Supreme Court, 7-2, Ends Immunity of Cities From Civil Rights Suits

By WARREN WEAVER Jr.

WASHINGTON, June 6—Overruling a 1961 decision, the Supreme Court opened the door today to lawsuits against cities and other communities whose official policies have circumscribed the civil rights of their residents.

The 7-to-2 ruling swept away the absolute immunity from civil rights liability that municipalities have enjoyed but left unclear the extent to which they may now be subject to meeting the cost of large legal judgments.

Writing for the majority, Associate Justice William J. Brennan Jr. tried to allay the fears of public officials by declaring that a municipality should not be automatically liable for illegal negligent acts of all of its employees unless they represented official policy.

Justice Brennan also stressed that the Court was not attempting to define "the full contours of municipal liability" for civil rights deprivations by this ruling or to express any views on the possibility that Congress might be able to legislate "some form of official immunity."

In his dissent, Associate Justice William H. Rehnquist said that the Court's 1961 declaration of immunity, which was abandoned today, "has protected municipalities and their limited treasures from the consequences of their officials' failure to predict the course of this Court's constitutional jurisprudence."

"None of the members of this Court can foresee the practical consequences of today's removal of that protection," he continued. "Only the Congress, which has the benefit of the advice of every segment of this diverse nation, is equipped to consider the results of such a drastic change in the law. It seems all but inevitable that it will find it necessary to do so after today's decision."

Chief Justice Warren E. Burger joined in the dissent. Associate Justice John Paul Stevens agreed with the majority that municipalities were subject to civil rights suits but declined to endorse the majority's attempt to limit the limits ruling, calling them "merely advisory."

Ironically, the case (Monell v. Department of Social Services, No. 79-1914) arose in New York City, whose recent financial problems have probably made the community least able to cope with a new source of governmental expense.

In 1971, a group of female employees of the city's Board of Education and Department of Social Services charged in Federal District Court that their civil rights had been violated by the policy of requiring unpaid pregnancy leaves before they were medically necessary.

While the case was pending, the city charged its policy to meet the objections eliminating that legal issue, but the trial court held that the city employees were not entitled to back pay. It cited as its reason the 1961 Supreme Court ruling that cities were exempt from damages in civil rights suits. The United States Court of Appeals for the Second Circuit affirmed.

In a sense, the high court had already overruled its 1961 decision by implication. In a series of cases in which the issue was never raised, the Justices had accepted the contention that school boards were not immune to civil rights suits, upholding injunctions and awards of damages.

1871 Rights Act Recalled

In the majority opinion, Justice Brennan undertook a loan re-examination of Congressional approval in 1871 of the civil rights statute under which the New York City employees sued. He concluded that "it beggars reason to suppose that Congress would have exempted municipalities from suit."

Rehnquist said, local governments, and their employees acting in the official capacity "can be sued directly for monetary declaratory or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers."

The same liability applies, the majority held, when "governmental custom" has resulted in a constitutional deprivation, one never formally approved by the local legislative body. Arguing that there was not sufficient reason to reverse the 1961 grant of municipal immunity, Justice Rehnquist observed that "private parties must be able to rely upon explicitly stated holdings of this court, without being obliged to pursue both the briefs of the litigants to predict the likelihood that this court might change its mind."

7-2, An Opinion by Powell

In a concurring opinion, Associate Justice Lewis F. Powell Jr. said that the ruling raised but did not answer "difficult constitutional questions." He noted that there remained "substantial line-drawing problems in determining when execution of a government's policy or custom can be said to inflict constitutional injury such that Government as an entity is responsible under the civil rights law."

In another case, the Court ruled over a sharp dissent by Justice Powell and Rehnquist that a deportation case involving a man whom the Government contends is an Italian alien should receive a full trial in Federal district court after 11 years of Court of Appeals hearings.

Justice Powell said that the defendant, Joseph V. Agostino, is a former convict who has told "five different stories" about his nationality, "so transparently false" that no judge had ever believed him.

Justice Powell declared that "there can be no case less deserving of further factual review than this one" (Agostino v. Immigration and Naturalization Service, No. 78-510).

The eight of companies that jointly own the Trans-Alaska Pipeline lost their Supreme Court bid for higher transmission rates. First Business Page.
Who Should Pay for Civil Wrongs?

Cities and towns received an unexpected jolt last week when the Supreme Court ruled that they were subject to lawsuits for violations of civil rights. The decision, which reversed a 1961 case, stripped away the blanket immunity long enjoyed by local governments in such cases. Previously, the only recourse for victims of misconduct by police officers or discrimination by city officials was to sue them individually. The Court's decision makes sense as a general principle of public policy. But it raises troublesome questions about municipal liability and who should bear the cost — questions that Congress must now confront.

