers typically are sued in their “official” capacities when declaratory or injunctive relief is sought. See Rizzo v. Goode, 423 U.S. 362 (1976); Gay Students Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974). The official-capacity defendants—those charged with administering or formulating the offending policies—are assumed to be in the best position to effectuate any remedial modifications ordered by the court.

subsequent changes in the maternity leave regulations mooted the plaintiffs' requests for declaratory and injunctive relief, their back-pay claims survived. The district court denied recovery as to all defendants, reasoning that Monroe forbade any payment of money damages that would necessarily and ultimately be borne by a municipal government. On appeal, the second circuit held that the board of education was not a person within the meaning of section 1983 and that, although local officials sued in their official capacity were, damages could not be assessed against them since any such award ultimately would be paid by the city. The Supreme Court,
however, reversed and overruled Monroe "insofar as it [held] that local governments are wholly immune from suit under § 1983."51

Writing for a majority of the Court, Justice Brennan52 undertook an exhaustive reanalysis of section 1983's legislative history.53 It was pointed out that, while the House first approved H.R. 320 without modification, a number of amendments were offered in the Senate, including one by Senator Sherman.54 As introduced, Senator Sherman's proposal authorized a civil action in the federal courts for redress of injury to persons or damage to property caused


It is generally agreed that a governmental entity that provides indemnification may not raise Monroe immunity or eleventh amendment sovereign immunity as a defense. See Muzquiz v. City of San Antonio, 520 F.2d 993, 1008 (5th Cir. 1975) (Goldbold, J., dissenting in part), rev'd en banc, 528 F.2d 499 (5th Cir. 1976), vacated and remanded, 98 S. Ct. 3117 (1978); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 286-87 (6th Cir. 1974). See also Tribe, supra note 41, § 3-35, at 132 n.22.

51 98 S. Ct. at 2022.

52 Justice Brennan was joined by Justices Stewart, White, Marshall, Blackmun and Powell. Justice Stevens joined only in parts I, III and V of the majority opinion. Justice Powell authored a separate concurring opinion. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined.

53 See 98 S. Ct. at 2023-36. Justice Brennan observed that § 1 was the Act's least controversial provision and was approved as introduced in both Houses. Id. at 2023. In contrast, those provisions of H.R. 320 which established presidential power to suspend the writ of habeas corpus, Act of April 20, 1871, ch. 22, § 4, 17 Stat. 13, and use federal troops to suppress civil disorders, id. § 3, provided civil and criminal sanctions for participation in conspiracies, inter alia, to deprive persons of their civil rights, id. § 2, and mandated disqualification from jury duty for those in complicity with such unlawful combinations, id. § 5, occupied center stage throughout the debates. 98 S. Ct. at 2023.

54 98 S. Ct. at 2023; see GLOBE, supra note 2, at 663. As noted by the Court, the Sherman amendment was to have been appended "as an additional section" and was not intended to modify any of the bill's other provisions. 98 S. Ct. at 2023; see GLOBE, supra note 2, at 663.
by persons "riotously and tumultuously assembled." Justice Brennan emphasized that, as introduced, this amendment "did not place liability on municipal corporations"; rather, it imposed liability on the inhabitants of the locality wherein the injury or damage occurred. Upon the House of Representatives' repudiation of the Sherman amendment, the entire bill was referred to a conference committee. On April 18, 1871, the conferees reported back to their respective houses a somewhat expanded version which would have imposed liability directly upon municipalities if the individual defendants could not satisfy the judgment. Although passed by the

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25 98 S. Ct. at 2023. The first version of the Sherman amendment provided [that if any house . . . [or other structure] 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 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, . . . 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.


24 98 S. Ct. at 2023. During the debates on the first conference committee revision of the Sherman amendment, it was pointed out that a number of states had enacted riot statutes with provisions purportedly similar to the original proposal and the first conference committee revisions of the amendment. See Globe, supra note 2, at 751 (remarks of Rep. Shellabarger); id. at 762 (remarks of Sen. Stevenson); id. at 771 (remarks of Sen. Thurman); id. at 792 (remarks of Rep. Butler). Senator Thurman, however, exposed the inaccuracies of analogizing the Sherman amendment and the various state riot statutes. See id. at 771-72.

27 98 S. Ct. at 2023. While the House of Representatives approved H.R. 320 in its original form by a vote of 118 to 91, Globe, supra note 2, at 522, it rejected the original Sherman amendment overwhelmingly. Id. at 725.

26 98 S. Ct. at 2024. For the complete text of the Sherman amendment as revised by the first conference committee, see Globe, supra note 2, at 749, 755, reprinted in Monell v. Department of Social Servs., 98 S. Ct. 2018, 2042 (1978). The various modifications were reported to the House of Representatives by Representative Shellabarger, see Globe, supra note 2, at 750-52, and to the Senate by Senator Edmunds. See id. at 756-59.

29 98 S. Ct. at 2024; see Globe, supra note 2, at 749, 755. This formulation of the amendment also made explicit that only intentional deprivations were to be actionable, that individual offenders could be joined on the motion either of the plaintiff or the defendant municipal-
Senate, the bill containing this version of the Sherman amendment was overwhelmingly rejected by the House of Representatives. Since, as Justice Brennan observed, the "sole basis" for the *Monroe* Court's grant of absolute immunity to municipalities was an "inference" drawn from the House's rejection of the Sherman amendment, it was necessary to identify and analyze the sources of that antipathy.

The Court noted that proponents of the amendment believed that Congress, in furtherance of the fourteenth amendment, could enact legislation to enforce constitutionally protected rights against a municipal corporation. House opponents, on the other hand,

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See *Globe*, *supra* note 2, at 749, 755. As in the original version of the amendment, a municipality which had been ordered to respond in damages was subrogated to the plaintiff's right to recover from those who had actually caused the injury.

98 S. Ct. at 2024. The vote in the House was 106-74 in favor. *Globe*, *supra* note 2, at 800. The second conference committee formulation, subsequently adopted as § 6 of the Act, excised all provisions for municipal liability. In pertinent part, this version stated:

> That any 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 . . . for all damages caused by any such wrongful act which such first-named person or persons by reasonable diligence could have prevented . . . .


98 S. Ct. at 2023. In *Monroe*, Justice Douglas had stated that "[t]he response of the Congress to the [Sherman amendment] was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." 365 U.S. at 191 (footnote omitted). This analysis of the congressional rejection of the amendment has been criticized by numerous commentators. *See, e.g.*, Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. Cal. L. Rev. 131, 132-36 (1972); Levin, *supra* note 3, at 1519-36; *Developments*, *supra* note 13, at 1192; Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 Minn. L. Rev. 1201, 1205-07 (1971) [hereinafter cited as *Minn.*].

98 S. Ct. at 2025-27. Justice Brennan focused on the statements of Representative Shellabarger, one of the Sherman amendment's chief proponents, in examining the position of those in favor of the Sherman amendment. *Id.* at 2025. The Court first looked to Representative Shellabarger's explanation of the rights protected by § 2 of H.R. 320, which like the Sherman amendment also implicated the constitutional authority of the federal government to intrude in the internal affairs of the several states. 98 S. Ct. at 2025. The congressman asserted that the "privileges and immunities" of citizens, as defined in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1825) (No. 3,230), had to be protected. *See Globe App.*, *supra* note 16, at 68-69. This proposition was not questioned by opponents of the Sherman amendment. *See Globe*, *supra* note 2, at 772 (remarks of Sen. Thurman); *id.* at 791 (remarks of Rep. Willard). The question, however, was the extent to which Congress could protect those constitutional rights. Representative Shellabarger thought that legislation enacted to enforce
stressed the significance of the difference between legislation imposing an obligation to keep the peace and legislation merely providing a civil remedy for a municipality’s failure to implement a state-imposed obligation to do so. The prevailing view among these

U.S. Const. art. IV, § 2, cl. 3, provided the closest analogy. See Globe App., supra note 16, at 70 (remarks of Rep. Shellabarger). U.S. Const. art. IV, § 2, cl. 3, which was superseded by the thirteenth amendment, provided:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon Claim of the Party to whom such Service or Labour may be due.

The constitutionally protected right of slave owners to be secure in their ownership was implemented by the Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, which provided for the recapture and return of runaway slaves across state lines. The constitutionality of that legislation was upheld in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). The Prigg Court, in an opinion written by Justice Story, found the 1793 Act to be an authorized congressional exercise under the Necessary and Proper Clause of the Constitution. Id. at 618-22. The Court reasoned that should the possibility exist that state process for recovery of fugitive slaves might tend to defeat a slaveowner’s constitutionally guaranteed rights, then “the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it.” Id. at 614-15.

Turning to the Sherman amendment, Representative Shellabarger argued that since it would “enure[] the protection which the Fourteenth Amendment made every citizen’s federal rights,” 98 S. Ct. at 2027, it was “appropriate” legislation, and therefore constitutional. See Globe, supra note 2, at 751 (remarks of Rep. Shellabarger); id. at 800 (remarks of Rep. Perry). The final inquiry, then, was whether congressional imposition of an obligation to keep the peace upon local governments was proper. See id. at 751 (remarks of Rep. Shellabarger). By analogy, the answer was found in Board of Comm’rs v. Aspinwall, 65 U.S. (24 How.) 376 (1860) which was the first in a long line of Contract Clause cases involving suits initiated by holders of railroad bonds to enforce payment by their municipal government guarantors. See generally 6 C. Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-1888, 918-1116 (1971). The Aspinwall Court held that the federal courts had jurisdiction to issue a writ of mandamus to compel a municipal corporation to lay and collect a tax for the purpose of satisfying the interest claims of coupon holders. 65 U.S. (24 How.) at 384-85.

98 S. Ct. at 2027. Numerous congressmen observed that, at the time of the debates, an “obligation” to keep the peace was not generally imposed by the states on town and county governments. See Globe, supra note 2, at 791 (remarks of Rep. Willard); id. at 794 (remarks of Rep. Poland); id. at 795 (remarks of Reps. Blair and Burchard); id. at 799 (remarks of Rep. Farnsworth). One commentator has noted that in 1871 neither the obligation nor the where-withal to keep the peace had been delegated to local governments. Only the largest cities of the day, the majority of which were situated in areas unaffected by Klan violence, had police departments. At that time, law enforcement was assumed primarily by the various states. Kates & Koub, supra note 61, at 135 (citing President’s Commission on Law Enforcement and Administration of Justice Task Force Report: The Police, History of the Police 50 (1967)). While a number of states and cities had riot statutes, see note 56 supra, it was argued that these were radically different from the Sherman amendment. See Kates & Koub, supra note 61, at 135.

