nb/ss 8/24/77 Reviewed. Splendid memo. Will discuss
Latest. 9/10-12

MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Nancy Bregstein

RE: Summer Project August 25, 1977

Inferring a Damage Action from the
Fourteenth Amendment

The Constitution guarantees certain rights; 42 U.S.C. § 1983 provides a statutory cause of action at law or equity for the vindication of those rights when they have been violated under color of state law. Section 1983 conceivably covers all violations of the Fourteenth Amendment, including those rights in the Bill of Rights that have been applied to the states through the due process clause of the Fourteenth Amendment.

There are two significant gaps in the coverage of § 1983. First, it applies only to action under color of state law, not federal law. Second, municipalities and certain other government units [hereinafter referred to collectively as municipalities] are not considered

"persons" within the meaning of the statute. Monroe v. Pape, 347 U.S. 167. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, sanctioned a cause of action against federal officials--for the deprivation of Fourth Amendment rights--based exclusively on the Fourth Amendment, without reference to a statutory cause of action. The Court has not addressed itself to the questions whether Bivens extends beyond the Fourth Amendment and whether plaintiffs may base a cause of action against municipalities on the Fourteenth Amendment. This memorandum will explore the power of the federal courts to entertain causes of action based directly on the Constitution in general and on the Fourteenth Amendment in particular, and, assuming the existence of such power, the discretionary factors for and against recognition of such a cause of action. The only conclusion I have reached with certainty is that the Constitution's requirement of a case or controversy is a wise one: It is far more difficult to evaluate the merits of opposing points of view in the abstract than with the assistance of sharply opposed parties and the concreteness of a live dispute. In exploring this topic, occasionally I have had to conjure up hypothetical situations and lawsuits that might be brought if a Fourteenth Amendment cause of action were recognized. My conclusions therefore are tentative and subject to reevaluation if and when a real case that poses this issue comes to the Court.

Two questions remain open:
1. Does Bivens extend beyond 4th Amend?
2. May municipalities be sued under 14th Amend?

Even if answers are "yes", are these discretionary factors for or against such a cause of action?

At the outset, some explanation of terminology will be helpful. I shall sometimes refer to a cause of action based directly and exclusively on the Fourteenth Amendment as a "Fourteenth Amendment action". A cause of action against federal officials for the violation of Fourth Amendment rights will be called a "Bivens action". The generic term for either or both of the above will be a "constitutional cause of action". Usually I shall refer to "inference" or "recognition", rather than "creation", of a constitutional cause of action, because the latter term may imply judicial activism with whatever pejorative connotations that carries.

The question of the propriety of a constitutional cause of action can be approached from two angles, one theoretical and one practical. The theoretical approach involves an analysis of the power of the federal judiciary to entertain a cause of action based on a constitutional provision, and if that power exists, an analysis of the factors for and against exercising that power in the context of different constitutional provisions. The inquiry proceeds on the analytical assumption that § 1983 does not exist. Making that assumption aids analysis, because it isolates the question of judicial remedial power from complications attendant upon the existence of a congressional remedy tht is not comprehensive.

The practical inquiry is more limited. Because Congress has enacted § 1983, and because the courts have interpreted § 1983's coverage as coextensive with the

Gerald Gunther questions whether 1983 coverage is coextensive with Const. See letter of 9/1/77. attached

Constitution, the only occasions for resort to a constitutional cause of action would be when constitutional rights have been violated by municipalities or by federal officials. After Bivens, the remaining practical significance of recognition of a constitutional cause of action would be limited to suits against municipalities and suits against federal officers based on Amendments other than the Fourth. I think the issue is more important as it relates to municipalities than as it relates to federal officers; doctrinally, too, it may be a greater extension of Bivens to recognize a Fourteenth Amendment action than to recognize a cause of action against federal officers based on provisions of the Bill of Rights other than the Fourth Amendment. The greater portion of this memo therefore will be devoted to the problem of Fourteenth Amendment action. Throughout, the problem is whether to infer a private right of action for damages. The power of the federal courts to grant declaratory and injunctive relief, to grant writs of habeas corpus, and to nullify state statutes and convictions, all based on violations of the Constitution, has never been questioned; and the power has been exercised frequently.

If coextensive, we are only concerned with suits against (1) municipalities or (2) federal officials.

Yes

The problem is whether to infer a private right of action for damages

Yes

I. Introduction: The Scope of the Bivens Decision

One interpretation of Bivens would limit it to its exact holding and would render unnecessary all of ~~t~~what

follows. That interpretation has two prongs, neither of which persuades me. Both will be discussed more fully, but they should be mentioned at the outset.

A. Limiting Bivens to Suits Against Federal Officers

If Bivens were limited to suits against federal officers there would be no basis for extending its reasoning to suits based on the Fourteenth Amendment. The argument for so limiting Bivens is that the decision was intended to do no more than remedy the anomaly of the existence of a federal cause of action against state officers for the deprivation of constitutional rights while there existed no corresponding cause of action against federal officers. In short, a plaintiff could sue state officers in federal court but had to go to state court to sue federal officers.

Theory for limiting Bivens: to remedy the anomaly

Although the situation before Bivens may have been anomalous, it was not unexplainable. When Congress enacted the predecessor of § 1983 it did not have in mind unconstitutional conduct by federal agents and therefore saw no need to provide a remedy for such conduct. This is not to say that the Court was wrong to correct the anomaly when it did, but it would be inaccurate, in my opinion, to say that the Court did no more than "fill in the gap" left by Congress. The Court independently recognized the validity of a constitutional cause of action; it did not purport to be filling in a gap left by congressional oversight or to be discerning legislative intent. Indeed,

But opinion in Bivens not predicated on the anomaly theory

the Court has eschewed appropriating to itself the power to amend or supplement federal statutes. Wheeldin v. Wheeler, 373 U.S. 651; see Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 934 (1976) [hereinafter cited as Municipal Liability][1].

The Bivens opinion devotes all its attention to the legitimacy and propriety of a constitutional cause of action. It does not discuss the problem of disparate treatment of state and federal violations of constitutional rights. The Court's decision probably was informed by an awareness of the anomaly, which was mentioned in petitioner's brief, at 13. Even there, the point was made in only one paragraph. Most of the discussion in Bivens, and by implication the core of the Bivens rationale, concerns the histcrical and theoretical basis for the federal courts' capacity to grant fitting remedies in cases of constitutional violations. I do not think the Bivens decision can be read as a narrow corrective device that sought only to place federal officials on the same plane as state officials.

§1331 as jurisdictional base for implied cause of action vs. municipalities

In a sense, using § 1331 as a jurisdictional base for a constitutional cause of action against municipalities is more appropriate than using it as a basis for a Bivens action. This is true despite the existence of § 1343(3) as a jurisdictional base for § 1983 suits against state officers. It is no coincidence that § 1331 and the

§1331 & 1983 enacted

Reconstruction civil rights statutes were passed almost contemporaneously. Even before the Civil War, statutory removal provisions often were extended whenever there was sectional opposition to national policy. This has been explained as the "willingness of Congress to exercise the Constitutional power of lower court jurisdiction over federal questions to meet that challenge of anti-federal philosophy which subsequently was fought out on the field of battle. Extension followed extension during the war years and in the early reconstruction period." Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U.Pa. L. Rev. 639, 644 (1942). The law was not unaffected by the nationalism of and following the Civil War.

Extension of federal question jurisdiction.

The passage of a statute providing for original jurisdiction of federal questions in the federal courts was part of the same current that produced §§ 1983 & 1343(3). Chadbourn & Levin describe the passage of § 1331 not as a technical legal reform unrelated in substance to historical developments, but as a political response to the Civil War and a part of Reconstruction:

> "[t]he scene was set for the passage of an Act which can be regarded as the 'culmination of a movement . . . to strengthen the Federal Government against the states'. Therefore, even if this tremendous broadening of the scope of the Federal judiciary came about through legislation consented to by a Congress not fully aware of the meaning of its actions, yet, it is patent that the Act is intelligible in terms of the political and economic background of its time, and clearly is part of, rather than an exception to, the trend of the legislation which preceded it."