The Supreme Court case arose from a sex discrimination charge brought by a group of women employees of the New York City Department of Social Services. In 1971, they had been forced by the city's dated personnel policies to take unpaid pregnancy leaves before they were medically necessary. The women filed an action under the Civil Rights Act of 1871, which allowed suits against any "person" who, while acting in a governmental capacity, violated a citizen's federally protected rights. In 1961, the Warren Court ruled that Congress could not have intended a "person" to mean a municipality. Last week, the Burger Court announced that a more meticulous review of the legislative background compelled it to reach the opposite conclusion.

Will the removal of this shield of immunity deter official lawlessness? The exposure of local treasuries to damage claims should certainly help to dissuade public officials from ordering or tolerating behavior that violates citizens' rights. But the trouble with making municipalities liable is that it exposes the taxpayer to a vast array of damage claims in situations where public servants acted in good faith or where individual officials broke the law entirely on their own initiative. Some public responsibility for the conduct of public officials is desirable; it should encourage people to monitor their governments still more closely. But some limits on liability are needed to protect the taxpayer when, for instance, a police unit engages secretly in illegal wiretapping or when a local board of education is found to have violated legal principles in its allocation of funds or in its disciplinary policies.

Should taxpayers have to pay damage claims even when all reasonable precautions have been observed in the conduct of public business? The Supreme Court's latest decision is silent on this question. The categorical doctrine of municipal immunity was bad public policy. But the issue cannot be allowed to rest where the Court left it. Federal legislation will be needed to define the degree of municipal liability in different situations. The nation's mayors have a strong interest in getting Congress to face up to a problem that everyone has been only too happy to leave to the judiciary.
Wide Application Seen for Ruling
Opening Cities to Civil Right Suits

By ROGER WILKINS

When the Supreme Court decided recently that local government bodies were not immune from suits seeking money damages under one of the oldest civil rights laws in the country, civil rights and civil liberties lawyers were jubilant.

"The limitations that earlier decisions had placed on Urban Affairs that legislation were some of the longest nails in the coffin," Drew S. Days 3d, the Assistant Attorney General for Civil Rights, said after the decision was handed down.

The history of the statute is intriguing and the implications of the decision for cities and other local governing bodies are enormous, according to lawyers who have followed the issue through the courts.

The recent case, Monell v. Department of Social Services, was brought by a group of female employees of the New York City Department of Social Services and the Board of Education. They alleged that they had been victims of unconstitutional discrimination because they had been forced to take unpaid maternity leaves before the leaves were medically necessary.

Statute Passed In 1871

The statute under which they sued, passed in 1871 to enforce the 14th Amendment, adopted three years earlier, gave people "whose constitutional rights were violated the right to sue the persons who had violated those rights."

The plaintiffs lost at their trial and on the first level of their appeal because the courts followed a 1961 decision—ironically, written by former Justice William O. Douglas, who was considered by civil rights forces as one of their staunchest supporters on the Court—holding that municipal governing bodies were not "persons" who could be sued for money damages for violations of constitutional rights.

One of the most remarkable things about the judicial history of the 1871 statute, according to civil rights lawyers, is that after its passage it remained virtually unused for almost three-quarters of a century.

Purpose of Legislation

It was passed to enforce the rights of newly freed slaves, but shortly after its passage, the spirit of liberalism that followed the war gave way to a long period of regression of blacks. It was not until the beginning of the civil rights movement in the 1950's that lawyers began attempting to assert the rights that the statute purported to provide.

When a case under the statute—involving police brutality in Chicago—finally did reach the Supreme Court in 1961, Justice Douglas rejected arguments that would have made the statute virtually a dead letter. However, he seriously underpinned the court's decision by deciding that money damages could not be awarded in such cases, according to civil rights lawyers.

The lawyers argue that the 1961 decision made constitutional-rights claimants "second-class citizens" before the common law, since money damages have been, under the common law, the established way for civil wrongs to be deterred. They say, for example, that money damages in contract and negligence law serve as powerful deterrents to behavior that injures other individuals or institutions.

An Exception Is Noted

In announcing the decision from the bench, he said, that no municipality would be liable, for example, for damages inflicted by an ambulanceman who drove on the sidewalk and hit a pedestrian.

The decision would cover, according to William Caldwell of the Lawyers Committee for Civil Rights Under Law, the kinds of violations of prisoners' rights that forced the closing of the Tombs and of similar violations of rights that have frequently been found to occur in public mental institutions.

"This case will be of tremendous importance in nonracial cases," Mr. Schnapper of the Legal Defense Fund said. "People will be able to get redress for violations of the First Amendment rights or for illegal searches and seizures conducted by local police in violation of the Fourth Amendment or for violations of the Eighth Amendment prohibition of cruel and unusual punishment."