98 S. Ct. at 2030; see notes 65-67 and accompanying text infra. The Monell Court comprehensively reviewed the decisions containing the constitutional principles espoused by opponents of Senator Sherman’s proposal. 98 S. Ct. at 2029. In the first of these cases, Prigg
members of the House was that imposition of the latter type of liability would have been constitutional.\(^5\) Placing an affirmative duty on local governments to protect their own citizens, however, was strenuously opposed as being beyond the power of the federal government.\(^6\) Since section 1, as enacted, did not impose the type of liability which led to rejection of the Sherman amendment, the Monell Court concluded that there was no evidence in the debates to support the view that applying the statute to municipalities was considered constitutionally impermissible.\(^7\)

v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), the Court, in addition to authorizing congressional enforcement of the Fugitive Slave Clause, intimated that Congress could not “insist that states . . . provide means to carry into effect the duties of the national government.” \(\text{Id. at 615-16.}\) Subsequently, in Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), the Court thought it “clear, that the Federal Government, under the Constitution, has no power to impose on a State officer . . . any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State . . . .” \(\text{Id. at 107-08.}\)


\(^5\) 98 S. Ct. at 2030-31. That the federal courts could decide cases involving the misuse of authorized powers was made explicit in the Contract Clause decisions. \textit{See} note 62 \textit{supra}. Several opponents of the amendment recognized that the federal courts had this power. \textit{See}, e.g., \textit{Globe}, supra note 2, at 791 (remarks of Rep. Willard); \textit{id. at 794} (remarks of Rep. Poland); \textit{id. at 795} (remarks of Rep. Burchard).

\(^6\) As Justice Brennan noted in \textit{Monell}, “[a]ny attempt to impute a unitary constitutional theory to opponents of the Sherman amendment is . . . fraught with difficulties . . . .” 98 S. Ct. at 2028. The basic constitutional objection to the Sherman amendment, however, was grounded in the fact that most states did not impose peacekeeping obligations on local government units. Since the effect of the Sherman amendment would be to require municipalities, as a matter of federal law, to maintain public order or suffer the consequence of suits for damages, those opposed thought the amendment unconstitutional. \textit{See Globe}, \textit{supra} note 2, at 791 (remarks of Rep. Willard); \textit{id. at 794} (remarks of Rep. Poland); \textit{id. at 795} (remarks of Rep. Blair); \textit{id.} (remarks of Rep. Burchard); \textit{id. at 799} (remarks of Rep. Farnsworth).

Aside from objections framed in constitutional terms, some members of Congress apparently objected to the amendment since it proscribed only injury resulting from “riotous and tumultuous assemblies.” This objection was based upon the fact that the Ku Klux Klan usually eschewed “tumult and public alarm and demonstrations.” \textit{Globe}, \textit{supra} note 2, at 840 (remarks of Rep. Shellabarger). Further, several Senate opponents objected to the amendment on policy grounds. They believed that the lien provision in the amendment would tend to impair a municipality’s credit standing. \textit{See}, e.g., \textit{id. at 762} (remarks of Sen. Stevenson); \textit{id. at 763} (remarks of Sen. Casserly).

\(^7\) 98 S. Ct. at 2030. The Court posited other justifications for its view that the 42d Congress did not perceive § 1 of the Act to create “the Hobson’s choice of keeping the peace or paying civil damages” that was the source of congressional antipathy to the Sherman amendment. \textit{See} 98 S. Ct. at 2030-32. Justice Brennan initially observed that Collector v. Day, 78 U.S. (11 Wall.) 113 (1870), exemplified the continuing vitality of the doctrine of
GOVERNMENTAL LIABILITY

Having determined that “nothing said in debate . . . would have prevented holding a municipality liable under § 1 . . . for its own violations of the Fourteenth Amendment,”65 the Court turned to the question whether the Forty-second Congress intended to impose section 1 liability on governmental entities as well as natural persons. Initially it was noted that legal and natural “persons” alike were considered by Congress to be capable of causing the deprivations sought to be redressed by section 1.66 In fact, Representative Bingham70 asserted that the uncompensated taking of private prop-

“dual” or “coordinate sovereignty,” the dominant antebellum philosophy of federal-state relations. 98 S. Ct. at 2029. See generally Developments, supra note 13, at 1138-41, 1166-61. Day inverted the principle announced in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), that state governments had no authority to tax federal instrumentalities which were lawfully established to effectuate federal powers. This had the effect of restricting the federal exercise of its enumerated powers. Day was overruled in Graves v. New York, 306 U.S. 466, 486 (1939). Yet, despite the doctrine’s vitality at the time of the debates, Justice Brennan asserted that it encompassed no inherent limitation on the power of the federal judiciary to interpret and enforce constitutional limitations on municipalities. 98 S. Ct. at 2031. The Court then examined the anomalous situation in which the contracts to which municipalities were parties in the Aspinwall line of cases were viewed by opponents of the Sherman amendment to be enforceable in the federal courts, yet the imposition of damages under the amendment was not. The Monell Court determined that a “violation of the Constitution was the predicate for ‘positive’ relief in the Contracts Clause cases, whereas the Sherman amendment imposed damages without regard to whether a local government was in any way at fault for the breach of the peace for which it was to be held for damages.” Id. at 2031 n.40. Thus, since § 1 granted jurisdiction to the federal courts to provide “positive” relief for violations of the fourteenth amendment, the opponents of the Sherman amendment presumably would not have objected to § 1 suits against local governments for their own infringements upon the amendment rights of individuals. See id. at 2031. The Court also noted that those involved in the debates recognized that no constitutional distinction could be drawn between individual state officials and local governments. See GLOE, supra note 2, at 785 (remarks of Rep. Blair); id. at 799 (remarks of Rep. Farnsworth). It was unquestioned, although deplored by some, see, e.g., id. at 365 (remarks of Rep. Arthur); GLOBE APP., supra note 16, at 217 (remarks of Sen. Thurman), that § 1 could be used against state officials. See, e.g., id. at 334 (remarks of Rep. Hoar); id. at 367-68 (remarks of Rep. Sheldon). Therefore, an assertion of § 1 federal power under the Act against local governments would have been viewed as constitutional. 98 S. Ct. at 2032.

65 98 S. Ct. at 2032. Justice Brennan noted that both proponents and opponents of § 1 agreed that it “swept very broadly.” Id. at 2033 n.45. According to Representative Shellabarger, “[t]his act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed.” GLOBE APP., supra note 16, at 68, quoted in 98 S. Ct. at 2032. See also id. at 81, 85 (remarks of Rep. Bingham); id. at 216-17 (remarks of Sen. Thurman). Representative Shellabarger observed that § 1’s civil remedy was meant to be available to whites as well as to former slaves. Id. at 68 (remarks of Rep. Shellabarger).

66 98 S. Ct. at 2033-34; see note 67 and accompanying text supra.

70 Representative Bingham was the principal draftsman of both § 1 and § 5 of the fourteenth amendment. See R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 22 (1977); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 STAN. L. REV. 5, 41-42 (1949).
erty by a city in *Barron v. Mayor of Baltimore* had influenced his draftsmanship of section 1 of the fourteenth amendment. His view, in 1871, was that section 1 of the Act provided a civil remedy for such uncompensated takings. It would be anomalous, the Court observed, to cabin the contemplated redress to the responsible municipal officials, since "the government unit . . . had the benefit of the property taken." Further evidence that "person" had assumed generic significance by 1871 was discerned in the recognition by some congressmen that "person" encompassed both commercial and municipal corporations under the current case law. Finally, barely a month before the introduction of H.R. 320, Congress had passed what has become known as the Dictionary Act. This Act stated that, in legislation subsequently enacted, "[t]he 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." While the inclusion of "bodies politic and corporate" in the word "person" seems to be permissive rather than mandatory, Justice Brennan reasoned that the Dic-

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71 32 U.S. (7 Pet.) 243 (1833). *Barron*, aside from holding the articles of the Bill of Rights inapplicable to the states, specifically held that a city's uncompensated taking of private property could not be redressed under the fifth amendment. *Id.* at 250-51.

72 *Globe App.*, supra note 16, at 84.

73 See *id.* at 85.

74 98 S. Ct. at 2034. While federal courts have been reluctant to utilize § 1983 as a vehicle to redress uncompensated takings of property, such suits have been allowed under the fifth amendment, see *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933), and the due process clause of the fourteenth amendment, see *Griggs v. Allegheny County*, 369 U.S. 84, 90 (1962). See also *98 S. Ct.* at 2051 n.4 (Rehnquist, J., dissenting).


It should be noted that although commercial and municipal corporations were considered to be "citizens" of states for purposes of art. III jurisdiction, in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 182 (1869), the Court declined to hold that such entities were "citizens" for purposes of the Privileges and Immunities Clause. Indeed, as Justice Rehnquist noted in *Monell*, the one court which, by 1871, had considered the question whether a corporate body was a "person" within the terms of the fourteenth amendment, concluded not only that a corporation was not a "person," but that it also was not a "citizen." *98 S. Ct.* at 2051 (Rehnquist, J., dissenting) (citing *Insurance Co. v. New Orleans*, 13 F. Cas. 67, 68 (C.C.D. La. 1870) (No. 7,052)).


77 The Dictionary Act, ch. 71, § 2, 16 Stat. 431 (current version at 1 U.S.C. § 1 (1976)).

78 See text accompanying note 77 *supra.*
tionary Act was meant to provide a general rule of construction.\textsuperscript{79} The Court concluded, therefore, that absent any contextual limitation, Congress intended "persons" to be read to include "bodies politic and corporate."\textsuperscript{80} Accordingly, the Court sanctioned imposition of liability where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated,"\textsuperscript{81} but expressly refused to sanction the imposition of liability on a theory of respondeat superior.\textsuperscript{82}

\textsuperscript{79} 98 S. Ct. at 2035 n.53 (citing CONG. GLOBE, 41st Cong., 3d Sess. 775 (1871) (remarks of Sen. Trumbull)).