Id. 645 (footnotes omitted). This interpretation of the mood surrounding passage of the statute giving the lower federal courts general federal question jurisdiction legitimates the idea of using § 1331 as a basis for a constitutional cause of action against those subdivisions of a state not protected by the Eleventh Amendment, including municipalities. Except for the obvious fact that it makes sense for the federal courts to have primary responsibility for enforcing the Constitution against federal officers, it is more consistent with the background of the enactment of § 1331 to use it to enforce the Constitution against states and localities than against the federal government and its agents.

B. Limiting Bivens to Fourth Amendment Violations

The other prong of the narrow interpretation of Bivens is that the decision should be confined to the Fourth Amendment. This interpretation is based on the emphasis in the opinion on the historical origin of the Fourth Amendment. The Amendment was conceived because of the Framers' concerns about British use of the writs of assistance and the general warrant, accompanied by their knowledge of Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765). See Bivens, supra, 403 U.S. at 400 n.3 (Harlan, J., concurring). Entick v. Carrington provided for the recovery of damages by citizens whose homes had been broken into unlawfully by the King's

officers. With this legal and historical tradition in mind, the Court easily could determine that the Framers contemplated, or might have contemplated, enforcement of the Fourth Amendment by actions for damages. But cf. Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1132 (1969).[2] Webster Bivens probably had a much better case than would a plaintiff urging a cause of action based on the right to a pre-deprivation hearing under the due process clause of the Fifth Amendment, because of the novelty of the line of cases establishing the right.

There is a range of possibilities as to reach of Bivens

(1) A very narrow interpretation of Bivens would limit it to the Fourth Amendment. (2) A slightly broader reading would apply it only to rights traditionally recognized at common law. (3) A slightly different emphasis might allow recognition of a damage action only for the kinds of violations of rights that ordinarily would give rise to a cause of action for damages. It would be hard to imagine, for example, a common law damages action to vindicate the Fifth Amendment privilege against self-incrimination, although the right itself was well-established at common law.

These interpretations of Bivens, and the concerns upon which they are based, probably are more tenable than the "anomaly" interpretation. They do not erect an absolute bar to recognition of causes of action based on constitutional provisions other than the Fourth Amendment. They simply caution that the courts must

consider the appropriateness of a damage remedy in each particular kind of case.

One reason for not limiting Bivens to the Fourth Amendment is that § 1983 has been construed to provide a cause of action for the violation of many constitutional rights, despite the more limited class of evils Congress had in mind when it enacted the statute. To the extent that there is any validity to the "anomaly" theory, it cautions against perpetuating the anomaly of the existence of different causes of action depending on whether the defendant is a municipality, its agent, or a federal officer. At least in cases where the Court can see reasons as persuasive as those in Bivens for recognizing a damage action, the anomaly should be avoided.[3] See Part V, infra.

It has indeed!

II. History and Theory of the Remedial Power of the Federal Courts

The power of the federal courts to award damages in causes of action based directly on the Constitution is established by Bivens. If it is accepted, as urged in Part I, that Bivens was not intended to be limited, and is not limited by its rationale, to suits against federal officers or suits alleging violations of the Fourth Amendment, then there is no longer any need to counter the argument tht the federal courts do not have the power to award damages against municipalities for the deprivation of constitutional rights. The argument of greatest concern at present is that the Court should not sanction

such a remedy when it has refused to construe Congress' intent in § 1983 to allow such a remedy. This really is a problem involving the relationship between Court and Congress in matters of constitutional rights and remedies. See Part III, infra. The problem is different from the main problem of Bivens, which involved the relationship between state and federal law.

Yet to place the present inquiry in proper perspective, it is appropriate to summarize the reasoning of the Bivens decision and the analyses of pre-Bivens commentators that seem to have been accepted by the Bivens Court, either explicitly (by citation) or implicitly. The main purpose of this section is to elaborate on the point that the Court in Bivens was not filling in a gap left by Congress, in deference to Congress, but was exercising a power wholly independent of congressional remedial power. This power would be the same whether or not § 1983 existed.

The Bivens theory is a theory of remedies, not of substantive constitutional law. The existence and scope of the Fourth Amendment right to be secure in one's home was not at issue in Bivens. The questions posed in Bivens were whether a victim of unconstitutional conduct should look to federal or state law for relief, and, once it was determined that federal law governed, whether the federal remedy could be an award of damages when such a remedy had not been specifically authorized by Congress.

It is not entirely clear to me why the power of the federal courts to award damages for constitutional

violations should have been in doubt. The stumbling block would have to have been either the federal courts' inability to engage in creative lawmaking or doubts about whether the Constitution contains personal rights amenable to enforcement through damages, rather than just limitations on government power enforceable only in defense, for example, to a criminal charge.

I view the latter as a plausible concern because by the time of Bivens, the ability of the federal courts to infer damage remedies from federal "statutes" had been established. J.I. Case v. Borak, 377 U.S. 426. Of course in the case of implication from a statute Congress has provided the basic framework of rights. It might have been doubted whether the Constitution likewise is "law" in the sense of defining personal rights or enforceable legal interests. In Bivens , the Court accepted the thesis advocated in Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. Pa. L. Rev. 1 (1968), that one of the Framers' main reasons for writing the Constitution was to codify pre-existing personal interests in liberty. A corollary of this thesis is that violation of such interests appropriately gives rise to a damage remedy. The notion that at least some of the rights enumerated in the Constitution are personal, enforceable rights was expressed as early as Marbury v. Madison, 1 Cranch 137, where the Constitution was viewed as law, enforceable in ordinary courts of law.

Katz traced the idea of a fundamental charter as ordinary law back to the days of Magna Carta and its use in the old English courts. Katz described this usage, and argued that the common law nature of Magna Carta "directly refutes the notion that laws that place limits on governmental activity are somehow different from private law." He suggested that "[t]he apparent difference arises from the conceptual difficulty in constructing norms that are to be binding upon the organs holding the residuum of lawmaking power." Id. 10. This problem, of course, is less significant in the American than in the British system of government, because in the former the people hold the residuum of lawmaking power through the Constitution. "[I]n a constitutional case, the right involved does not 'depend' upon the government, but rather arises from the basic law which created and seeks to control that government." Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1557 (1972). This was one of the basic tenets of Marbury. Even with respect to the British common law, however, Katz noted that similar reasoning applied when Magna Carta was given effect as ordinary law in the British common law courts.

Katz pointed out, however, that the idea of the Constitution as enforceable law does not necessarily lead to its enforcement by means of a particular remedy, such as damages. "The Bill of Rights gave legal recognition to the interests in liberty contained therein. It is our

task to make the remedial decisions." Id. 35. This is where the concern about creative lawmaking comes in. "The granting of money damages against the Government, in the absence of legislative authorization, actively involves the judiciary in policy decisions relating to the allocation of limited resources and, in certain instances, will raise serious questions concerning the enforceability of a court's mandate." Dellinger, supra at 1533 (footnote omitted).

Yet there has been a "historical relationship between constitutional interests in liberty and the ordinary remedial legal system." Katz, supra, at 12. That relationship is critical to preserving the rights embodied in the Constitution.

> "The purpose in treating interests in liberty as part of the common law is to assure their application in practice through protection by judicial process. That purpose is frustrated when courts of law recognize their existence as political ethic yet deny adequate remedy in their service."

Id. 12. This principle was recognized in Bell v. Hood, 327 U.S. 678, 684, where the Court stated: "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Even though a damage remedy for constitutional violations might have been novel when Bivens was decided, it could not have been argued that "the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment." Id. at 402. The

Court therefore did not have to travel very far from the cases of statutory implication to the proposition that a cause of action for damages could be inferred from a constitutional provision. After all, constitutional provisions are more fundamental than statutory provisions. Justice Harlan stated this point as whether or not we place at least as much importance on the Fourth Amendment as on the SEC's proxy rules. See J.I. Case v. Borak, supra. 403 U.S. at 410-11. The Court made clear that it was doing no more than choosing from "traditionally available judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law." Id. at 403. The Bivens Court concluded that the Constitution is law, and law that can be applied in ordinary civil suits for damages:

> "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."