"And I don't think any mayor will lightly issue the kind of orders that Mayor Daley did during the peace demonstrations in Chicago in 1968."
Mr. Justice Lewis F. Powell, Jr.
Supreme Court of the United States
Washington, D.C. 20543

Dear Justice Powell:

It is always a source of great pleasure to receive a letter from you. Aleta and I are particularly pleased that our Michael serves as the standard by which the recent products of the Comfort and Stephan households will be judged. In our modest view, you have chosen (as always) the appropriate standard of review.

Susan Weiner told me that she very much enjoyed meeting you. Although I hoped you might select her, I anticipated that her clerkship on the district court might prove a barrier. I do wish to note that this year's editor-in-chief of the law review, Nancy Morawetz, who will be clerking for Pat Wald on the D.C. Circuit, is an impressive individual. She is in my constitutional law seminar, and I am delaying an official letter of recommendation until I see her written work. If her work is as impressive as her bearing and intelligence, I intend to bring her application to your attention. By the way, Eliot Polebaum, an N.Y.U. graduate, is clerking for Justice Brennan this year, and John Sexton, the Chief's clerk, will be joining our faculty next fall. One of our projects here is to enhance the N.Y.U. presence on the Court.

I am delighted that you shared David Stewart's memorandum with me. I take up the gauntlet in the enclosed memorandum.

Sometime this fall Norman Dorsen and I (perhaps accompanied by Bill Nelson, a former White clerk, who recently joined our faculty) will be making our annual pilgrimage to the Court. As soon as the date is firmed up, I hope to be able to schedule a meeting with you. Gerald Gunther beat me to it last year, and I do not intend to let that happen again.
As always, my best wishes and warmest regards to you, the Powell family and the Powell chambers. Aleta and I miss you all.

Sincerely,

Sam
Monell and the Rejection of the Sherman Amendment

Given the Court's penchant for extending the reach of Section 1983 far beyond the expectations of even the Radical Republicans, e.g., Maine v. Thiboutot, No. 79-838, and the refusal to extend a "good-faith" defense to municipalities in Owen v. City of Independence, No. 78-1779, I can appreciate your sense of disquiet on reading David Stewart's memorandum.

As I understand David's position, it is (i) that the rejection of the Sherman Amendment is persuasive evidence of the intention of the 42nd Congress to exclude municipalities from the reach of §1983, and, moreover, (ii) that the use of the word "person" in the eventual compromise that became 42 U.S.C. §1986 demonstrates conclusively "that Congress in 1871 did not think it was creating municipal liability."

I quote from page 11 of David's memorandum:

Thus, my argument is simple. When the Forty-Second Congress wished to exclude municipal liability for the failure to act, it used the phrase "any person or persons." The repeated references to "citizen," "individual," and the use of personal pronouns buttress the inescapable conclusion that "any person or persons" did not include local governments. Since the term "any person" was used in the predecessor to Section 1983,
17 Stat. 13, it is logical that that phrase also excludes municipal liability.

In my view, David has simply restated the argument that prevailed for a time in *Monroe v. Pape*, 365 U.S. 167 (1961), but was properly overturned in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

I deal first with David's second argument, that when Congress used the word "person" in what is now §1986 to exclude municipal immunity, it must have intended to exclude municipal liability when it used the word "person" in §1983. Aside from the surface appeal of this point, little illumination is derived from the use of the term "person" in §1986. One would hope that legislators drafted with greater precision, and avoided the use of words capable of several meanings. This was one reason for the Dictionary Act, passed only months before the Civil Rights Act was enacted, to clarify that "in all acts hereafter passed...the word 'person' may extned and be applied to bodies politic and corporate...unless the context shows that such words were intended to be used in a more limited sense [ ]." Act of Feb. 25, 1871, ch. 71, §2, 16 Stat. 431. I think it likely that members of the 42nd Congress intending to preserve municipal liability for municipal action under §1983, while excluding municipal liability for private rioting under §1986, agreed to the use of the word "person" without focusing on the effect this would have on the far less controversial provision that earlier had passed both houses with little debate.
Great consequences should not attach to careless draftsman­ship, absent substantial evidence of an intention to save local governments from liability for their own wrongdoing under §1983. Thus, David's argument ultimately rests on his first premise.

As David himself recognizes, there are good reasons for proceeding with caution before equating the rejection of the Sherman Amendment with a decision to immunize local governments from liability for their own conduct under §1983. Section 1 of the Civil Rights Act of 1871, the predecessor to §1983, was the subject of only limited debate and was passed without amendment. The purpose of the measure was to impose liability on those committing constitutional violations causing compensable injury. The literal reach of Section 1983 is quite broad and comprehensive. The statements of its proponents suggest that such a reach was indeed intended. The Sherman Amendment, by contrast, elicited much debate and several revisions. The theory of the first two versions was that local governments should be held liable not only for their own unconstitutional wrongdoing, but for their inaction in failing to prevent private rioting.