\textsuperscript{80} Id. at 2035 & n.53. Justice Brennan observed that it would be illogical, where no contextual limitation was present, to selectively apply the Dictionary Act. To do so would indicate that there was no "rule" at all, a view contrary to the congressional intent as manifested by the statute's legislative history. See id.

\textsuperscript{81} The Court also found support for the view that municipal corporations were included in the phrase "bodies politic and corporate" in both contemporary case law and state statutes. Id. at 2035 & n.51 (citing Northwestern Fertilizing Co. v. Hyde Park, 18 F. Cas. 393, 394 (C.C.N.D. Ill. 1873) (No. 10,336); Brief for Petitioner apps. D & E, Monroe v. Pape, 365 U.S. 167 (1961)).

\textsuperscript{82} 98 S. Ct. at 2036. With respect to the issue of stare decisis, both the majority and the dissent professed adherence to the principle that previous interpretations of a statute's meaning are to be accorded greater deference than previous constitutional adjudications. Id. at 2038 (citing Edelman v. Jordan, 415 U.S. 651, 671 & n.14 (1974)); 98 S. Ct. at 2048 (Rehnquist, J., dissenting). This "rule" is premised on the belief that Congress can always overturn a court's interpretation of a statute. Overturning a constitutional interpretation, however, would require a constitutional amendment. See Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting).

\textsuperscript{83} Id. at 2036. It should be noted that Justice Brennan explicitly stated that consideration of the issue of respondeat superior was not necessary to the Court's decision. See 98 S. Ct. at 2038. For this reason, Justice Stevens declined to join in Section II of the opinion. Id. at 2047 (Stevens, J., concurring in part).

The majority found support for rejecting imposition of liability on a respondeat superior basis in both the statute's language and in its legislative history. The pertinent language of § 1983 suggested that the existence of an employee-employer relationship was insufficient to fasten § 1983 liability on a municipal employer. 98 S. Ct. at 2036-37. Focusing on the "cause to be subjected" language of the statute, Justice Brennan believed that § 1983 could not "be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." Id. at 2036. According to the Court, the House's rejection of the first conference committee's version of the Sherman amendment, which essentially embodied a vicarious liability concept, strengthened "the inference that Congress did not intend to impose [respondeat superior] liability." Id. at 2037 n.57. Justice Brennan acknowledged that most supporters of the Sherman amendment viewed its provisions as operative "only when a locality was at fault or had knowingly neglected its duty to provide protection." Id. But, he noted, at least one proponent "apparently" viewed the amendment as imposing a species of vicarious liability on municipalities. See GLOBE, supra note 2, at 792 (remarks of Rep. Butler). Moreover, the final version of the Sherman amendment, enacted as § 6 of H.R. 320, totally excised all "elements of vicarious liability," although it retained the essential precept that residents of a community might be held liable for Ku Klux Klan depredations. 98 S. Ct. at 2037 n.57. Ultimately, Justice Bren-
As it did in Monroe, the Court in Monell eschewed any reliance on "policy" considerations in determining the amenability of local governments to suit under section 1983 and relied solely on legislative history. This exclusive reliance on the origins of section 1983 has been severely criticized. Such intrinsically equivocal evidence is considered a poor foundation upon which to construct an authoritative analysis of section 1983's intended scope. Yet, of all the aids to detecting congressional purpose, verbatim transcriptions of the debates are the truest record from which to work.

The accuracy of the Monell Court's comprehensive analysis of the debates seems unassailable. In fact, Justice Rehnquist, in his dissent, could find little in the Court's exegesis of section 1983's history with which to quarrel. Yet, while Monell demonstrates that the Monroe Court erroneously equated the "obligation" imposed by the Sherman amendment with the civil liability created by section 1 of the Act, whether the Forty-second Congress affirmatively intended to bring municipal corporations within the scope of "persons" liable under section 1 is less certain. The Monell Court tacitly acknowledged that there was little explicit congressional consideration of municipal liability under section 1 of the Act.

nan had to concede that "[s]trictly speaking . . . the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees." Id. For a general discussion of the doctrine of respondeat superior, see W. Proser, Law of Torts § 69 (4th ed. 1971).

See 365 U.S. at 191.

See 98 S. Ct. at 2023-35.


See Kates & Kouba, supra note 61, at 135-36.


See 98 S. Ct. at 2050-53 (Rehnquist, J., dissenting). Justice Rehnquist, however, began his discussion of § 1983's legislative history with an examination of the Dictionary Act. He stated that, in view of the ambivalent status of commercial and municipal corporations for purposes of constitutional analysis, the 42d Congress may well have intended "person" to apply only to natural persons. Id. (Rehnquist, J., dissenting). Moreover, the views of Representative Bingham, see notes 70-74 supra, were judged to offer little support for the notion that § 1 of the Act was intended to sanction relief against municipalities. 98 S. Ct. at 2051 (Rehnquist, J., dissenting).

See 98 S. Ct. at 2025-32.

See id. at 2023. The Court repeatedly referred to the "limited" debate on § 1, while
Instead, the Court inferred from section 1’s broad remedial scope that “there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1.” Further evidence that Congress intended “persons” to include municipal corporations was found in the allusions of several congressmen to decisions of the Court in which both commercial and municipal corporations were held to be “citizens” for article III diversity jurisdiction purposes. As Justice Rehnquist noted, however, it was hardly settled in 1871 that corporations, whether commercial or municipal, were “persons” for all purposes and in all contexts. On balance, though, and particularly in light of the Dictionary Act, the Court’s conclusion that the Forty-second Congress meant to include municipal corporations in the word “person” appears to be the correct one.

Monell should have significant impact on civil rights litigation involving municipalities. It would appear that the viability and utility of the trend permitting federal causes of action to be bottomed on the fourteenth amendment has been virtually extinguished. On the other hand, Monell should have a catalytic effect on the operation of pendent party jurisdiction. In addition, the decision appears to lay a foundation for state government liability under section 1983. The balance of this Note will examine these issues.

The Future of the Constitutional Cause of Action

The concept of a constitutional cause of action can be traced to the Supreme Court’s recognition of an implied right of action under the fourth amendment in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics. Relying on Bivens, the

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1 Id. at 2034.
2 See Globe, supra note 2, at 752 (remarks of Rep. Shellabarger); id. at 777 (remarks of Sen. Sherman).
3 98 S. Ct. at 2051 (Rehnquist, J., dissenting); see note 75 supra.
4 See notes 120-141 and accompanying text infra.
5 See notes 158-161 and accompanying text infra.
6 See notes 164-194 and accompanying text infra.
7 403 U.S. 388, 392 (1971). Bivens involved a claim that federal agents had violated the plaintiffs’ fourth amendment rights to be free from unreasonable searches and seizures. Id. at 397. A factual backdrop reminiscent of that in Monroe gave rise to the Bivens action. Webster Bivens’ apartment was entered by six federal agents in November 1965. After his home was searched, he was arrested and handcuffed in front of his spouse and children. 409 F.2d 718, 719 (2d Cir. 1969). While still in his apartment, the federal agents accused Bivens of violating the narcotics laws and threatened to arrest his family. After being transported to a federal court building, Bivens was transferred to another federal facility where he was
lower federal courts began to recognize an equivalent cause of action in the fourteenth amendment context to hold local government

questioned, searched and subjected to the booking process. 403 U.S. at 389. Following his release on bond, the charges against him were dropped. Approximately 18 months after his arrest, Bivens filed suit against the agents involved, alleging causes of action under § 1983 and directly under the Constitution, with jurisdiction grounded on 28 U.S.C. § 1343(3) (1976) and 28 U.S.C. § 1331(a) (1976), respectively. Because the federal officers had not acted "under color of" state law as § 1983 expressly required, and because Bell v. Hood, 71 F. Supp. 813, 816-20 (S.D. Cal. 1947), on remand from 327 U.S. 678 (1946), had determined that no cause of action lay against federal agents for violations of either fourth or fifth amendment rights, the district court dismissed Bivens' complaint. 276 F. Supp. 12, 16 (E.D.N.Y. 1967). Following a unanimous affirmance by the second circuit, the Supreme Court reversed. 403 U.S. at 390.

The Court noted that neither a statutorily based cause of action pursuant to federal law nor adequate protection under state law was available to the plaintiffs. Id. at 395-97. The Bivens Court accordingly held that a valid claim was stated under the fourth amendment. Id. at 389. Writing for a 6-3 majority, Justice Brennan cautioned against taking an "unduly restrictive" view of the fourth amendment's remedial scope, noting that it "operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." Id. at 391-92. Central to the Court's holding that Bivens' complaint stated a cause of action was the recognition that if no damage remedy were implied under the Constitution, Bivens would be left without a remedy in the federal courts for a violation by federal agents of Bivens' federally guaranteed rights. Id. at 395-97. It was also noted that state remedies would in all likelihood prove inadequate in situations similar to that presented sub judice. Id. at 394-95. While the fourth amendment by its terms did not authorize damage awards, Justice Brennan believed that the full range of remedies could be seized upon to redress federal statutory violations. Id. at 396 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)). Since damage awards were classically viewed as "the ordinary remedy for an invasion of personal interests in liberty," 403 U.S. at 395, and "no special factors counselling hesitation" could be discerned, the Court approved imposition of damage liability on federal officials who violate a citizen's fourth amendment rights. Id. at 396-97.


It should be noted that the Supreme Court has not expressly authorized application of the Bivens rationale to redress violations of constitutional protections other than those em-
units liable for their own unconstitutional practices. *Turpin v. Maillet*, a decision exemplifying this extension of *Bivens*, was handed down by the second circuit one day prior to publication of *Monell*. The discussion which follows will examine *Turpin* and assess the availability of a constitutional cause of action against municipalities now that a statutory remedy exists under section 1983.