403 U.S. at 395.

As far as the intent of the Framers is relevant, the remarks made above in the context of the Fourth Amendment are also relevant to the rest of the Bill of Rights. I have not looked for a common law equivalent of Entick v. Carrington that could be said to have been part of the inspiration behind any of the other Amendments. Further research would be necessary in the context of

particular constitutional guarantees asserted in particular cases. It seems reasonable to think that similar notions of common law concerns and safeguards informed the Framers' decisions to include each of the guarantees in the first eight Amendments. See, e.g., Miranda v. Arizona, 384 U.S. 436, 458-60 and authorities cited therein (historical and common law origins of the privilege against self-incrimination).

If it cannot be said that the Framers specifically contemplated that the provisions of the Bill of Rights would give rise to damage actions, neither can it be said that they ruled out the possibility. The fact that there existed a common law cause of action for trespasses by the King's officers, Entick v. Carrington, supra, did not deter the Framers from incorporating a safeguard against unreasonable searches and seizures into the Bill of Rights, thereby elevating it from a common law right to a constitutional right. Instead of resting on a definitively established common law right, the Framers felt it necessary to give the right more permanence by writing it into the fundamental law. Brief for Petitioner, Bivens, supra, at 8-10. It would be anomalous, therefore, to treat other constitutional rights, which by definition also were considered fundamental and more important than common law rights, as less worthy of protection if they were not protected by the common law. And the language of Article III sustains the power of the federal courts to create a damage remedy, because the federal courts were empowered to

But if Art III is read thus broadly why is Bivens viewed as a "creative" exercise of judicial power?

provide remedies in any case within "the judicial power", and the judicial power was to extend to all cases arising under the Constitution.

> "Given a common law background in which courts created damage remedies as a matter of course, it is not unreasonable to presume tht the judicial power would encompass such an undertaking on the part of the federal courts, unless there were some contrary indication that the judicial implementation of such a remedy was not to be part of the article III judicial power."

Art III

Dellinger, supra, at 1541-42.

One of the fears about allowing the federal courts to recognize constitutional causes of action for damages is that judicial pronouncements on the Constitution since Marbury have been considered immutable, or at least not subject to rejection by Congress. The defendants made this argument in Bivens. They argued that inferring a remedy from a statute is different from, and more permissible than, inferring a remedy from the Constitution, because Congress can overrule the Court's judgment on a statutory matter whereas it cannot on a constitutional matter. Thus even if the Court were wrong about the need for a constitutional remedy, or the choice of a particular remedy, its judgment could not be corrected by Congress. (This seems to be another formulation of the fear of creative lawmaking by the judiciary, rather than the legislature.) This would be true even if Congress determined that the facts upon which the Court based its

Gunther makes this point in her letter re to 1983

decision were empirically unfounded. Compare Oregon v. Mitchell, 400 U.S. 112; Katzenbach v. Morgan, 384 U.S. 641. Justice Harlan addressed this contention in Bivens but refused to state any conclusions about the assumption that Congress could not overrule the Court on a remedial choice in a constitutional case. 403 U.S. at 407 n. 7; see Dellinger, supra, at 1545-50.

Harlan in Bivens

This aspect of the relationship between Court and Congress in terms of constitutional remedies will be discussed at greater length below. See Part III, infra. In brief, however, it seems to me that the defendants' argument in Bivens does not make sense. If the decision to allow a damage remedy is so closely linked to the constitutional right that the matter is one for exclusive judicial competence, as is the determination of the substance of constitutional rights, Marbury v. Madison, then it is no less appropriate that such matters be determined exclusively by the judiciary than that the judiciary decide substantive issues of constitutional law. If, on the other hand, the remedy is only one of several that might be devised to implement constitutional rights, then the Court will not be jealous of attempts by a coordinate branch to find better means of implementation. E.g., Miranda v. Arizona, 384 U.S. 436, 567. See Burt, Miranda and Title II: A Morganatic Marriage, 1969 S. Ct. Rev. 81. The role of Congress in shaping constitutional remedies does not impinge on the basic power of the Court to devise means of implementing constitutional rights.

Nancy thinks concern as to judicial creation of remedies is not merited

In sum, I believe there is no doubt that Bivens was rightly decided. Starting from that premise, the only impediment to recognizing a Fourteenth Amendment action akin to the Bivens action is the pre-existence of a sweeping but not fully comprehensive remedy enacted by Congress.[4] The question addressed in the next section is whether the existence of § 1983, and the Court's perception that Congress intended to exclude municipalities from its reach, should preclude judicial recognition of a cause of action for damages against municipalities based on the Constitution.

III. The Relationship Between Court and Congress in the Field of Constitutional Remedies

The question whether to infer a cause of action for damages from the Fourteenth Amendment really is but a part of the larger question of the respective roles of, and relationship between, the Court and Congress in implementing constitutional rights. The area of inquiry includes the debate over whether Congress can prohibit the federal courts from ordering busing as a remedy in school desegregation cases; the Court's invitation to Congress to find a more effective means than the Miranda warnings of protecting the Fifth Amendment right against self-incrimination; the Katzenbach v. Morgan/Oregon v. Mitchell theories of the respective roles of Court and Congress in enforcing the equal protection clause of the

Fourteenth Amendment; and the famous Hart & Wechsler dialogue on whether and to what extent Congress can deprive the lower federal courts of their jurisdiction to grant certain remedies, when that would result in a deprivation of constitutional rights. Hart & Wechsler, The Federal Courts and the Federal System 330 (2d ed. 1973). I do not intend to discuss all these areas. It is important to recognize, however, that these questions and the area of immediate concern are related.

At first I shall discuss the question whether Congress' position on municipal liability should have any bearing on the Court's decision whether to recognize a Fourteenth Amendment action for damages against municipalities. This discussion involves the views of the Court and the commentators on Congress' role in implementing and defining constitutional rights. With that theoretical background in mind, I shall examine whether there has been a square declaration by Congress that municipalities are to be exempt from monetary liability for constitutional violations committed by them or by their agents. I shall examine what the Court held in the debates on the so-called Sherman amendment to the Ku Klux Klan Act of 1871; what the Court held in Monroe v. Pape; whether Monroe was rightly decided; and whether and to what extent the Court's holding in Monroe bears on the present inquiry. My conclusion is that neither the congressional debates on the Sherman amendment nor the Court's holding in Monroe precludes judicial recognition of a Fourteenth

Amendment action. I shall discuss nevertheless what the proper effect on the Court should be if there were a square declaration by Congress that municipalities were to be exempt from monetary liability for their own or their agents' constitutional violations.

Many landmark constitutional cases contain significant qualifications, which are interpreted by students and commentators as escape hatches, should a new constitutional doctrine prove unworkable or should the lower courts extend the newly-announced principles beyond their proper compass. Bivens is not exception. The Court included in its opinion the following caveat: "The present case involves no special factors counselling hesitation in the absence of affirmative action by the Congress." 403 U.S. at 396. That explicit limitation on the scope of Bivens seems almost perfectly tailored to the situation of implication of a remedy from the Fourteenth Amendment in cases not covered by § 1983. A superficial reading of the qualification in Bivens would seem to answer definitively, and in the negative, the question treated in this memorandum.

Even if the above-quoted caveat from Bivens is not considered an absolute bar to judicial creation of monetary liability for constitutional violations by municipalities,

another point made in Bivens might at least restrict the scope of the Court's discretion in considering the appropriatness of awarding a damage remedy. The Bivens Court rejected the City of Chicago's

> formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts."

Id. at 397. Thus even if the Court perceived no affirmative action by Congress thoroughly precluding the creation of a damage remedy, it still might find that Congress had created other remedies equally effective at implementing the constitutional right at stake, and therefore would not create its own remedy because, however "appropriate", it would not be "necessary".