Justice Brennan's opinion for the Court in Monell canvasses the arguments presented by the opponents of the Sherman Amendment. As you stated in your Monell concurring opinion: "Of the many reasons for the defeat of the Sherman proposal, none supports Monroe's observation that the 42d Congress was
fundamentally 'antagonistic,' 365 U.S., at 191, to the proposition that government entities and natural persons alike should be held accountable for the consequences of conduct directly working a constitutional violation." 436 U.S., at 706 (Powell, J., concurring).

I suppose that fragments of the legislative history can be marshalled in favor of either position on the "meaning" of the rejection of the Sherman Amendment. What counts for me is that Congress in 1871 intended §1983 to serve as a broad remedial measure for violations of constitutional rights; that Congress knew municipalities were capable by their own conduct of committing violations causing compensable wrong, e.g., Representative Bingham's manifest intention to overrule Barron v. Baltimore, 7 Pet. 243 (1834), and make takings by cities without compensation redressable under the Fourteenth Amendment and its implementing legislation, Cong. Globe, 42d Cong., 1st Sess., App., at 84-85 (1871); *

* In Barron v. Baltimore, petitioner had sued the city for making his wharf in Baltimore harbor useless. The trial court awarded petitioner $45,000, but the state appellate court reversed. Barron then claimed in the Supreme Court that his private property had been "taken for public use, without just compensation" in violation of the fifth amendment. Chief Justice Marshall's opinion held that no federal question was presented because the fifth amendment did not apply to relations between the individual and a state.

In a speech on the floor of the House, Representative Bingham explained that he drafted §1 of the Fourteenth Amendment with Barron in mind:
and that unambiguous evidence of a legislative intention to save municipalities from the rule of accountability established in §1983 is lacking. As you observed in your Monell concurrence, adherence to Monroe had the effect of standing the Douglas-Frankfurter debate on its head:

The Court correctly rejects a view of the legislative history that would produce the anomalous result of immunizing local government units from monetary liability for action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not remediable under, state law. No conduct of government comes more clearly within the "under color of" state law language of §1983. It is most unlikely that Congress intended public officials acting under the command or the specific authorization of the government employer to be exclusively liable for resulting constitutional injury.

436 U.S., at 707.

* I had read--and that is what induced me to attempt to impose by constitutional amendment new limitations upon the power of the States--the great decision of Marshall in Barron vs. the Mayor and City Council of Baltimore, wherein the Chief Justice said, in obedience to his official oath and the Constitution, as it then was:

"The amendments [to the Constitution] contain no expression indicating an intention to apply them to State governments. The court cannot so apply them."
7 Peters, p. 250

In this case the city had taken private property for public use, without compensation as alleged, and there was no redress for the wrong in the Supreme Court of the United States; and only for this reason, the first eight amendments were not limitations on the power of the States. Globe App. 84.
Your concluding remarks in the Monell concurrence state the best argument for overturning Monroe. Adherence to Monroe would not obviate a decision on municipal liability in the context of a constitutional tort action under Bivens, and the "difficulty" would remain of "inferring from §1983 'an explicit congressional declaration' against municipal liability for the implementation of official policies in violation of the Constitution." 436 U.S., at 713.

* * *

As your dissent in Owen demonstrates with great force, the decision in Monell did not lead inexorably to the outcome in Owen. The force of the Owen dissent is ultimately strengthened by the fact that your position has never been one of reflexive opposition to the claims of §1983 plaintiffs.
October 25, 1980

Dear Sam:

How good of you to go to the trouble of providing another memorandum for the Powell Chambers!

It is, as can be said of all Estreicher products, well written and persuasive. Although I think David makes a good lawyer-like argument, I am not convinced that we were wrong in Monell.

I do feel a bit like I was "taken" in some of the conversations that then occurred - not by you, of course. Even so, I continue to think Monell was decided correctly.

You always will be welcome to use our facilities when you are here recruiting. I look forward to seeing you.

Sincerely,

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lfp/ss
The Supreme Court Rewrites A Law:
MUNICIPAL LIABILITY UNDER § 1983

By David O. Stewart *

The Supreme Court executed one of the most striking reversals in judicial history when it decided Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). The decision in Monell held municipalities liable for damages under 42 U.S.C. § 1983 for the unlawful deprivation of civil rights. But only seventeen years before, in Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court had decreed that municipalities were completely immune to damage actions under § 1983. The story of these two cases provides a fascinating illustration of the limitations of judicial decision-making in response to diverse legal, intellectual and political concerns.