**Turpin v. Maillet**

In *Turpin*, the plaintiff had successfully prosecuted a section 1983 suit against a West Haven, Connecticut, police officer. Despite the fact that he had been found liable for using “excessive force” in attempting to restrain the plaintiff, Officer Skeens had no disciplinary action taken against him. This suit received much attention within the city’s police department as well as the community-at-large. Skeens was subsequently promoted and, soon after the first suit was concluded, Turpin was arrested again by two other officers and charged with disorderly conduct. When the criminal charges were later dropped by the local prosecutor, Turpin filed suit, alleging that the “official” response to his earlier suit, Skeen’s promotion, had created an environment in which the West Haven police were encouraged to violate his constitutional rights.

In addition to a section 1983 claim against the arresting officers, Turpin brought a fourteenth amendment claim against the city. Although the district court dismissed the fourteenth amendment claim, it was reinstated by a divided second circuit sitting en banc.

bodied in the fourth amendment. The Court will decide this Term, however, whether a cause of action may be stated directly under the fifth amendment. *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc), *cert. granted*, 47 U.S.L.W. 3301 (U.S. Oct. 30, 1978).

Turpin obtained a judgment of $3,500 which was ultimately paid by the city’s liability carrier. *Id.*

*Id.* at 155.

*Id.* at 158.

*Id.*. Turpin also sought to append state law claims against the city. *Id.; see Conn. Gen. Stat. Ann. § 7-465 (West Supp. 1978).*

Turpin was decided on June 5, 1978. The decision in *Monell* was handed down on June 6, 1978.

Id. at 154-55. Turpin obtained a judgment of $3,500 which was ultimately paid by the city’s liability carrier. *Id.*

101 579 F.2d at 155.

102 *Id.*. The second incident apparently occurred within 3 months after the judgment in the first suit. *Id.*

103 *Id.* at 158.

104 *Id.*. Turpin also sought to append state law claims against the city. *Id.; see Conn. Gen. Stat. Ann. § 7-465 (West Supp. 1978).*

105 579 F.2d at 155. The district court’s dismissal of the fourteenth amendment claim was consistent with the then controlling view in the second circuit. See *Fisher v. City of New York*, 312 F.2d 880 (2d Cir.) (per curiam), *cert. denied*, 374 U.S. 828 (1963).

106 579 F.2d at 168.
Chief Judge Kaufman, writing for the majority,\textsuperscript{107} acknowledged that the rule of Monroe prevented the plaintiff from seeking damages from the city under section 1983.\textsuperscript{108} Since no federal statutory remedy was available to vindicate Turpin's constitutional rights, the majority considered whether it would be proper to exercise its common-law function of fashioning remedies where federal rights have been violated.\textsuperscript{109} The majority pointed out that other circuits had relied on the Bivens reasoning and permitted damage suits against municipalities directly under the fourteenth amendment. Accepting the premise that the Bivens rationale was not limited to redress fourth amendment violations, the Turpin court sought to determine whether anything in the language or legislative history of the fourteenth amendment would leave a federal court without power to imply a cause of action.\textsuperscript{110} The court found no such barrier and stated that “[i]f the judicial branch has an obligation, independent of Congress, to enforce the terms of any constitutional provision, certainly the fourteenth amendment should be foremost among them.”\textsuperscript{111} Moreover, the second circuit could find no

\textsuperscript{107} Chief Judge Kaufman was joined by Judges Feinberg, Gurfein, Mansfield and Oakes. Judge Oakes submitted a separate concurring opinion. Judge Van Graafeiland filed a dissenting opinion in which Judges Meskill, Mulligan and Timbers concurred.

\textsuperscript{108} 579 F.2d at 156.

\textsuperscript{109} Id. at 157 (citing Monaghan, \textit{Constitutional Common Law, 89 Harv. L. Rev. 1 (1975)}).

\textsuperscript{110} 579 F.2d at 158-60. The city contended that the language of § 5 of the fourteenth amendment, “Congress shall have power to enforce . . . this article . . . ,” U.S. Const. amend. XIV, § 5, foreclosed the judiciary from creating a remedy. Whether § 5’s grant of power is exclusive to the legislative branch, see \textit{Ex parte Virginia}, 100 U.S. 339, 345-48 (1879); Mahone v. Waddle, 564 F.2d 1018, 1059 (3d Cir. 1977) (Garth J., dissenting in part and concurring in part), \textit{cert. denied}, 98 S. Ct. 3122 (1978), has a significant impact on whether federal courts may imply a cause of action directly under the Constitution. The city of West Haven relied principally on \textit{Ex parte Virginia}. In that case, a Virginia state court judge had been arrested and indicted for excluding black citizens from jury service in violation of the Act of Mar. 1, 1875, ch. 114, § 4, 18 Stat. 336. 100 U.S. at 340. The statute was upheld as a valid exercise of Congress’ power under § 5 to enforce the fourteenth amendment. Id. at 349. In discussing § 5, the \textit{Ex parte Virginia} Court observed:

\begin{quote}
It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed [by the fourteenth amendment]. . . . It is the power of Congress which has been enlarged.
\end{quote}

Congress is authorized to enforce the prohibitions by appropriate legislation. \textit{Id. at 345} (emphasis in original).

The second circuit rejected the contention that the fourteenth amendment’s legislative history evinced an intent to remit enforcement exclusively to Congress. Chief Judge Kaufman noted that Representative Bingham, § 5’s framer, believed that the Supreme Court, pursuant to § 25 of the Judiciary Act of 1789, was empowered to enforce against the states the negative limitations that forbade deprivations of enumerated civil rights. \textit{Id. at 159-60} (quoting \textit{Globe App., supra} note 16, at 83 (remarks of Rep. Bingham), \textit{reprinted in 1 B. Schwartz, Statutory History of the United States: Civil Rights 304-05 (1970)})..

\textsuperscript{111} 579 F.2d at 158; see Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971).
"'explicit congressional declaration' antithetical to the existence of a cause of action." The court looked to section 1983's legislative history as interpreted by Monroe and its progeny, and observed that it was "difficult to draw any reasoned conclusion regarding Congress' attitude toward municipal liability . . . from the fate of the Sherman Amendment."

Since Bivens instructed "that those directly responsible for unconstitutional behavior may be called to task for their wrongful acts," the creation of a constitutionally derived cause of action for damages for fourteenth amendment violations was deemed to be entirely appropriate. The court consequently held that where "injuries [result] from . . . actions of [municipal] employees that [were] authorized, sanctioned or ratified by municipal officials or bodies functioning at a policy-making level," then the municipality may be sued for damages in the federal courts.

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112 579 F.2d at 160.
113 Id. at 161.
114 Id. The difficulty in assessing Congress' attitude toward municipal liability is reflected in the divergent views of numerous commentators as to the significance of the House's rejection of the first two formulations of the Sherman amendment. See Kates & Kouba, supra note 61, at 136; Levin, supra note 3, at 1531; McCormack, supra note 7, at 31 n.182; Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413, 1467-68 (1975).
115 579 F.2d at 164. One commentator suggests that the propriety of implying a damage remedy under any constitutional provision should depend on whether the remedy is both "appropriate" and "necessary." See Hundt, Suing Municipalities Directly Under the Fourteenth Amendment, 70 Nw. U.L. Rev. 770, 777-78 (1975); cf. Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1551 (1972) ("necessary" or "appropriate").
117 579 F.2d at 164. Chief Judge Kaufman believed that the vast potential for constitutional abuse inherent in concentrated municipal power evidenced the need for judicial creation of such a remedy. Id. at 166; cf. Butz v. Economou, 98 S. Ct. 2894, 2910 (1978) ("[e]xtensive Government operations offer opportunities for unconstitutional action on a massive scale"). The court, however, narrowly defined the circumstances under which municipal liability would be appropriate. Thus, imposition of liability on municipalities would be appropriate only in instances where "the municipality, no less than the employee, has violated the Constitution." 579 F.2d at 165. In restricting municipal liability to those situations in which the local government entity was "directly responsible" for deprivations of constitutional rights, the court rejected respondeat superior as a permissible basis of liability. Id. at 166-67; cf. Rizzo v. Goode, 423 U.S. 362, 371 (1976) ("affirmative link" must be shown between "plan or policy" formulated by official sued, and conduct said to be violative of § 1983). This reflects the court's interpretation of Bivens to require a showing that liability would attach only to "those actors who can meaningfully be termed 'culpable.'" 579 F.2d at 166.

Although the question of immunity was not an issue under the facts of the case, the court did mention the possibility of according municipalities some limited immunity, but only in
The Effect of Monell on the Constitutional Cause of Action

The Supreme Court has considered the availability of a constitutional cause of action only in the context of the fourth amendment. The standard that has emerged from Bivens for implying such a right is whether judicial creation of the remedy is either “necessary” or “appropriate” to effectuate a particular constitutional guarantee. In applying this standard, those lower federal courts that have extended Bivens to sanction a constitutionally based cause of action against municipalities for violations of fourteenth amendment rights have stressed the absence of a means of redress under the then prevailing interpretation of section 1983.

The following comparison of the constitutional cause of action and the section 1983 remedy should serve to clarify whether the Bivens-Turpin remedy remains “necessary” or “appropriate” after Monell.

It is readily apparent that section 1983 authorizes redress for deprivations of rights secured both by the Constitution and federal statutes, while the Bivens-Turpin remedy is limited to redress of constitutional violations. To the extent that most deprivations of federal statutory rights can be framed in terms of fourteenth amendment violations, however, the range of illegal conduct that is actionable under the two theories would seem to be coextensive. Another facial distinction between the two causes of action is that federal jurisdiction of constitutionally based causes of action is predicated on the general federal question statute, with its attend-
The amount-in-controversy requirement. Thus, the potential for dismissal of such claims would appear to be much greater than in section 1983 actions wherein no jurisdictional amount need be satisfied. Yet, in practice, no significant advantage accrues to the section 1983 action in this regard, since the amount-in-controversy requirement in Bivens-type actions has generally been applied with a light hand. With respect to the substantive elements of the two causes of action, a broad congruence may be discerned. Most importantly, there is general agreement on the necessity of showing that an official municipal policy or custom caused the injury for which redress is sought. The corollary proposition, that liability may not be

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123 See 28 U.S.C. § 1331(a) (1976) ($10,000). If enacted, H.R. 9622, which was passed by the House of Representatives on February 28, 1978, will remove all amount-in-controversy requirements in federal question cases and, thus, remove this distinction between the two causes of action.