The caveats in Bivens are explicit, self-imposed limitations on the Court's latitude in recognizing constitutional causes of action. These supplement other arguable limits on the Court's remedial powers that may inhere in the Court's institutional role and its relationship with Congress.

In my view, the Court's first caveat is inapplicable in the context of inferring from the Fourteenth Amendment a damage action against

municipalities. I am not sure what kind of "factors counselling hesitation" the Court had in mind. The one that comes to mind in the present context is the exclusion of municipalities from liability under § 1983. I am not sure whether it would be Congress' expression of views during the Sherman amendment debates, see Part III.B.1., infra, or the Court's holding in Monroe (based on those debates), see Part III.B.2., infra, that would amount to a factor counselling hesitation. It seems logical that it would have to be Congress' action, because the Court can overrule itself. The debates on the Sherman amendment were not concerned with municipal liability in general, as will be discussed below. The Court recognized this when it emphasized that it was construing the word "person" in "this particular Act". 365 U.S. at 191. Municipalities are subject to liability under other civil rights statutes enacted at about the same time as the predecessor of § 1983, including §§ 1983 & 1982. Congress cannot be said to have given municipalities a general exemption. Thus the "special factors counselling hesitation" would have to be policy factors that would inform the Court's judgment about the appropriateness of inferring a damage remedy. These factors will be discussed in Part IV, infra.

The second caveat in Bivens alludes to the proper test to be applied in determining the standard of need for a judicial remedy: must the Court conclude that a particular remedy is necessary for effectuation of the constitutional right, or need it only be appropriate? The

The Court in Bivens identified Congress' choice of a different remedy as something that would deprive the Court of its latitude in choosing remedies to implement constitutional rights. The Court implied that if Congress already had taken steps to implement a particular right, the Court could not substitute a different remedy unless it deemed it necessary to effectuate the right. Even the meaning of "necessary" is unclear: does it mean necessary in order to prevent the right from becoming a "mere form of words", or only necessary in order to effectuate the right as fully as possible? Whatever the answer to these questions, the suggestion in Bivens corresponds to the current debates over whether and when Congress can deprive the federal courts of their jurisdiction to grant certain remedies.

In the case of the Court's dilemma over whether to recognize a damage remedy against municipalities for Fourteenth Amendment violations, it could be said that Congress has provided a suitable remedy in § 1983. The remedy is not comprehensive, however, because a plaintiff cannot sue a municipality that commits a constitutional violation. Because the existence of § 1983 stands as a possible barrier to the Court's exercise of its remedial powers, it is necessary to address the subject covered by the caveat of the Court in Bivens, the non-commital observation of Justice Harlan, 403 U.S. at 407 n. 7, and the general debate about respective judicial and legislative remedial roles.

A. Theories on Constitutional Remedies

"It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison. At least until recently, the Court has been the ultimate and perhaps the exclusive arbiter of constitutional questions. Congress plays a greater role in certain areas, such as the commerce clause, than in others. That is explainable by the explicit constitutional grant to Congress of plenary power over commerce. See Monaghan, The Supreme Court 1974 Term - Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975).[7] It is well-established, however, that in the area of individual rights, the Court has the last say.

It would be a short step from Marbury and its principle of judicial review to the conclusion that the Court is also the ultimate, and perhaps exclusive, arbiter of questions concerning implementation of constitutional rights. If there were an exact correlation between rights and remedies, then even that step would not be necessary. But such has not been the case. Possibly because remedies are considered more fungible than rights, it has long been recognized that in most cases more than one remedy may be "appropriate", so that no single remedy is "necessary". If the relative value of various remedies depends on empirical judgments, such as whether a particular remedy is an effective deterrent (e.g., capital punishment or the Miranda warnings), then choosing the "best" remedy becomes a matter particularly within the legislative realm of

competence. Katzenbach v. Morgan, 384 U.S. 641, 656. Thus Congress has become involved to a greater degree in remedial questions than it has in primary determinations of constitutional rights. See Burt, Miranda and Title II: A Morganatic Marriage, 1969 S. Ct. Rev. 81, 118-34; Gunther, Constitutional Law: Cases and Materials 1035-39 (9th ed. 1975) and cases and authorities cited therein.

When Congress simply enacts legislation in furtherance of rights already declared by the courts, there obviously is no conflict between the legislature and the judiciary and no questions of institutional roles are raised. E.g., South Carolina v. Katzenbach, 383 U.S. 301. When Congress acts to remedy constitutional violations it identifies without aid from the courts, troublesome questions are raised. Katzenbach v. Morgan. Katzenbach held that the Court will sustain remedial legislation to enforce the equal protection clause of the Fourteenth Amendment when it perceives a basis for Congress' conclusion that such legislation was called for. The Court need not independently find an equal protection violation. But see 384 U.S. 641 (Harlan, J., dissenting). Whatever the respective merits of the Brennan and Harlan positions, Morgan was not a case in which the Court disagreed with the gist of Congress' assessment of the equal protection situation; nor was it a case in which Congress attempted to restrict, rather than expand or further judicially recognized constitutional rights. If, however, the Court were to decide to recognize a Fourth Amendment action for

Recognition of damage right vs municipalities might cause ?

damages against municipalities, there might be a conflict between Court and Congress.

The conflict might be actual; it might be potential. The conflict would be actual if the existence of a non-comprehensive remedy in § 1983 meant that the Court had to hold its remedy "necessary" to enforce the constitutional right. The conflict would be potential even if § 1983 and the Court's constitutionally-based remedy were viewed as complementary, because there still would be the possibility that Congress would attempt to overrule the Court's remedial decision by legislating to prevent grant of the remedy. E.g., Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (not requiring Miranda warnings); proposals for anti-busing legislation. Even in the case of a potential conflict, the Court might want to be more careful initially in choosing to grant a particular remedy if it wanted to stave off the possibility of a confrontation with Congress. Thus although the Court theoretically would be required only to choose an appropriate remedy, if in the post-Katzenbach era the Court could anticipate that the Congress might want to have its own remedial way, the Court probably might want to be over-cautious and to choose the most appropriate remedy.

Professor Monaghan's theory on the relationship between constitutional rights and remedies gives theoretical support to the notion of a "dialogue" between the Court and Congress. Monaghan, The Supreme Court 1974 Term - Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1

Re-read

(1975). Monaghan's concern is not the same as that of this memorandum. He focuses in particular on the exclusionary rule and the relationship between the Court and the states, not the Court and Congress. Monaghan reasons that

> "[a]s a matter of traditional constitutional theory, the significant issue [re the exlusionary rule] is whether the Supreme Court has the authority to mandate the exclusionary rule if the rule is not a necessary corollary of a constitutional right."

Id. 6 & n. 38. The issue would arise if a state legislature created a damage remedy a la Bivens; Monaghan's question is whether the state still would have to honor the exclusionary rule. Monaghan concludes that the state would not be so bound. His reason is that the choice of a means of implementing a constitutional right involves a "subconstitutional policy issue that turns largely on an evaluation of debatable legislative facts . . . ." Id. 8.

(A question arises in my mind whether a victim of an unlawful search might not be entitled to both damages and exclusion of unlawfully seized evidence from his criminal trial. One of the facts that influenced the Bivens Court was the unavailability to Bivens, who had not been prosecuted, of the exclusionary rule. Absent a remedy in damages, he was left with no remedy at all. This suggests tht a victim may be entitled to only one remedy. Such a conclusion seems inconsistent, however, with the traditional theory that the purpose of any remedy is to make

a victim whole. In certain imaginable situations, a victim would not be made whole by either damages or exclusion of evidence but not both. This observation is buttressed by recognition that the respective purposes served by a private damage remedy and the exclusionary rule are entirely different. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment . . . ." United States v. Calandra, 414 U.S. 338, 347.)