In both Monroe and Monell, the Supreme Court's decision was based on its interpretation of the deliberations of the

* J.D. Yale University, 1978; B.A. Yale University, 1973; Member of District of Columbia bar.

The Monell Court attempted to soften the impact of its reversal of Monroe v. Pape by limiting municipal liability to those injuries suffered due to municipal policies and thereby excluding liability for injuries caused by unauthorized actions by municipal officers. Nevertheless, Monell has had direct and serious consequences for local governments. Moreover, in 1980 the Supreme Court denied to municipalities the "good-faith" defense available to individuals in § 1983 cases. See Owen v. City of Independence, 445 U.S. 622 (1980). In response to appeals from local governments, Congress is considering restoration of good-faith immunity for local governments, but has taken no such action yet. See S.585, 97th Cong., 2d Sess. (1982); Municipal Liability Under 42 U.S.C. 1983, Hearings before the Subcommittee on the Constitution of the Senate Judiciary Committee, 97th Cong., 1st Sess. (1981).
Forty-Second Congress in approving the Civil Rights Act of 1871. Monroe concluded that the Forty-Second Congress squarely excluded municipal liability; Monell explained that the Forty-Second Congress meant to create such liability. Thus, the Court issued, within seventeen years, diametrically opposing decisions based on exactly the same legislative history. That performance certainly weakens any claim to predictability in the legal system.

A careful review of the legislative history of § 1983 demonstrates that Monroe v. Pape was right: The Forty-Second Congress did not intend to subject local governments to liability for constitutional deprivations. But, due to apparent considerations beyond pure statutory construction, the Monell Court found it necessary to skirt, somewhat uncomfortably, the evident intent of Congress. In so doing, however, the Court raised at least as many questions as it answered.

I.

James Monroe, his wife Flossie, and their six children were awakened one evening by thirteen Chicago police officers who broke into their home and made them stand naked in the living room while the officers ransacked their house for evidence of a recent murder. Mr. Monroe was then interrogated at the police station for ten hours, and ultimately was released. The Monroes

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2/ Section 1983 was enacted initially as Section 1 of the 1871 Civil Rights Act, and was codified as § 1979 of the Revised Statutes.

- 2 -
sued the City of Chicago, Detective Frank Pape, and twelve unknown police officers, alleging that the police acted illegally and without either an arrest or search warrant. The suit demanded damages under § 1983 for the denial by the Chicago police of rights, privileges and immunities secured by the Constitution. The District Court dismissed the complaint, however, and the Court of Appeals affirmed.

In a landmark decision announced by Justice Douglas, the Supreme Court reinstated the Monroes' claim under § 1983. The Court ruled that the alleged police actions had been undertaken "under color of" state law for purposes of § 1983, which therefore provided a remedy for the Monroes' constitutional injuries even though those illegal acts were contrary to formal governmental policy. The Court then turned to the claim by the City of Chicago that it was immune to actions brought under § 1983.

Justice Douglas's discussion of municipal immunity focused on an amendment proposed by Senator John Sherman of Ohio to the bill that became the Civil Rights Act of 1871. The Sherman Amendment, which was introduced on the floor of the Senate, derived from the English "riot acts." Senator Sherman proposed that all individuals in a locality be held liable in damages to anyone injured by riots or mob violence. The Senate adopted the Sherman Amendment, but the House refused to do

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4/ Id., at 663.
A Conference Committee then reported a revised version would have imposed liability on "the county, city or parish in which any of the said offenses shall be committed" for injuries due to mob violence. But the House refused to accept that version, too.

Justice Douglas placed great weight upon the refusal of the House to adopt the first Conference bill. He emphasized Rep. Poland's assertion that the House Conferees had then told the Senate Conferees "that that section imposing liability upon towns and counties must go out or we should fail to agree." A second Conference Committee heeded Rep. Poland's advice. The Sherman Amendment was revised to impose liability on any "person or persons" depriving an individual of his civil rights, and was enacted as § 7 of the Civil Rights Act of 1871. That provision now is codified as 42 U.S.C. § 1986.

Although Justice Douglas did not completely explain the significance of the Sherman Amendment episode for municipal liability under § 1983, the connection between the two is direct. Section 1983, by its terms, applies only to "persons." If a municipality is to be held liable under that statute, it must be because a local government is a "person" under that statute. The Sherman Amendment episode is important because Congress rejected municipal liability as proposed by Sen. Sherman, and because Congress expressed that rejection in the

\[^5/\] Id., at 749 (emphasis added).

final legislation by using the terms "person or persons" to describe those parties who would be liable for damages. Thus, Congress excluded municipal liability by using the terms "person or persons" in the provision now codified as § 1986. Accordingly, the word "person" in the predecessor to § 1983 -- a provision which was drafted and enacted simultaneously by the same Congress -- simply cannot include local governments. The Forty-Second Congress could not have intended -- without any explanation -- that "person" would include municipalities in one section of the Civil Rights Act at the same time the identical term excluded local governments in another section of the bill.