124 See 28 U.S.C. § 1343(3) (1976). The monetary requirement is a particular obstacle when the complaint alleges deprivations of voting rights or violations of the first amendment. Some lower federal courts have viewed such constitutional rights as being inherently incapable of valuation and accordingly have found that the jurisdictional amount has not been satisfied. See, e.g., Goldsmith v. Sutherland, 426 F.2d 1395, 1398 (6th Cir.), cert. denied, 400 U.S. 960 (1970); Calvin v. Conlisk, 367 F. Supp. 476, 483-84 (N.D. Ill. 1973), rev’d, 520 F.2d 1, 9-10 (7th Cir. 1975), vacated and remanded on other grounds, 424 U.S. 902 (1976).

125 A number of federal courts have taken a liberal stance and have held that an allegation of a constitutional violation will be deemed to satisfy the amount-in-controversy requirement. See, e.g., Calvin v. Conlisk, 520 F.2d 1, 9 (7th Cir. 1975), vacated and remanded on other grounds, 424 U.S. 902 (1976); Schroth v. Warner, 353 F. Supp. 1032, 1036 (D. Hawaii 1973); Cottrell v. Resor, 325 F. Supp. 797, 810 (E.D.N.Y.), rev’d on other grounds, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972). Other courts will permit aggregation of compensatory and punitive damages in order to satisfy the requisite jurisdictional amount. See, e.g., Hanna v. Drobnick, 514 F.2d 393, 398 (6th Cir. 1975); Hartigh v. Latin, 485 F.2d 1091, 1092 (2d Cir. 1974). The Rizzo decision has been criticized in light of Estelle v. Gamble, 429 U.S. 97 (1976), wherein the Court posited a "deliberate indifference" standard for imposition of liability on prison personnel whose ignorance of prisoners' medical needs allegedly violated eight amendment standards. Id. at 104;
imposed on a respondeat superior basis, is also generally applicable for both types of actions. Certain other substantive limitations

see Developments, supra note 13, at 1229-31. What is feared is that, if Rizzo's "affirmative link" requirement is applied to § 1983 actions where equitable relief is sought against individual officers in their official capacity, as well as in damage actions, all but the most egregious unconstitutional practices would be insulated from the reach of the statute. Another commentator takes a considerably more sanguine view of Rizzo's implications for the availability of equitable relief under § 1983. Such relief will apparently be available so long as those officers named as defendants have the authority to correct the violations in question:

To hold, as part of the law of remedies, that no public officer can be enjoined in his official capacity unless he has been personally involved in the government's unconstitutional conduct would call into question a staggering number of past cases brought against department heads, Governors, and mayors whose administrations have issued regulations without their personal participation. . . . This standard also would cast a shadow over the practice of substituting successor officers as defendants under Federal Rule of Civil Procedure 25(d).

Levin, supra note 3, at 1502-03 & n.76. But cf. Monell v. Department of Social Serv., 98 S. Ct. 2018, 2038 n.58 (1978) ("we would appear to have decided [in Rizzo] that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability").

In Monroe, the Court, in dictum, stated that § 1983 liability would henceforth be shaped "against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187. The Monroe Court clearly implied that imposition of liability would not be permitted on a respondeat superior theory under § 1983. Id. at 191 & nn.48-49; see Moore v. County of Alameda, 411 U.S. 693, 710 n.27 (1973). See generally Levin, supra note 3, at 1519-39.


Monell's repudiation of respondeat superior as a basis of liability would seem to conclusively resolve the issue. 98 S. Ct. at 2036. It is submitted, however, that neither the Monell Court's textual interpretation of § 1983, nor its analysis of the significance of the House's rejection of the Sherman amendment, compels a no-respondeat superior rule in the § 1983 context. As Justice Brennan conceded, somewhat disingenuously, "[s]trictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees." Id. at 2037 n.57.

Given the limited scope of activity and the concomitant small workforce of a municipality or local government in 1871, it is not surprising that the issue was not considered by Congress. Additionally, as Monell makes clear, the dominant congressional concern at the time was not appropriate theories of liability or the propriety of money damages versus equitable relief. Rather, Congress was divided over whether the imposition of an "obligation to keep the peace" where that duty was not imposed on local governments by state law would be permissible. See notes 62-67 and accompanying text supra.
apply under either approach. It would seem that the Burger Court's reluctance to extend substantive due process protection to certain "liberty" and "property" interests in the section 1983 context would be applicable as well to the Bivens-Turpin type of action. Moreover, regardless of the approach taken, compensation for constitutional deprivations will be measured by actual injury, with only nominal damages awarded for the infringement itself.

A potentially critical difference in the operation of the two causes of action should be noted. In litigation under specified federal statutes including section 1983, 42 U.S.C. § 1988 mandates that where federal law is "deficient in the provisions necessary to furnish suitable remedies," the action should be governed by state law insofar as there is no conflict with federal statutory and constitutional deprivations will be measured by actual injury, with only nominal damages awarded for the infringement itself.

The circuits appear to be in disagreement over whether liability may be imposed on a respondeat superior basis when one sues directly under the Constitution. See Lehmann, Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials, 4 Hastings Const. L.Q. 531, 572 nn.260-61 (1977); Levin, supra note 3, at 1522 n.185. While Turpin appears to represent the majority view, a strong case can be made that, as a matter of federal common law, municipalities should be so liable. See Lehmann, supra, at 575; cf. Pitrone v. Mercadante, 572 F.2d 98, 101 (3d Cir.) (per curiam) (Gibbons, J., concurring), cert. denied, 47 U.S.L.W. 3222 (U.S. Oct. 2, 1978).

128 The Court's holding in Paul v. Davis, 424 U.S. 693 (1976), seems likely to have a powerful limiting effect on the availability of § 1983 relief for certain types of injury. Paul involved a § 1983 suit seeking damages and equitable relief for inclusion of the plaintiff's photograph and name in a flyer distributed to local merchants advising them of the identities of "active shoplifters" in the Louisville, Kentucky area. The plaintiff had been arrested once on shoplifting charges, but had not been prosecuted prior to issuance of the flyer. Those charges were eventually dismissed, after distribution of the flyer had been completed. Id. at 695-96. While the sixth circuit ruled that plaintiff's reputation was an interest deserving of due process protections under the fourteenth amendment, 505 F.2d 1180, 1184 (6th Cir. 1974), the Supreme Court disagreed. Distinguishing a number of its own precedents, see 424 U.S. at 701-10, the Court observed that the facts alleged by the plaintiff would give rise to a "classical claim for defamation actionable in the courts of virtually every State." Id. at 697; cf. Estelle v. Gamble, 429 U.S. 97, 106-07 (1976) (prison physician's negligence may be actionable in state courts, but is not a constitutional deprivation within ambit of § 1983). The effect of Paul seems to be that injury to reputation, standing alone, like injuries to other non-constitutionally derived rights, is not sufficient to invoke the protections of § 1983.

Finally, in Carey v. Piphus, 435 U.S. 247 (1978), the Court determined that "[t]o the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." Id. at 256-57. In the context of student suspensions from public schools ordered by school officials without proper due process protections, the Carey Court declined to apply the "common-law tort rule of [presumed] damages," id. at 258, and stated "that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights." Id. at 266.


129 Id.

Recently, in *Robertson v. Wegmann*, the Supreme Court utilized section 1988 and incorporated Louisiana’s survivorship law which mandated the abatement of a section 1983 action. While this result may be questioned in light of the policies and concerns of section 1983, it is suggested that had the suit been maintained on a *Bivens-Turpin* theory, dismissal would not have occurred. Under the Rules of Decision Act, a similar choice of law provision which seems applicable to constitutional causes of action, the Court has generally taken a chary approach to incorporating state law which, while not in conflict with federal law, would not serve the purposes to which the federal law is directed. After *Monell* it cannot be gainsaid that section 1983 provides an effective remedy for injury resulting from municipal activity that violates the fourteenth amendment. In addition, as outlined above, a broad congruence exists between the section 1983 and constitutional causes of action. On this basis alone it would seem reasonable to conclude that the statutory remedy *pro tanto* displaces the constitutional right of action. Whether the direct constitutional action survives

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124 *Id.* at 1997. In *Robertson*, a § 1983 action was commenced by Clay Shaw against Jim Garrison and others for malicious prosecution. Shaw died before trial and the executor of his estate, Wegmann, was substituted as plaintiff. 98 S. Ct. at 1993. The state survivorship statute dictated that the action abate, since an executor was not within one of the classes of beneficiaries in whose favor this action would survive. *See* *La. Civ. Code Ann.* art. 2315 (West 1971). Since § 1983 contained no provision for survivorship, the Court, reversing both lower courts, declined to apply a “rule of absolute survivorship” in § 1983 actions. 98 S. Ct. at 1995. It was suggested, however, that had “Shaw’s death [been] caused by the deprivation of rights for which he sued under § 1983,” the result might have been different. 98 S. Ct. at 1997.
125 See 98 S. Ct. at 1997-2002 (Blackmun, J., dissenting).
127 98 S. Ct. at 1999 (Blackmun, J., dissenting).
128 Despite the similar contours of the two causes of action, it is to be noted that where respondeat superior principles are incorporated into the constitutional cause of action the probability of recovery of damages is unarguably enhanced. It might be thought, therefore, that in such cases, because particular constitutional guarantees are better implemented by the constitutional right of action than by the § 1983 remedy, that the former approach should survive. Yet, as the first circuit has noted: “While a direct action . . . might often provide superior opportunities for compensation, the existence of a statutory remedy which is designed to implement the constitutional guarantee may itself render the *Bivens* analysis inappropriate.” *Kostka v. Hogg*, 560 F.2d 37, 42 (1st Cir. 1977).
129 The notion that the existence of a federal statutory damages remedy which effectuates a constitutionally recognized right will supplant or pre-empt an equivalent constitutionally based, but judicially created, right of action has been alluded to by some commentators. For example, Professor Monaghan, who views the *Bivens* remedy as a product of the constitutional common law, see Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 *Harv. L. Rev.* 1, 24 (1976), also acknowledges that this constitutional common law is “subject to amendment, modification, or even reversal by Congress.” *Id.* at
after Monell remains problematic, however, in the absence of definitive judicial resolution of the issue. Only if it is found that the constitutional cause of action is still "necessary" or "appropriate" should it survive. It is suggested that a search for such justifications is likely to be unavailing. Even assuming the continued viability of both types of actions, since they are so similar, federal courts can be expected to adhere to the oft-expressed principle that a statutory claim, rather than a constitutional claim, should provide the basis upon which a decision is reached.