In any event, Monaghan concludes that there exists a level of "subconstitutional" law, or "constitutional common law", which is of constitutional dimension but not constitutionally required. It involves remedies chosen to implement constitutional rights, based on decisions that are informed by the Constitution but are not interpretations of the Constitution. The theory of constitutional common law somewhat resembles earlier commentators' discussions of the Court's exercise of its supervisory power. E.g., Hill, The Bill of Rights and the Supervisory Power, 69 Colum. L. Rev. 181 (1969).[8]

In areas of constitutional common law, Monaghan would allow Congress to alter the implementation of rights as long as "the net result of the legislative change constitute[d] an 'adequate' substitute for what the Court required[.]" Id. 26. Dellinger, supra, expresses a similar thought, at 1547:

> "In view of this initial congressional remedial power, the answer to the government's contention in Bivens that Congress is without authority to displace or modify a remedy independently created by the Court to implement constitutional provisions would depend upon the relationship of the remedy created to its substantive constitutional predicate."

Dellinger →

But even if the Court were to conclude that a particular remedy was "part and parcel" of the underlying constitutional right, Mapp v. Ohio, 367 U.S. 643, 651, Congress could substitute an alternative remedial scheme if it would afford "comparable vindication" of the constitutional right. Id. 1548.

> "On the other hand, if there were ever a case in which it could be established that a particular remedy was 'indispensable' in the sense that no other remedial scheme could possible prevent the substantive constitutional requirements from becoming a 'mere form of words,' then, and only then, would Congress be wholly without power to revise or replace that remedy."

Id. 1548-49. A stricter test for whether the Court should yield would be "whether the constitutional interest is impaired substantially, not whether it is impaired virtually to the vanishing point." Hill, supra note 1, at 1153.

The imprimatur placed on congressional "expansion" of constitutional rights in Katzenbach seems to have implanted the idea that Congress could also change (i.e., restrict) aspects of constitutional law with which it disagrees. Justice Brennan's attempt to foreclose just such a development by his footnote in Katzenbach may turn

out not to have much force. Once it has been conceded that Congress should have a greater role in constitutional decisions because of its special factfinding competence, it is hard to limit Congress' participation to expansion of rights and remedies. Congress may also want to restrict remedies, and worse, to restrict rights. This is especially conceivable considering how hard it is in most cases to draw a clear line between the right and the remedy. See Monaghan, supra, at 30-31 (where he concedes the difficulty of "distinguishing between Marbury - shielded constitutional exegesis and congressionally reversible constitutional law"); 33-34. There are many areas in which Congress might choose to cut back on the Court's substantive decisions, and such restriction could be accomplished in most cases by cutting back or altering the Court's choice of remedies.

The commentary on Congress' ability to substitute its judgment for the Court's in matters of constitutional implementation generally favors congressional participation. Monaghan lauds the idea of "involving Congress in the continuing process of defining the content and consequences of individual liberties." Id. Burt sees a benefit in having Congress draw lines that the Court cannot draw in a principled fashion. Burt, supra, at 119-21 (discussing "congressional revisory authority . . . 'around the edges' of the Court's proclaimed doctrine in

the reapportionment area). Monaghan sees political gains, too, because

> "where the Court's rule is perceived to have gone too far, it can be rejected or modified by the political process without the necessity of a constitutional amendment. On the other hand, it is the Court, and not Congress, which in the end decides whether a given rule is common law or something more."

Monaghan, supra. at 29-30.

These commentators approve of allowing congressional participation to go beyond remedies, and indeed, I cannot see how Congress' role can be limited to remedial action under these theories. That seems to me a radical departure from Marbury. See Katzenbach, 384 U.S. at 667-68 (Harlan, J., dissenting). I would suggest that the Court be wary of deferring to Congress on constitutional remedial matters, because of the difficulties of distinguishing between rights and remedies and the danger too much deference poses to the notion of judicial review.

Yet it may be useful for Congress to play a role in the remedial area. Dellinger contends that, "[g]iven the wider range of remedial techniques available to the legislature, the Court should often defer to the ability of Congress to effectuate a more precise compromise of competing interests." Dellinger, supra, at 1549. I would say "could defer" rather than "should often defer". But even under his own formulation, Dellinger warns that

> "this should be the case only where (1) Congress has provided an alternative remedy considered by

> Congress to be equally effective in enforcing the Constitution, and (2) the Court concludes that in light of the substitute remedy, the displaced remedy is no longer 'necessary' to effectuate the constitutional guarantee."

Id.

With this theoretical background in mind, the Court's holding in Monroe and the congressional debates on which it was based will be examined. The objective of the inquiry will be to ascertain (1) what Congress has said about municipal liability; (2) whether Congress has legislated affirmatively to exempt municipalities from liability for constitutional violations; (3) and whether Congress thinks it has provided in § 1983 a remedy "equally effective" as a Fourteenth Amendment action for enforcing the Fourteenth Amendment. The results of this inquiry will lead to the conclusion that Congress has not inserted itself into the field of constitutional remedies in such a way as to preclude judicial recognition of a Fourteenth Amendment action.

Nancy's conclusion

B. The Significance of Monroe v. Pape

1. The Sherman amendment debates

Senator Sherman of Ohio offered an amendment to the Ku Klux Klan Act of 1871, the text of which is reproduced in the Monroe opinion, 365 U.S. at 188 n. 38. The purpose of the Sherman amendment was to ensure private respect for the civil rights of the newly freed slaves by attacking the purses of the wealthy members of the Southern

Sherman Amend. to KKK Act

communities. The amendment would have imposed liability on localities whenever looting, rioting, etc., took place within their boundaries. It sought to impose a form of absolute liability, based on the convictions of its sponsors that the wealthy members of these communities could stop the private lawlessness if their own financial resources were at stake.[5] It is not accurate to speak of the Sherman amendment in terms of vicarious liability; it would have imposed a form of absolute or strict liability. Indeed, "the Sherman Amendment would have allowed plaintiffs to sue municipalities for damages flowing from strictly private acts without joining the actual tortfeasor as a defendant." Kates & Kouba, Liability of Public Entities under Section 1983 of the Civil Rights Act, 45 S. Calif. L. Rev. 131, 134 (1972).

The objections to the Sherman amendment in the House were on both constitutional and on policy grounds. It is difficult, however, to separate the two. Because opponents of the amendment considered its substantive content so onerous, the amendment seemed particularly beyond Congress' constitutional competence. It cannot be said whether the opponents of the measure objected in general to the imposition of any liability on municipalities by Congress (or the federal government), because their comments stated only that they viewed the imposition of this form of liability as beyond congressional (or federal) power.

Some and perhaps all of the reasons given against Congress' ability to impose the liability of the Sherman amendment on municipalities were tied to the nature of local government in 1871. In 1871, most law enforcement was carried out by state, not local, officials. Local officials were not empowered to perform the functions that would have been necessary to stop the rioting and looting at which the Ku Klux Klan Act was directed. (The wording of the Fourteenth Amendment and § 1983 is evidence of Congress' concern with abridgement of constitutional rights by the state.) "Thus, under the Sherman Amendment the federal government would in essence have imposed liability upon municipalities for failure to perform law enforcement duties which were not theirs." Kates & Kouba, supra, at 135; see id. 154. Kates & Kouba conclude, at 136:

> "Nothing in the rejection of the Sherman Amendment is inconsistent with the idea that municipalities should be liable for the torts of their own employees. To the extent that a negative pregnant can be drawn from any debate, it would seem that Congress believed liability of those municipalities which had law enforcement powers to be both just and constitutional."

See Cong. Globe, 42d Cong., 1st Sess. 794, 795 (attached).

It hardly would be doubted today that it would be unfair to subject a municipality to liability for failing to protect constitutional rights if the state had not given the municipality the power to protect these rights. Representative Poland, the Manager of the bill in the House, said in a passage quoted in Monroe: "I did understand from the action and vote of the House that the

Some and perhaps all of the reasons given against Congress' ability to impose the liability of the Sherman amendment on municipalities were tied to the nature of local government in 1871. In 1871, most law enforcement was carried out by state, not local, officials. Local officials were not empowered to perform the functions that would have been necessary to stop the rioting and looting at which the Ku Klux Klan Act was directed. (The wording of the Fourteenth Amendment and § 1983 is evidence of Congress' concern with abridgement of constitutional rights by the state.) "Thus, under the Sherman Amendment the federal government would in essence have imposed liability upon municipalities for failure to perform law enforcement duties which were not theirs." Kates & Kouba, supra, at 135; see id. 154. Kates & Kouba conclude, at 136:

> "Nothing in the rejection of the Sherman Amendment is inconsistent with the idea that municipalities should be liable for the torts of their own employees. To the extent that a negative pregnant can be drawn from any debate, it would seem that Congress believed liability of those municipalities which had law enforcement powers to be both just and constitutional."