As Justice Douglas concluded in a holding that drew no dissenting comment on the Court, the "response of the Congress to the proposal to make municipalities liable for certain actions... was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." 1

II.

In several decisions after Monroe, the Supreme Court reaffirmed or extended its finding of municipal immunity under § 1983. Thus, Justice Marshall's opinion for the Court in Moor v. County of Alameda 8/ reviewed the legislative history of the

1/ 365 U.S. at 19. A peripheral issue in the interpretation of § 1983 is presented by the Dictionary Act of 1871. That statute stated that "the word 'person' may extend and be applied to bodies corporate and politic." 16 Stat. 431 (emphasis added). The provision therefore provides no firm guidance on the municipal liability question under § 1983.


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Sherman Amendment and concluded again that local governments could not be liable to § 1983 actions. And in City of Kenosha v. Bruno, 9/ the Court extended municipal immunity to injunctive actions with the following statement:

We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.

At the same time, however, the court decided a series of cases brought under § 1983 in which local school boards were included as named defendants for injunctive relief. 10/ Moreover, the Court handed down at least two decisions involving plaintiffs who sought money damages from a school board. 11/ In none of those decisions, most of which concerned volatile school desegregation issues, did the Court consider whether Monroe v. Pape granted immunity from § 1983 actions to those school boards. The Court's failure to apply Monroe to the school board cases was unexplained. That failure may have been the result of the strong feelings surrounding the school desegregation effort, perhaps combined with a judicial unwillingness to cut off desegregation suits on a "technical" ground. But by that


10/ E.g. Green v. County School Board, 391 U.S. 430 (1968), Milliken v. Bradley. For a full listing of such cases see Monell, supra, 436 U.S. at 663, n.5.

desegregation suits on a "technical" ground. But by that failure, the Court painted itself into a corner.

There is no principled basis for distinguishing school boards from municipalities under § 1983. Both are local units of government and creatures of the State. The rejection of the Sherman Amendment by the Forty-Second Congress could hardly be interpreted as a rejection of liability for some units of local government but a simultaneous approval of suits against other units of local government. Sooner or later, the tension between Monroe and the school board cases had to be resolved.

The resolution came in 1978, when the Court decided Monell. The case involved a class action by female employees of the City of New York, who challenged the requirement that they take an unpaid leave of absence during the last four months of pregnancy. The suit, brought under § 1983, demanded injunctive relief along with backpay for prior periods of forced leave. The Supreme Court used the occasion to reexamine municipal liability under § 1983, focusing largely on the legislative history of the Civil Rights Act of 1871.

Justice Brennan approached the legislative history from an oblique angle. Rather than focus on what Congress did, Justice Brennan concentrated on what certain congressman said. Several congressman opposed the Sherman Amendment on the ground that Congress could not impose liability on local governments for failing to control mob violence when Congress lacked the power to impose on local governments, as creatures of the State, the
obligation to keep the peace. 12 Thus, the opposition to the Sherman Amendment, according to Justice Brennan, was based on Congress's refusal to impose liability for a municipality's failure to perform acts that Congress could not directly require it to perform.

Justice Brennan reasoned that the predecessor of § 1983, unlike the Sherman Amendment, did not impose liability for a local government's failure to act; rather, the provision made a "person" liable for affirmative actions denying constitutional rights. Because the predecessor of § 1983 imposed no affirmative duties on a "person," Justice Brennan wrote, the grounds articulated for opposing municipal liability under the Sherman Amendment did not apply to municipal liability under the predecessor to § 1983.

Justice Brennan's analysis of the legislative history is accurate in some respects, but it is largely irrelevant to the municipal immunity question. 13 The Sherman Amendment episode is significant not for the theories stated by a few congressman, but for the use of the terms "person or persons" to exclude municipal liability in the final legislation, which was the predecessor to § 1986. Nothing in Justice Brennan's opinion challenges the analysis that if "person or persons" does not

12/ See Monell, supra, 436 U.S. at 673-683.

13/ One symptom of the weakness of Monell's statutory interpretation is its length. A persuasive reading of a statute and legislative history rarely requires twenty-five pages and forty-four footnotes, but Justice Brennan, writing for the Court, resorted to such extreme length to try to explain away Monroe. The effort, though resourceful, was unavailing.
include local governments in § 1986, the term "person" cannot
include them in § 1983.