PENDENT PARTY JURISDICTION AFTER Monell

The doctrine of pendent jurisdiction empowers a federal court to adjudicate claims over which it has no independent basis of jurisdiction. While the absolute immunity of municipalities from suit

3. Of course, existence of the § 1983 remedy for unconstitutional municipal activity is due, not to the Congress, but to the Court itself. The judicial development of the § 1983 damage remedy against municipalities in Monell may thus indicate, as Justice Powell suggested, that the Court would rather "confess error and set the record straight" than "constitutionalize a cause of action against local government that Congress intended to create in 1871." 98 S. Ct. at 2047 (Powell, J., concurring). Since the Monell Court's choice of the § 1983 remedy would seem to have decided, albeit sub silentio, that it, and not the Bivens approach, "appropriately effectuates the mandate of the Constitution," see Dellinger, supra note 115, at 1548 n.89, the conclusion seems inescapable that the development of the constitutional right of action is at an end in the fourteenth amendment context.

140 It appears that the second and eighth circuits will have the first opportunities to determine whether the constitutional cause of action remains viable after Monell. See Turpin v. Mallet, 579 F.2d 152 (2d Cir.), vacated and remanded sub nom. City of West Haven v. Turpin, 47 U.S.L.W. 3368 (U.S. Nov. 28, 1978); Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977), vacated and remanded, 98 S. Ct. 3122 (1978).


under section 1983 remained in existence, the federal courts were without jurisdiction to hear state claims against them. With the

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), first explored the reach of article III of the Constitution. Strictly speaking, no pendent state law claim was involved in Osborn. Rather, the case involved Osborn's claim that the statute, 3 Stat. 266 (1816), which authorized the Bank of the United States to "sue and be sued . . . in any circuit court of the United States," was unconstitutional because it permitted adjudication of questions of state law that would inevitably be involved in suits by the bank. This was claimed to be in derogation of article III of the Constitution, U.S. Const. art. III, § 2, which limited the judicial power of the federal courts to cases "arising under the Constitution . . . or laws of the United States." Observing that "[t]here is scarcely any case, every part of which depends on the constitution, laws or treaties of the United States," 22 U.S. (9 Wheat.) at 820, Chief Justice Marshall concluded "that when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, even though other questions of fact or of law may be involved in it." Id. at 823.

Following Osborn, in Siler v. Louisville & N.R.R., 213 U.S. 175 (1909), the Court permitted joinder of state and federal claims where a Kentucky statute authorizing rate setting for intrastate railroad operations was alleged to be unconstitutional, and a rate order promulgated thereunder was alleged to be unauthorized. The federal constitutional claim, although "substantial" enough to vest jurisdiction in the federal court, id. at 191, was not decided by the Court since it held that the rate order was unauthorized under the terms of the state statute. Thus, an adjudication of the federal claim would have been advisory. Id. at 193.

In Hurst v. Oursler, 289 U.S. 238 (1933), the Court permitted joinder of claims of copyright infringement under federal law and unfair competition under state law. Unlike Siler, jurisdiction over the federal claim was statutorily derived. See Act of Mar. 4, 1909, ch. 320, § 34, 35 Stat. 1075, 1084 (repealed 1948). The Court, implicitly stressing the article III "case or controversy" requirement, announced a "rule of general application":

The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action.

289 U.S. at 246 (emphasis in original).

As UMW v. Gibbs, 383 U.S. 715 (1966), recognized after adoption of the Federal Rules of Civil Procedure, Hurst's "test" became the "source of considerable confusion." Id. at 724. Gibbs involved an attempted joinder of a state claim alleging intentional interference with business contracts with an action under § 303(a) of the Labor-Management Act, 29 U.S.C. § 187(a) (1976). Expanding considerably what it termed an "unnecessarily grudging approach" under Hurst, the Gibbs Court posited its own two-part "test" for the exercise of pendent jurisdiction. 383 U.S. at 725-26. First, "[t]he state and federal claims must derive from a common nucleus of operative fact," such that a single "constitutional 'case'" is present. Id. at 726. Second, the court must be satisfied that "considerations of judicial economy, convenience, and fairness to litigants" are served by taking jurisdiction of the state-derived claim. Id. at 726.

removal of Monroe's bar, it is now permissible, where the requirements for the exercise of pendent jurisdiction otherwise are satisfied, for pendent state law claims against municipalities to be decided in the federal courts.\textsuperscript{144} This should be true even in cases where liability under state law is based on notions of respondeat superior.\textsuperscript{145}

The bar placed on the adjudication in federal courts of independent state law claims against municipalities under the Monroe rule was articulated in Aldinger v. Howard.\textsuperscript{146} In Aldinger, the plaintiff commenced section 1983 actions against Spokane county and several of its officials.\textsuperscript{147} In addition, the plaintiff lodged a state law claim\textsuperscript{148} against the county, over which the district court was alleged to have pendent jurisdiction. Having dismissed the section 1983 claim against the county on the authority of Monroe, the district court concluded that it had no basis for exercising pendent jurisdiction over the state claim.\textsuperscript{149} Following an affirmance by the ninth circuit,\textsuperscript{150} the plaintiff appealed to the Supreme Court. The Court affirmed the dismissal, rejecting the plaintiff's contentions that jurisdiction over the state claim against the county could be based on the presence of a viable section 1983 claim against the individual defendants,\textsuperscript{151} and that it was not necessary to find an independent

\begin{footnotesize}
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\item At present, the issue whether to exercise jurisdiction over pendent state law claims does not involve any examination of the similarity of the "rights" asserted, or sought to be vindicated, in the state and federal claims. Rather, the focus is on the factual similarity of the claims. See note 142 supra. Thus, while respondeat superior liability may be established by state law and is not permissible in the § 1983 context, thereby implicating different "rights," the presence of the federal courts' power to exercise pendent jurisdiction should be unaffected by any such dissimilarity between the two causes of action. One commentator, however, suggests that a "common nucleus of operative law" should underlie the federal and state claims in order for pendent jurisdiction to be exercised in conformity with article III. See Yale, supra note 142, at 648-50.
\item 427 U.S. 1, 17 (1976), aff'g 513 F.2d 1257 (9th Cir. 1975).
\item Id. at 3-4.
\item See 513 F.2d 1257, 1258 (9th Cir. 1975). The state law claim was based on Wash. Rev. Code § 4.92.090 (1976), which abolished the governmental immunity previously enjoyed by county governments. The Washington statute in question imposed vicarious liability in both tort and contract action. Id. § 4.08.120.
\item 427 U.S. at 5.
\item 513 F.2d at 1258.
\item 427 U.S. at 17. Prior to Aldinger, the sixth, seventh and ninth circuits had refused to
\end{enumerate}
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basis of federal jurisdiction over the county. The Aldinger Court reasoned that since Monroe had held that municipalities were not "persons" within the meaning of section 1983 and since the federal claim to which plaintiff sought to append her state law claim was based on section 1983, the federal courts were not free to exercise pendent jurisdiction. It was apparent that the Court’s reluctance to permit adjudication of the state law claim derived from a determination not to permit suits against municipalities indirectly where it had consistently refused to do so directly.

The Monell decision would seem to obviate Aldinger’s primary concern that pendent party jurisdiction not be used as a bootstrapping mechanism. In the future, the propriety of exercising federal jurisdiction over state law claims against a municipality may be determined on traditional pendent jurisdiction grounds since an independent basis of federal jurisdiction over municipalities now exists under section 1983. The requirements for exercising pendent

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152 See 427 U.S. at 12-13. Ms. Aldinger had asserted that since Gibbs’ two-part test, see note 142 supra, was satisfied, it was essentially irrelevant whether the party against whom her state law claim was directed was otherwise not amenable to suit in federal court. The Aldinger Court, however, stated that a federal court’s article III “power” to adjudicate pendent claims depends on the presence of three elements. There must be a “substantial” federal claim, see Haygans v. Lavine, 415 U.S. 528, 539-41 (1974), coextensive factual bases for the two claims and the statute conferring jurisdiction over the federal claim must not contain an express or implicit negation of jurisdiction over the state law claim. 427 U.S. at 18.

153 See 427 U.S. at 4.

154 Id. at 17.

155 See id. at 16-17.


jurisdiction over state law claims against a municipality should thus turn on whether the state and federal claims derive from a "common nucleus of operative fact" and whether judicial economy, fairness and convenience to the litigants would be served by adjudicating all claims in the federal forum.\textsuperscript{158} Since section 1983 was enacted to make a federal forum available to individuals deprived of rights, privileges or immunities,\textsuperscript{159} it is suggested that the discretionary power of the federal judiciary to remit litigants to the state forum should be narrowly circumscribed.\textsuperscript{160} As a practical matter, the prevalence of state laws imposing liability on municipalities on a respondeat superior basis illustrates the dramatic effect that the pendent jurisdiction doctrine should have in section 1983 suits.\textsuperscript{161}

\textbf{Beyond Municipal Liability: Monell, Section 1983 and the States}

Many pre-Monell cases seized upon Monroe's holding that municipalities were not "persons" within the ambit of section 1983 to justify, a fortiori, the conclusion that various state agencies and state governments were not amenable to suit under section 1983.\textsuperscript{162} Generally, these decisions evidenced no discernible rationale to support this conclusion; rather, they assumed that Congress' exclusion of municipalities from suit under section 1983 necessarily implied a similar state immunity.\textsuperscript{163} It is submitted that Monell, despite the


\textsuperscript{159} Mitchum v. Foster, 407 U.S. 225, 242 (1972); accord, Monroe v. Pape, 365 U.S. 167, 180 (1961); id. at 193 (Harlan, J., concurring); id. at 251-52 (Frankfurter, J., dissenting).