See Cong. Globe, 42d Cong., 1st Sess. 794, 795 (attached).

It hardly would be doubted today that it would be unfair to subject a municipality to liability for failing to protect constitutional rights if the state had not given the municipality the power to protect these rights. Representative Poland, the Manager of the bill in the House, said in a passage quoted in Monroe: "I did understand from the action and vote of the House that the

House had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law." Cong. Globe, supra, at 804, quoted in 365 U.S. at 190. The Court seems to have taken this passage to mean that municipalities did have the power to administer state law, and that the House objected per se to the imposition of liability on them. But even assuming that Kates & Kouba are wrong that the objection was that many states had not empowered their counties and towns to control the lawlessness of the Klan, the meaning of the passage more plausibly is that the House objected to this particular kind of liability, i.e., liability for failing to prevent private illegality.

This point can be made by analogy to Professor Charles Black's theory of state action. Professor Black would find state action, sufficient to invoke the Fourteenth Amendment, whenever a state tolerated, i.e., failed to prohibit, private discrimination. Black, Foreword: "State Action," Equal Protection and California's Proposition 14, 81 Harv. L. Rev. 69 (1967). Professor Black's theory has not been accepted, at least by the Court. It is easy to understand why a nineteenth century Congress would be equally hesitant about adopting as theory, and enacting into law, the proposition that municipalities could be held liable for failing to prevent the illegal conduct of private parties. The only difference between the two situations is that private discrimination

is not illegal under the Fourteenth Amendment (whatever its legal status might be under the modern Civil Rights Acts), whereas the activities of the Ku Klux Klan were to be illegal. Still, the kind of liability contemplated by the Sherman amendment would have been quite different from imposing liability on municipalities for their own wrongful acts or those of their agents. Congress did not come close to expressing any opinion on the constitutionality of imposing the latter liability.

After making the above-quoted remarks in opposition to the Sherman amendment, Representative Poland went on to say:

> "At the same time we [the House conferees] said to them [the Senate conferees] that there was a disposition on the part of the House, in our judgment, to reach everybody who was connected, either directly or indirectly, positively or negatively, with the commission of any of these offenses and wrongs, and we would go as far as they chose to go in inflicting any punishment or imposing any liability upon any man who shall fail to do his duty in relation to the suppression of those wrong."

Cong. Globe, supra, at 804. The result of the House's position was the suggestion of the substitute provision for the Sherman amendment, see note 5, supra. That provision required some knowledge or notice of illegal activities as a prerequisite to the imposition of liability. It still would have subjected third parties to liability for the acts of others, but the requirements of knowledge and failure to take action ensured that only those who were blameworthy would be subject to liability.

Although adoption of the substitute provision could be read to mean that Congress did not doubt its powers to impose a form of vicarious liability on individuals, in contrast to its views about its powers with respect to counties and towns, I would dispute this reading. The liability imposed by the substitute provision really is not vicarious liability at all; it is liability for a form of tortious nonfeasance. The provision was far more limited than the Sherman proposal because of its requirement of blameworthiness in a more focused manner than the over-all blameworthiness proposed by Senator Sherman.[6] I would conclude that the House's rejection of the Sherman amendment was based on objections to its specific content, not on neutral constitutional grounds or even on policy grounds related to municipalities generally.

If the decision to reject the Sherman amendment indeed was based on Congress' perceptions of its own constitutional limitations, see Monroe, 365 U.S. at 188-90; Moor v. County of Alameda, 411 U.S. 693, 708-09 and n. 24, that should give the Court less pause than would a congressional determination on policy grounds to exempt municipalities from liability. If Congress had rejected municipal liability on policy grounds based on empirical evidence, that would be the kind of congressional determination to which the Court ordinarily gives deference. But determinations as to constitutional power are not usually considered binding on the Court. Congress' doubts about its power to enact the Sherman amendment,

interpreted in light of the objections to the specific content of the Sherman proposal, should have even less effect on the Court.

2. The holding in Monroe

The Court's holding in Monroe does not attribute to the Sherman amendment debates a significance broader than that urged here. Monroe held that Congress did not intend to include municipalities in the category of "persons" subject to liability under § 1983. The Court reached this conclusion through an analysis of the debates in the House on the proposed Sherman amendment. The content of the debates and the Court's inferences from them are familiar ground. 365 U.S. at 188-91; see Part III.B.1. supra. The Court held, 365 U.S. at 191: "The response of Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."

The Court did not hold that Congress affirmatively sought to exempt municipalities from liability under what we now know as § 1983. The Court could not have reached such a conclusion; there was no debate on the subject. Rather, the Court inferred from the House's hostility to the Sherman amendment an incongruity in concluding that Congress intended to include municipalities in the meaning of the word "persons" as it was used in "this particular" statute.

The Court seems to have started from the premise that it would be unusual to consider municipalities "persons". There would have to be some indication that Congress affirmatively intended to include municipalities for the Court to make that definitional leap. Perhaps congressional silence would not have precluded the Court from reading "persons" to include all municipalities. But given the debates, and the absence of a clear burden of proof on the issue whether "persons" did or did not mean municipalities, it is understandable that the Court chose to read the statute as it did.

The holding in Monroe is not, however, deference to a congressional determination of policy that municipalities should be exempt from liability for damages. This is apparent from the Court's holding in City of Kenosha v. Bruno, 412 U.S. 507. If the Court were going by Congress' policy concerns, it is improbable that injunctive relief against municipalities would have been foreclosed by the 1871 debates. That was not the House's concern at all. See id. 516 (Douglas, J., dissenting). Rather the Court refused to give the word "persons" a bifurcated meaning depending on the kind of relief sought. City of Kenosha makes sense in light of the rationale of Monroe as explained above; it would not make sense in light of a rationale that Congress attempted to protect municipalities from financially ruinous monetary liability.

Neither did Monroe hold that Congress lacks constitutional power to impose civil liability on

municipalities. The Court explicitly disclaimed such a conclusion. 365 U.S. at 191. The decision does not even hold that Congress thought itself without constitutional power to impose liability on municipalities for the kinds of violations of § 1983 that are now alleged under that statute. Congress was not thinking of actions against municipalities for their own constitutional violations; the power of Congress cannot be divorced from the contemplated exercise of that power.

3. Was Monroe rightly decided?

If there had to be an affirmative indication that municipalities were included in the word "persons", it was clear that none was present. On the other hand, if the initial premise was that Congress had to say something to indicate that municipalities were not to be included, at least there were the Sherman amendment debates. On balance, the Court chose to be cautious. It is thoroughly understandable that, in giving new life to a theretofore buried statute, the Court would want to be careful not to risk going beyond the bounds of congressional intent in defining the class of "persons" subject to liability under the newly constituted state.

I think Monroe was wrongly decided. The debates over the Sherman amendment were completely unrelated to the class of "persons" who would be liable under the provisions of the statute ultimately adopted. As explained above, the objections to the amendment cannot fairly be read as objections to imposing liability of municipalities

Nancy Hunter Monroe was wrongly decided as to meaning of person.

for their own wrongs. As far as I can tell from their briefs, the parties in Monroe did not discuss the debates over the Sherman amendment. The Court was not presented with the argument that the debates were not relevant to municipal liability for unconstitutional conduct of its own agents. Although it is true that Congress probably was not thinking of municipalities in particular as "persons" when it enacted the predecessor of § 1983, it is equally true that Congress was not thinking of the violations now subsumed under that statute.

