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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. 1/

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

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1/ 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 consquences 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. [2] 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 relased. 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.

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 rememdy 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. [3/] 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. [4/] The Senate adopted the Sherman Amendment, but the House refused to do

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3/ See Cong. Globe, 42d Cong., 1st Sess., p. 663 (1871).

4/ Id., at 663.

so. 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. 5/ 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." 6/ A second Conference Committee heeded Rep. Poland's advice. The Sherman Amendment was revised to impose liablity 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 liabilty 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

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5/ Id., at 749 (emphasis added).

6/ 365 U.S. at 190, citing Cong. Globe, 42d Cong., 1st Sess., p. 804 (1871).

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." 7/

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

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7/ 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.

8/ 411 U.S. 693, 709-710 (1973).

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

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9/ 412 U.S. 507 (1973).

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.

11/ Cohen v. Chesterfield County School Board, 414 U.S. 632 (1974); Tinker v. Des Moines Independent School Dist., 393 U.S. 503, (1969).

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, focussing 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

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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, "strip[ped] 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

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[14] Justice Rehnquist and Chief Justice Burger dissented.

[15] 347 U.S. 483 (1954).

[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.

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[19] 209 U.S. 123 (1908).

[20] 403 U.S. 388 (1971).

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

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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 muncipalities 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 muncipalities, 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 overpowering, 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 muncipalities 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

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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

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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.

24/ See Owen v. City of Independence, supra, 445 U.S. at 651.

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

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26/ Maine v. Thiboutot, supra, 448 U.S. at 17 (Powell, J., dissenting).

27/ 453 U.S. 1 (1981).

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 immmunity. To correct that mistake, local governments must look to Congress.