\textsuperscript{160} It should be noted that the Supreme Court has explained the operation of the doctrine of pendent jurisdiction in the following terms: "[I]t is evident from Gibbs that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated. On the contrary, given advantages of economy and convenience and no unfairness to litigants, Gibbs contemplates adjudication of these claims." Hagans v. Lavine, 415 U.S. 528, 545-46 (1974) (dictum).

\textsuperscript{161} Moreover, in many states the degree of state protection of civil rights, due process guarantees, and other Bill of Rights restraints on governmental conduct has equaled, if not outstripped, federal protection of those rights. State constitutions and state judicial interpretation of their provisions have become primary and powerful guarantees of individual rights. See generally Brennan, \textit{State Constitutions and the Protection of Individual Rights}, 90 Harv. L. Rev. 489 (1977). Whatever benefits accrue from this development, as well as from the widespread use of respondeat superior principles among the states, should be realizable since decision of a pendent state claim is generally preferred to the adjudication of federal claims. Siler v. Louisville & N.R.R., 213 U.S. 175, 193 (1909).


\textsuperscript{163} Engdahl, \textit{supra} note 143, at 74 n.361.
Court's limitation of its holding "to local government units which are not considered part of the State for Eleventh Amendment purposes," may be the precursor to state government liability under section 1983.

In resolving this issue, initially it must be determined whether states are included within the term "persons" for purposes of section 1983. Since Monell made clear that "bodies politic and corporate" were understood by the Forty-second Congress to be encompassed in the "persons" made liable for violations of section 1983, there would seem to be no principled basis on which to exclude state governments from the ambit of the section. Moreover, as the Monell Court determined in relation to municipalities, there is nothing of substance in the debates on H.R. 320 that would indicate any significant congressional antipathy to imposition of section 1983 liability on state government defendants.

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164 98 S. Ct. at 2035 n.54. No eleventh amendment bar was implicated in Monell since local government entities do not share in its protections. See Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

165 98 S. Ct. at 2035.

166 See Hutto v. Finney, 98 S. Ct. 2565, 2580-81 (1978) (Brennan, J., dissenting). In Hutto, Justice Brennan observed that, in Monell, the Dictionary Act of 1871's provision for inclusion of "bodies politic and corporate" in the term "person" led the Court to conclude that municipal governments as "bodies politic" were intended by Congress to be suable in federal court for violations of § 1983. 98 S. Ct. at 2580 (Brennan, J., concurring). According to him, "bodies politic and corporate" could now be, and "certainly" was in 1871, read to include states. Id. (citing Pfizer, Inc. v. Government of India, 98 S. Ct. 584 (1978); United States v. Maurice, 2 Brock. 96, 109 (C.C. Va. 1823) (Marshall, C.J.)). A recent district court decision has adopted this rationale to find states to be "persons" for § 1983 purposes. See Aldredge v. Turlington, 47 U.S.L.W. 2371 (N.D. Fla. Nov. 17, 1978).

167 There are indications that at least some congressmen perceived no constitutional barriers to imposing damage liability directly on the states. Representative Willard, one of the Sherman amendment's staunchest opponents, felt that

if there is to be any liability visited upon anybody for a failure to perform that duty [imposed by the amendment], such liability should be brought home to the State . . . [I]n my judgment, this section would be liable to very much less objection, both in regard to its justice and its constitutionality, if . . . suit might be brought against the State, . . . and . . . judgment might be enforced upon the treasury of the State.


In fact, at the time of the debates no constitutional bar to suits against a state by its own citizens had yet been perceived. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 412 (1821). That the eleventh amendment extended to bar such suits was not decided until Hans v. Louisiana, 134 U.S. 1 (1890), a decision that has been severely criticized. See, e.g., Engdahl, supra note 143, at 28-32.

At the time of the Act's passage, there were few reported cases in the federal courts in which citizens brought suit against their own states. One commentator notes that this is because there existed no federal jurisdictional statute upon which to base such suits. See Engdahl, supra note 143, at 13 n.66. It was not until 1875 that general federal question jurisdiction was created. Act of March 3, 1875, ch. 137, §§ 1-2, 18 Stat. 470. Additionally, since the states generally barred access to their own courts for most suits against the sover-
Once having determined that state governments are "persons" for section 1983 purposes, it remains to be considered whether the eleventh amendment bars imposition of damages. The eleventh amendment provides that "$\text{the Judicial power of the United States shall not be construed to extend to any suit . . . commenced . . . against [a state] by Citizens of another State . . . .} $^{188}$ While the amendment has been interpreted to prohibit suits initiated by a state's own citizens $^{169}$ as well, a state may consent $^{170}$ to suit or may be deemed to have waived $^{171}$ its eleventh amendment protection.

Modern eleventh amendment jurisprudence begins with $\text{Parden v. Terminal Railway,}^{172}$ wherein the Court introduced the concept of "constructive waiver." $^{173}$ The $\text{Parden}$ Court concluded that maintenance of an action under the Federal Employees Liability Act $^{174}$ against the State of Alabama was permissible despite the eleventh amendment. $^{175}$ The Court read a constructive waiver of eleventh amendment protection into the legislative scheme enacted pursuant to Congress' plenary commerce-clause power and the

\footnotesize {eign, it is hardly remarkable that the Supreme Court so infrequently reviewed decisions handed down by state courts of last resort which involved suits by a citizen against his own state. See generally Baker, \textit{Federalism and the Eleventh Amendment}, 48 U. Coto. L. Rev. 139 (1977); \textit{Engdahl, supra} note 143.}

\footnotesize {\textit{Hans v. Louisiana}, 134 U.S. 1 (1890). The eleventh amendment also has been interpreted not to bar suits brought by the United States against a state, \textit{United States v. Mississippi}, 380 U.S. 128, 140-41 (1965), and by one state against another state. \textit{South Dakota v. North Carolina}, 192 U.S. 286, 315-21 (1904).}

\footnotesize {Suits against state officers in their official capacity for injunctive relief are not barred by the eleventh amendment. In such situations, the officer's unconstitutional conduct is deemed to strip him of his official character. \textit{Ex parte Young}, 209 U.S. 123 (1908). Where a suit for damages is commenced against a state officer in his official capacity or representative capacity, however, whether in form a damage action or an equitable action, the eleventh amendment bar applies. \textit{See Edelman v. Jordan}, 415 U.S. 651 (1974); \textit{In re Ayers}, 123 U.S. 443 (1887).}

\footnotesize {See \textit{Clark v. Barnard}, 108 U.S. 436, 447 (1883). This consent must appear from "express language or . . . such overwhelming implication from the text [of a state waiver of immunity statute] as would leave no room for any other reasonable construction." \textit{Murray v. Wilson Distilling Co.}, 213 U.S. 151, 171 (1909).}


\footnotesize {377 U.S. 184 (1964).}

\footnotesize {\textit{Id.} at 191-96. In \textit{Parden}, "for the first time . . . , a State's claim of immunity against suit by an individual [met] . . . a suit brought upon a cause of action expressly created by Congress." \textit{Id.} at 187.}

\footnotesize {45 U.S.C. §§ 51-60 (1976).}

\footnotesize {377 U.S. at 185. Jurisdictional provisions of the FELA legislation specifically subjected a "common carrier" to suit in federal district court for injuries to its employees. \textit{See id.} at 185-86.}
state's subsequent operation of the railroad. The ensuing cases indicated that the reach of the constructive waiver doctrine was to be limited to instances where there was a clear legislative intent that states be made amenable to suit. This reflected an attempt

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176 See id. at 191-92.

177 Almost a decade later, in 1973, the Court limited the reach of Parden's "constructive waiver" in Employees of the Dep't of Pub. Health & Welfare v. Department of Health & Welfare, 411 U.S. 279 (1973). Although the Employees Court reaffirmed the theoretical basis of congressional power to override the states' eleventh amendment immunity from suits by their own citizens in federal courts, see id. at 283-84, it stated that the power would not be given effect absent a clear legislative intent that states be made amenable to suit. See id. at 285. Yet, the clarity of congressional intent required to override the state's eleventh amendment immunity was described in seemingly contradictory terms. On the one hand, the Court stated that "we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue that State in the federal courts." Id. (emphasis added). The Court then asserted that "[i]t would . . . be surprising . . . to infer that Congress deprived Missouri of her constitutional immunity without changing the old § 16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away." Id. (emphasis added).

The Court found that the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1976), provided sufficient protection to state hospital workers when it authorized the Secretary of Labor to seek equitable relief, including backpay, on behalf of aggrieved workers. 411 U.S. at 285-86. The Court rejected the notion that in bringing state hospitals and schools within the Act's ambit, an action first approved in Maryland v. Wirtz, 392 U.S. 183 (1968), as a valid exercise of commerce power, but later found impermissible on tenth amendment grounds in National League of Cities v. Usery, 426 U.S. 833 (1976), the states thereby were held to have constructively waived their eleventh amendment immunity against suit in the federal courts. 411 U.S. at 285.

The decision has been criticized as inconsistent with Parden in the sense that in both cases the statutory grant of jurisdiction literally extended to governmental defendants. See Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203, 1241-47 (1978) [hereinafter cited as Field (II)]. A ground of distinction, however, is that a proprietary or profit-making activity, operating a railroad, was involved in Parden, while in Employees nonproft governmental activities were at issue. See id. at 1245-46.

In Edelman v. Jordan, 415 U.S. 651 (1974), the Court determined that the "mere fact" of state participation in a federally-funded, but state-administered, social welfare program was "not sufficient to establish consent . . . to be sued in the federal courts." Id. at 673. In Edelman, a § 1983 action was pressed against various state officials charged with administration of joint federal-state programs providing Aid to the Aged, Blind and Disabled [AABD]. 415 U.S. at 653. Alleging noncompliance with federal regulations concerning benefits eligibility and regulations mandating that claims for aid be processed within specified time periods, id. at 653 & n.1, the plaintiffs sought declaratory and injunctive relief, as well as an order for payment of AABD benefits wrongfully withheld. Id. at 656. The seventh circuit approved all relief requested, finding that the eleventh amendment was no bar to an award of monetary compensation (the amount of benefits wrongfully withheld) since it viewed such an award as "equitable restitution" rather than damages. Jordan v. Weaver, 472 F.2d 985, 993-94 (7th Cir. 1973), rev'd sub nom. Edelman v. Jordan, 415 U.S. 651 (1974). Since the officials were named in their official or representative capacities, id. at 658, any money recovery, however denominated, would be paid from the state treasury. As such, the eleventh amendment appeared to
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by the Supreme Court to reconcile the competing interests of state sovereignty and the protection of individuals against unlawful or unconstitutional state action.