Yet Congress chose broad language for the statute, susceptible of the Court's interpretation in Monroe . Its use of the word "person" was not equally susceptible of interpretation to include municipalities. In short, I think the decision in Monroe to be wrong but understandably so. Whether the decision has any bearing on the Court's independent deliberations about whether to hold municipalities liable in damages for their own constitutional violations or those of their agents is a different question.

C. Application of the Above Principles

It is plain that whatever the meaning of the debates on the Sherman amendment, Congress has not spoken on the question of the "necessity" or "appropriateness" of a damage remedy against municipalities for its own or its

agents' violation of constitutional rights. Thus the Court is not yet in Round II of the "dialogue" described above, in which it would have to deem its chosen remedy "necessary" to the effectuation of a given constitutional right in order to overrule Congress' foreclosure of such remedy. Aside from the fact that the debates on the Sherman amendment are wholly unrelated to municipal liability under § 1983 as it exists today, Congress has never voted affirmatively to exempt municipalities from liability. To allow the inconclusive debates on the Sherman Amendment to constitute legislation by Congress would alter the nature of the requirements for valid legislation. See Municipal Liability, supra, at 945. "To view the rejection of the [Sherman] Amendment by the House as determinative of this issue would be inconsistent . . . with the postulate that Congress can make law only by the affirmative steps set down in article I, section 7 of the Constitution." See also Train v. City of New York, 420 U.S. 35, 45 ("legislative intention, without more, is not legislation").

In addition, the policy of clear statement requires that the courts not consider themselves closed to asserted constitutional claims unless it is clear that Congress has acted to close them. "[W]here constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity, or of withdrawing jurisdiction, in order to defeat them." Hart &

Wechsler, supra, at 336; see Municipal Liability, supra, at 942-45 & cases & authorities cited therein. "[I]t would seem inconsistent with the principle of clear statement to permit a narrow construction of ambiguous statutory language to restrict the remedies available to a court in constitutional adjudication." Id. 944.

Besides, it would not be sufficient for Congress merely to disapprove a remedy chosen by the Court. Once the Court has chosen a remedy to effectuate a constitutional right, even under the theories permitting congressional participation in constitutional implementation, Congress must come up with an alternative remedy. See also Bivens, supra, 403 U.S. at 411, 415 (Burger, C.J., dissenting).

Section 1983 could be construed as a non-comprehensive alternative remedy for constitutional violations. As far as constitutional violations by municipalities are concerned, however, no remedy is available. It would be a distortion of the notion of alternative remedies to say that Congress can provide them by providing for alternative defendants, so that the remedy in § 1983 against state officers is an alternative to direct municipal liability.* This surely would not cover situations in which a municipality was the sole wrongdoer.

§1983 is an alternative remedy to one vs a municipality. It is not a remedy vs the municipality.

D. Summary

Congress already has begun to play a greater role than heretofore in defining, implementing, and even

* True, but what happens is that cities indemnify (by insurance or otherwise) employees

restricting constitutional rights. This congressional participation has been lauded by several commentators for theoretical and political reasons. It could be argued, under these theories, that Congress could prevent the Court from inferring a damage remedy from the Fourteenth Amendment by providing an alternative remedy. In my opinion, Congress has not yet provided such an alternative remedy. Section 1983 does not reach municipalities, but Congress has not affirmatively exempted municipalities from liability. Congress simply has not spoken on the question.

Even if § 1983 were construed as a remedy alternative to, though not as comprehensive as, a Fourteenth Amendment action, I would argue that it should not bar the Court from recognizing the Fourteenth Amendment action. The rationale of Bivens is linked to the rationale of Marbury. The "particular responsiblity [of the judiciary] to assure the vindication of constitutional interests", 403 U.S. at 407 (Harlan, J., concurring), must not be overlooked.

> "[I]t must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it [is] no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes."

Id. If Congress' enactment of a non-comprehensive remedy (whose non-comprehensiveness leaves victims of unconstitutional treatment by municipalities with redress

only against individual officers and not the municipality itself) can be considered provision of an "alternative" remedy, then that is the same as waiting for the legislative majority to act to vindicate individual rights. See also Hill, supra note 1, at 1112; Brief for Petitioner, Bivens, supra, at 13.

Furthermore, to the extent that a supposedly alternative remedy is less comprehensive than the remedy the Court would grant, constitutional rights usually will suffer restriction.* The Court would have to determine in a particular case whether acceptance of Congress' remedy in place of the Court's would defeat the right entirely or limit it substantially. In a particular case, the Court might conclude that the limitation was not sufficiently significant to risk a confrontation with Congress. In theory, however, it can be argued that no limitation is permissible. "[I]ndeed, if general remedial authority exists, a legislative statement that the authority shall not be employed for [the] purpose [of vindicating constitutional rights] would be vulnerable as discriminating against constitutional rights." Hill, supra note 1, at 1113. Even if Congress were able to restrict the granting of certain remedies by the federal courts, it is arguable that the state courts would be obliged to provide a remedy considered appropriate by the Supreme Court. This, of course, would be the same as the situation that existed before 1875.

* Often perhaps, but not necessarily

On the assumption that Congress has not yet provided a remedy alternative to a cause of action for damages against municipalities, I shall examine the factors for and against judicial recognition of such a remedy. The Court need not determine that such a remedy is "necessary" for effectuation of Fourteenth Amendment rights any more than it had to deem the Bivens remedy necessary to effectuation of Fourth Amendment rights. On the assumption that no alternative remedy has been provided yet, for present purposes it is sufficient to inquire into the appropriateness of the proposed remedy.

Nancy now moves to consider the appropriateness of recognizing damage suits vs cities

IV. Should the Court Infer from the Fourteenth Amendment a Damage Remedy Against Municipalities?

Although the Court has never sanctioned a damage remedy based directly on the Fourteenth Amendment, the lower federal courts have not considered it a great novelty. At least the circuit courts are almost unanimous in their willingness to allow the award of damages against municipalities, for their unconstitutional conduct, despite the unavailability under Monroe of § 1983. The case law will be discussed below. The cases are not helpful in analysis, however, because they rarely discuss the issue. Rather, they seem to assume both the power of the federal courts to infer remedies from the Constitution and the appropriateness of damages as a remedy for violations of the Fourteenth Amendment. The willingness of so many federal judges to assume the propriety of this kind of relief is some evidence, albeit informal, of the unexceptional nature of the relief.

Yet a nagging feeling remains that damages are different from other forms of relief. It requires some analysis to discern whether damages should be considered sufficiently different to preclude their availability under the Fourteenth Amendment. My conclusion is that the instincts of the federal judges are supported by logic. Whether damages should be available for every imaginable substantive violation of the Fourteenth Amendment is a different question which requires more specific treatment, see Part V.A., infra.

A. Logic

The Fourteenth Amendment has provided the basis for many kinds of relief other than damages. These include injunctions, Brown v. Board of Educ., 347 U.S. 483; declaratory judgments, Lee v. Washington, 390 U.S. 333; mandamus, Takahashi v. Fish & Game Comm'n, 334 U.S. 410; habeas corpus, Yick Wo v. Hopkins, 118 U.S. 356; and, most common of all, nullification of state statutes and convictions. Comment, Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection, 57 Calif. L. Rev. 1142, 1170 (1969). The latter of course involves use of the Amendment as a shield rather than as a sword; the Fourteenth Amendment is not asserted as the basis of a cause of action. It is clear, at least in the suits for injunctions, that the cause of action is given not by equity conceived of as an independent system, but by the Constitution. Hill, supra note 1, at 1139. If these various forms of relief are available, why not damages? In terms of policy there are arguments for and against imposing monetary liability on municipalities. These will be considered in the next section. The purpose of this section is to determine whether either logic or legal reasoning justifies treating damages differently from other forms of relief.

Traditionally damages were considered less onerous or unusual a remedy than injunctive relief. Equitable relief was available only if there existed no adequate remedy at law. Today, however, injunctions in cases involving "public law" or

the Constitution are fairly common. Because sovereign immunity and the Eleventh Amendment protect the state and federal governments from monetary liability, the requirement of unavailability of an adequate remedy at law is satisfied when the government itself is the defendant. Also, the absolute commands of the Constitution warrant equitable relief, in contrast to the presumption in "private" lawsuits that obligations are not absolute, but merely constitute promises to perform or to pay.