Nevertheless, only two Justices dissented in
Monell. 14/ And all of the Justices who joined the Court's
opinion had at some point in the past joined a Court opinion that
held municipalities immune under § 1983. What accounts for this
remarkable mass changing of minds especially when Justice
Brennan's view of the legislative history was so unconvincing?

As suggested before, the most likely explanation for
the Court's switch concentrates on the conflict between Monroe v.
Pape and the Court's willingness since Brown v. Board of
Education 15/ to hear § 1983 cases against school boards.
Justice Brennan's opinion cites twenty-three decisions brought
under § 1983 in which school boards were defendants. 16/ The
Court even attempted to find support for municipal liability from
the fact that Congress had not, as a result of those decisions,
"stripped the federal courts of jurisdiction over school
boards," and from other congressional actions. 17/

The Court's dilemma, however, was most fully
articulated in the concurring opinion of Justice Powell 18/:

This line of cases -- Monroe to Kenosha -- is
difficult to reconcile on a principled basis

14/ Justice Rehnquist and Chief Justice Burger dissented.
16/ 436 U.S. at 663, n.5.
17/ Id. at 696-699.
18/ Id. at 711 (Powell, J., concurring).
with a parallel series of cases in which the Court has assumed sub silentio that some local government entities could be sued under § 1983. If now, after full consideration of the question, we continued to adhere to Monroe, grave doubt would be cast upon the Court's exercise of § 1983 jurisdiction over school boards. See ante, at 663 n. 5 Since "the principle of blanket immunity established in Monroe cannot be cabined short of school boards," ante, at 696, the conflict is squarely presented.

Justice Powell noted that the Court could avoid outright reversal of Monroe by distinguishing the school board cases as primarily injunctive, and not involving monetary claims. He suggested that this approach would roughly follow the treatment by Ex Parte Young, 19/209 U.S. 123 (1908), of Eleventh Amendment issues, by allowing injunctive suits against local governments. But that approach, Justice Powell reasoned, would only resurrect the "bifurcated application" of § 1983 that the Court had rejected in City of Kenosha v. Bruno. Justice Powell also suggested that municipal immunity under § 1983 would only result in the recognition of a direct constitutional cause of action against local governments under the theory of Bivens v. Six Unknown Named Fed. Narcotics Agents. 20/ In these circumstances, Justice Powell concluded, "the better course" was to recognize municipal liability under § 1983.

19/209 U.S. 123 (1908).

III.

The choice facing the Supreme Court in Monell was a difficult one. To follow Monroe would indeed have "cast grave doubt" on the Court's jurisdiction in its school desegregation cases, a course that must have been both alarming and unappealing to many Justices. The political consequences of such an act would have been substantial. As a political institution, the Court could ill afford to confess that its most controversial and prominent line of decisions over the preceding twenty-five years -- insisting on desegregated education -- had occurred in cases over which the Court had improperly taken jurisdiction. 21/ The reduction of public confidence in the Court, and in public perceptions of the legitimacy of the Court's actions, could have been substantial.

But the course chosen by the Court, though possibly the "better course" as Justice Powell put it, carried real costs of its own. In essence, the Court proclaimed an irrational and intellectually insupportable interpretation of a major statute. The Court simply rewrote the Civil Rights Act of 1871, reversing the intent of the Forty-Second Congress. There can be no dispute that the Court exceeded its constitutional role.

Some justification for the Monell decision may be drawn from the fact that it was, and remains, subject to reversal by

21/ There is little question that a school desegregation suit could be brought directly under "federal question" jurisdiction by asserting a violation of the Fourteenth Amendment. The plaintiffs in the school board cases had not, however, followed that course for the most part, but had brought § 1983 suits.
Congress. And the Court can perhaps take some solace from the fact that there has been, as yet, no legislative restoration of municipal immunity under \$ 1983.

Nevertheless, it is difficult to understand why the Court did not adopt the middle course considered briefly in Justice Powell's opinion -- to relax municipal immunity for injunctive actions only, following the example in Eleventh Amendment jurisprudence of Ex Parte Young. Such a course still would not have recognized the true intent of the Forty-Second Congress, since the 1871 Act presumed complete municipal immunity. But the usurpation of legislative powers achieved by such a course surely would have been less severe than that accomplished by the eventual decision in Monell.