Of greater relevance for purposes of section 1983 is a recent development in which the Supreme Court has found that the fourteenth amendment contains significant limitations on the notion of state sovereignty found in the eleventh amendment.\(^{178}\) This view proceeds from the premise that the states, in ratifying the Constitution, impliedly ceded to the national government certain of their sovereign attributes.\(^{179}\) Utilizing this reasoning, the requisite "threshold fact of congressional authorization" necessary to sue states under a particular statute was found in Fitzpatrick v. Bitzer.\(^{180}\) In Fitzpatrick, employment discrimination suits were authorized to be brought in the federal courts for recovery of money damages by private parties against a state government under the Equal Employment Opportunity Act of 1972.\(^{181}\) Noting that the statute was passed under the enforcement provisions of section 5 of the fourteenth amendment, the Court stated that when Congress so acts, it not only "exercis[es] legislative authority that is plenary within the terms of the constitutional grant," it exercises "that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority."\(^{182}\) Thus, the Court ruled that Congress could empower pri-

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\(^{182}\) 427 U.S. at 453-56; see note 110 supra.
vate individuals to sue states for employment discrimination in federal courts.\footnote{427 U.S. at 456. In dictum, Justice Rehnquist observed that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the fourteenth amendment, provide for private suits against states or state officials which are constitutionally impermissible in other contexts." Id. (citations omitted); see Field (II), supra note 177, at 1237-38.}

Similarly, in *Hutto v. Finney*,\footnote{98 S. Ct. at 2536 (1978).} an award of attorney's fees to be paid ultimately by a state agency, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976,\footnote{Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1970)). For a discussion of this legislation, see Note, *The Civil Rights Attorney's Fees Awards Act of 1976*, 52 St. John's L. Rev. 603 (1978).} was upheld over objections that congressional intent to impose liability upon states for payment of attorney's fees in section 1983 actions was not sufficiently explicit.\footnote{98 S. Ct. at 2576. Attorney's fees were stated in the Act to be "a part of the costs" taxable against a losing party. The majority stated that the eleventh amendment had never been a bar to such awards. Id. at 2576-77. Since *Hutto* involved "expenses incurred in litigation seeking only prospective [equitable] relief," earlier cases involving "retroactive [monetary] liability for prelitigation conduct," were distinguished. Id. While the award of attorney's fees concededly had a compensatory aspect, the majority equated it with a fine for civil contempt and thus it was viewed to be merely ancillary to the injunctive relief awarded. *Id.* at 2574, 2576 n.24.} The majority indicated that since the 1976 Act was passed pursuant to Congress' power under section 5 of the fourteenth amendment and was intended to apply to the states, the eleventh amendment did not bar an award of fees.\footnote{Id. at 2575-76, 2578 n.31. In a concurring opinion Justice Brennan stated that legislation enacted pursuant to § 5 of the fourteenth amendment should be given *sui generis* treatment under the constructive waiver doctrine. 98 S. Ct. at 2580 (Brennan, J., concurring). Justice Powell, joined by the Chief Justice, dissented from the majority's award of attorney's fees under the 1976 Act. 98 S. Ct. at 2581 (Powell, J., concurring in part and dissenting in part). He viewed the applicability of the constructive waiver doctrine to be predicated upon congressional enactment of a statute which, by its express wording, provides for imposition of money damage liability against states. *Id.* (Powell, J., concurring in part and dissenting in part).}

Since the Civil Rights Act of 1871 was enacted pursuant to section 5 of the fourteenth amendment, the holdings in *Fitzpatrick* and *Hutto* would appear to foreclose the argument that the eleventh amendment precludes an award of damages against a state sued under section 1983. A review of the several opinions written in those cases, however, indicates a wide divergence of views among the members of the Supreme Court. While some members would continue to hold that the fourteenth amendment presents a special case...
in relation to the eleventh amendment, others would treat legislation enacted pursuant to section 5 of the amendment in an identical manner to legislation passed under the commerce clause or other article I grants.\footnote{Compare 98 S. Ct. at 2578 n.31 (Stevens, J.), and 98 S. Ct. at 2580 (Brennan, J., concurring), with 98 S. Ct. at 2582-84 (Powell, J., concurring in part and dissenting in part).} Additionally, the Court appears to be divided on the issue whether the test for abrogating the states' eleventh amendment immunity from suit in federal courts should be a "clear statement" in the language of a statute, or whether a clear congressional purpose found in a statute's legislative history will suffice to effect a "constructive waiver."\footnote{See note 177 supra. Compare 98 S. Ct. at 2575-76, 2578 n.31 (Stevens, J.), with 98 S. Ct. at 2582-83 & n.6 (Powell, J., concurring in part and dissenting in part).} The rationale posited by supporters of a clear statement test essentially derives from the salutary policy of ensuring that "Congress has considered the federalism interests compromised by suits against states."\footnote{Intergovernmental Immunities, supra note 41, at 695.} It is likely that the assurance of appropriate congressional consideration of such federalism interests also may be found where clear expressions of congressional intent to impose damages liability are found in the legislative history of a statute. It is submitted that such assurances may be found in section 1983's legislative history\footnote{See note 167 supra.} as demonstrated by the Monell Court's exegesis, thereby making imposition of section 1983 liability on state governments possible under either interpretation of the constructive-waiver doctrine.\footnote{Shortly after the Monell decision was announced, the Court, in a per curiam opinion, indicated that the eleventh amendment bars equitable relief against a state government which engages in penal practices violative of § 1983. Alabama v. Pugh, 98 S. Ct. 3057 (1978) (per curiam). In reaching its conclusion the Court discussed neither Fitzpatrick nor Monell, two decisions which would seem to weigh heavily on the issue whether state governments are amenable to suit under § 1983. It is submitted, therefore, that Pugh should not be read to foreclose further inquiry in this area.} Whether state governments may be sued in federal courts for violations of section 1983, notwithstanding the eleventh amendment, is a question whose resolution would seem to have broad implications for this nation's federal structure.\footnote{Cf. 98 S. Ct. at 2581-82 (Powell, J., dissenting) (creation of obligation on part of states to pay awarded attorney's fees will "undermine the values of federalism served by the Eleventh Amendment" unless clear congressional authorization to do so is present). See also Nowak, supra note 114, at 1469.} Practical considerations, involving the wisdom of imposing potentially substantial liability on the states,\footnote{Cf. 98 S. Ct. at 1053 (Rehnquist, J., dissenting) (decrying possible financial impact on local government).} are also inextricably a part of this controversy.
CONCLUSION

This Note has suggested that the Supreme Court's decision in Monell v. Department of Social Services, lifting the absolute immunity from section 1983 liability accorded to municipalities by Monroe v. Pape, should have a broad impact on section 1983 jurisprudence. The section 1983 damage remedy should now become the primary, if not exclusive, means of redress of constitutional violations by municipalities. Further, Monell should be read to abrogate the vitality of Aldinger v. Howard, thus permitting federal courts to adjudicate pendent state law claims against municipalities. Lastly, it is suggested that Monell may well foreshadow the imposition of section 1983 liability on state governments. While this Note has attempted to assess Monell's impact on several aspects of civil rights litigation, several significant issues, alluded to in Monell, remain to be resolved by the lower federal courts.

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15 See 98 S. Ct. at 2041. Since governmental entities enjoyed an absolute immunity prior to Monell, the question whether they should be accorded a "qualified" or "good faith" immunity from damage liability under § 1983 has not been treated extensively. See Monroe v. Pape, 365 U.S. 167, 192 (1961). If development of a qualified "immunity" from § 1983 liability in favor of municipalities proceeds by analogy that from that enunciated in a series of Supreme Court cases beginning with Tenney v. Brandhove, 341 U.S. 367 (1951), and culminating recently with Butz v. Economou, 98 S. Ct. 2894 (1978), the "immunity" is not a true immunity in the sense that no liability attaches ab initio. Rather, the "immunity" may more properly be termed a defense. See Pierson v. Ray, 386 U.S. 547, 555-58 (1967). This precludes the official from terminating the action at an early stage, as on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Scheuer v. Rhodes, 416 U.S. 232, 249-50 (1974). See generally Lehmann, supra note 162; Developments, supra note 13, at 1209-17; see also Butz v. Economou, 98 S. Ct. 2894, 2919 (1978) (Rehnquist, J., concurring in part and dissenting in part). Thus, the state or local official raising the defense will normally have to proceed to trial. See Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976); Scheuer v. Rhodes, 416 U.S. 232, 242-49 (1974).

In an excellent analysis of the question whether the liability of officers and their governmental employers should be coextensive, Professor Bermann proposes an "exclusive governmental liability model," possibly supplemented by a right of indemnification accruing to the governmental employer. See Bermann, Integrating Governmental and Officer Tort Liability, 77 COLUM. L. REV. 1175, 1213 (1977). Such a model would assure victims of tortious government activity compensation for their injuries, while "simultaneously protecting the individual official from excessive personal liability." Id.

One commentator has concluded that the policies behind according individual officers at least a qualified immunity from § 1983 liability are not apposite to the question whether municipalities should be accorded an immunity from Bivens liability. See Damage Remedies, supra note 19, at 955-58. First, it would not be "unjust" to hold a local government entity liable for its own constitutional transgressions, particularly where several individual officials are responsible for the plaintiff's injury. Second, any chilling effect on the decisionmaking of individual officials would be minimal in comparison with cases involving imposition of unlimited liability on individual officers. Id. Many courts have, in fact, followed this course. See, e.g., Owen v. City of Independence, 560 F.2d 925, 934 (8th Cir. 1977), vacated and remanded, 98 S. Ct. 3118 (1978); Kostka v. Hogg, 560 F.2d 37, 41 (1st Cir. 1977); Hander v. San Jacinto Junior College, 519 F.2d 273, 277 (5th Cir. 1975).