Moreover, the legislative history of the Sherman Amendment more nearly supports such a "bifurcated" outcome than it does the decision actually reached in Monell. The Forty-Second Congress refused to approve the imposition of money damages on local governments as proposed by the Sherman Amendment. Thus, Congress plainly intended that municipalities not be liable for such money damages. The legislative history might, however, be construed to be silent on the question whether equitable relief was to be available against local governments. That silence might be stretched to recognize equitable actions against municipalities, since by 1871 the federal courts had
established their power to enforce the Contract Clause against municipalities. 22/

Although this interpretation of the legislative history may not be overpowerting, it is at least as plausible as Justice Brennan's version in Monell, and has the additional virtue of preserving at least some of the original congressional intent to exempt municipalities from liability. Those few pre-Monell decisions in which plaintiffs sought money damages against school boards might have been called into question, but the vast majority of school board cases under § 1983 would have been undisturbed.

IV.

But the Court did not adopt a middle course in Monell. Instead, reflecting the civil rights sensibilities of the late twentieth century, it boldly overrode the apparent intent of Congress. That decision, it may be argued, briefly distorted the Supreme Court's perspective on § 1983. For a short time, Monell seems to have cast the Court adrift from traditional methods of judicial decision-making in § 1983 cases.

For example, in Owen v. City of Independence, the Court denied to local governments the "good-faith" immunity to § 1982 actions available to individuals. The Owen Court confronted incontestable evidence that municipalities in the nineteenth century enjoyed some form of immunity from tort actions. In view

22/ See Monell, supra, 436 U.S. at 673, citing Board of Committees v. Aspinwald, 24 How. 376 (1861).
of that evidence, and the fact that Congress did not abrogate those pre-existing immunities Congress must be presumed to have intended to accord to those governments in § 1983 actions the legal defenses they already enjoyed. 23/ Instead of acknowledging this historical truth in interpreting § 1983, the Court wondered which outcome, based on current economic theory, would best "serve as a deterrent against the future constitutional violations." 24/ The Court then trumpeted its decision as one that "properly allocates the costs" of constitutional injuries, 25/ not as the decision mandated by Congress.

Maine v. Thiboutot, 448 U.S. 1 (1980), marked the high-water point of the Court's erratic interpretation of § 1983. In that decision, the Court faced the question whether the phrase "and laws" in § 1983 creates a cause of action for deprivations under color of state law of any federal statutory right. The critical point in Thiboutot was that the Civil Rights Act of 1871 did not include the phrase "and laws" in the section that became 42 U.S.C. § 1983. Rather, the original version provided a cause of action for deprivation under color of state law only of rights

23/ There is an Alice-in-Wonderland quality to the exchange in Owen, since the entire case is based on a false premise: that local governments could be liable to § 1983 suits. Since the Forty-Second Congress did not intend to create such liability, discussions of partial municipal immunity are necessarily somewhat speculative and fanciful.


25/ Id., at 657.
"arising under the Constitution." The words "and laws" were inserted when the federal statutes were codified in 1874.

In an opinion virtually devoid of analysis, the Court in Thiboutot ruled that the codification created a cause of action under § 1983 for the loss of federal statutory rights, even though for no such causes of action had been recognized the preceding 104 years. In so ruling, the Court ignored both the principle that a codification does not alter the substantive statutes, and the express statements in Congress in 1874 that the codification did not change existing law. 26/

There have been indications in the past two Terms of the Supreme Court that the disorienting impact of Monell -- evident in Owen and Thiboutot -- is wearing off. The Court has taken substantial steps to cut back the dramatic expansion of § 1983 achieved by Maine v. Thiboutot. Within a year of Thiboutot, the Court reached out in Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers, 27/ to restrict Thiboutot even though the parties had not even discussed § 1983. Justice Powell, writing for the Court in Sea Clammers, emphasized that a § 1983 action may not be maintained to vindicate federal statutory rights "[w]hen the remedial devices in a particular act are sufficiently comprehensive." 28/ Because the federal statutes at issue in Sea Clammers had ample remedial provisions, the Court found that

26/ Maine v. Thiboutot, supra, 448 U.S. at 17 (Powell, J., dissenting).
28/ Id. at 20.
a § 1983 action was foreclosed. This analysis provides a means by which courts can prevent § 1983 from supplanting great chunks of the United States Code.

Still, when legal historians review the Court's heady adventures with § 1983 over the past few years, they may well conclude that Monell was a critical turning point. In Monell, the Court turned its back on congressional intent as a guide to applying § 1983, preferring rather to consult its own perceptions of the proper ways to provide redress for constitutional rights. That decision, however well-intentioned, must be seen as gravely flawed and its unsettling effect on the jurisprudence of § 1983 must be recognized. That effect can be contained, perhaps, through decisions like Sea Clammers, which make clear that § 1983 is not some sort of super-statute, providing an all-purpose federal remedy for all grievances against government action.

But, realistically, the Supreme Court cannot be expected to confess its error in Monell and restore municipal immunity. To correct that mistake, local governments must look to Congress.