When the defendant is not the sovereign, however, either injunctive relief or damages should be available. The fact that equitable relief has been available does not mean that damages should not be.[9] As far as municipalities are concerned, the remedy at law (i.e., damages) is not unavailable on sovereign immunity or Eleventh Amendment grounds. And even if a remedy at law is considered available but inadequate, that does not mean that the equitable remedy is wholly adequate either. Both may be necessary in a given instance to make a victim whole.

Beyond the fact that damages are the ordinary legal remedy, "there is nothing in history to show that damages . . . were not as readily applied to protect interests in liberty as to protect other interests, whether or not defined in a document." Katz, supra, at 43. Indeed, we must ask why we have come to regard damages as an exceptional remedy. It may

be because injunctions have become the mainstay of relief in the administrative context, and courts in public law litigations have come to perform many of the supervisory roles associated with administrative agencies, including overseeing school systems, prisons, state mental hospitals, and the like.

In the administrative context, injunctive relief seems to be considered less onerous than damages. Agencies, such as the SEC, may enjoin unlawful conduct upon a less stringent showing of culpability than is necessary for a private aggrieved party to recover damages. E.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185. This is just one example. This result is of course based on the fact that Congress has given the administrative agencies express enforcement powers, and the injunction an effective enforcement tool. It makes sense that a greater degree of wrongful conduct must be shown before a judicially-inferred private right of action for damages may succeed.

But it does not explain why use of injunctions should be preferred over damages when either would be based on the Constitution. Whether the court chooses to grant injunctive or monetary relief, the right on which the cause of action is based derives from the Constitution, and the cause of action is inferred from the Constitution by the judiciary. Which remedy is chosen should depend on its appropriateness for remedying the particular wrong, not on any a priori notions about the availability or unavailability of either.

Indeed, recent decisions of the Court indicate its dissatisfaction with some uses of injunctions by the lower

federal courts. Rizzo v. Goode, 423 U.S. 362. There the Court objected in part to the prospect of a federal district court's supervision of a municipal police department. If victims of unconstitutional police conduct could recover damages against the municipality, they might be able to achieve their goal of deterrence of future wrongs (by department-wide efforts to instruct police officers on their constitutional responsibilities), without involving the federal courts in the affairs of local government units. "An award of damages does not involve the problems of enforcement and day-to-day supervision of other branches of government which have made the courts reluctant to issue sweeping injunctions prohibiting unconstitutional action." Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 927 (1976). An award of damages also would serve to compensate the victims. The appropriateness of a monetary judgment against the municipality would depend of course on the facts of the particular case and the nature of the constitutional right alleged to have been violated. See Part V, infra.

The Court's decision in City of Kenosha v. Bruno, 412 U.S. 507, gives additional support to the reasoning that there is no a priori difference between the awarding of damages or an injunction as relief for constitutional violations. The plaintiffs in City of Kenosha sought to avoid Monroe's bar to municipal liability under § 1983 by arguing that Monroe governed only damage actions, not suits in equity. Rejecting the not unreasonable argument that the reasoning of Monroe had

no application to equitable relief, based as it was on the debates on the Sherman amendment, the Court refused to give a "bifurcated" meaning to the word "person" in the statute, depending on the nature f the relief sought. See also Monroe, 365 U.S. at 191 n. 50. But see 412 U.S. at 516 (Douglas, J., dissenting). Section 1983 therefore does not permit suits for injunctive relief against municipalities. Yet this Court and the lower courts have enjoined municipalities and other government units probably not covered by § 1983, such as school boards, see Monell v. Dep't of Social Services, 532 F.2d 259 (2d Cir. 1976), cert. granted, No. 75-1914, from unconstitutional conduct in many cases. Brown v. Board of Education is an obvious example. (I am assuming, perhaps incorrectly, that the school boards in Brown and Monell can be treated similarly. I do not know whether they were constituted differently under their respective states' laws. But certainly injunctions have issued against cities, despite the limitations of § 1983.) Of course in suits for injunctive relief it is as useful to name as defendants individual municipal officers as it is to name the municipality, so the parallel to suits for damages is not quite accurate. It seems clear, though, that the relief comes from the municipality. In Brown the school board itself was the defendant. The point is that the bar to municipal liability in § 1983 has not been thought to affect suits for injunctive relief under the Fourteenth Amendment. The same should be true in principle when monetary damages are involved. Municipal Liability, supra, at 942.

B. Policy Considerations

It has been established thus far that "neither the source of the right (the Constitution) nor the (rather customary) remedy (money damages) would seem to require that the judiciary await explicit legislative authorization before employing the remedy to vindicate the right." Dellinger, supra, at 1543. But "[i]t may well be true that the considerations governing a decision to create a damage remedy will differ from those respecting the granting of injunctive relief . . . ." Id. I turn now to those considerations.

The most obvious reason for allowing a damage action against municipalities is that municipalities have the funds with which to satisfy a judgment, while the individual officer rarely would. Although this sounds like an unfair allocation of liability, based on extent of resources, there are two reasons why imposing liability on the municipality is warranted. First, it is the municipality that gives the individual officer the power that made possible the infliction of harm. And if a constitutional cause of action has been stated, by definition the officer's actions did not constitute a private tort but were unconstitutional because of an abuse of pwer possessed only by virtue of state law. Monroe v. Pape. Second, holding a municipality liable for the actions of its agents is a standard application of respondeat superior. When an employer is held liable for the tort committed by its employee in the course of the latter's

performance of his duties, we do not question the propriety of holding the employer liable.

One of the main reasons suggested in support of the need for a damage remedy against municipalities is the existence of the good faith immunity defense for individual officers who commit constitutional violations. Municipal Liability, supra, at 926-27, 956-57; Kates & Kouba, supra, at 138. Accepting the need to protect the individual officer's latitude in exercising discretion, these commentators argue that the concerns that gave rise to the doctrine of immunity--"the unfairness of imposing liability uopn an official who may have been acting in good faith, and the undesirable inhibiting effect which the threat of such liability might have upon officials generally"--are not "of much force" as applied to a municipal defendant. Municipal Liability, supra, at 926-27, 956. More specifically:

> "First, it hardly seems unfair to hold liable a government which has demonstrably abused its powers to the injury of an individual victim. . . . [I]t seems fair that the costs of unconstitutional government action should be spread among the taxpayers, who reap the benefits of their government and who are ultimately responsible for it. Second, the risk that imposing liability unqualified by an immunity or good faith defense upon municipalities would deter their officials from conscientiously executing their public duties seems much more attenuated than the risk attendant to [sic] imposing such liability upon the officials themselves."

Id. 956-57.

The point on the remedy's effect on officers' exercise of discretion probably is well-taken, despite the possibility, recognized by the author of the Note, that administrative sanctions might be taken against the responsible officer when

the municipality is held liable for his unconstitutional conduct. The impediment to effective exercise of discretion probably still exists, but the Note is right that it is somewhat attenuated.

The first point, however, assumes its conclusion: that it would not be unfair to hold a municipality liable for unconstitutional conduct of its officers even when the officers are immune because they acted in good faith. It is true that the existence of the good faith defense sometimes leaves victims of unconstitutional conduct without a remedy. But it is by no means clear that a municipality should be held liable for the good faith but unconstitutional conduct of its officers.

It can be argued that even when the officer's actions are undertaken in good faith, the municipality should be liable if there has been a constitutional violation. First, as noted above, one of the main reasons supporting the immunity defense--fear of discouragin officers from assuming and executing responsibility--is absent. Second, the municipality may be responsible for not adequately apprising its agents of their constitutional responsibilities. (This argument would not apply if the constitutional rights at issue were so new that even the individual officer's supervisors should not have been aware of it.)

Third, the fact that there has been a constitutional violation differentiates the situation from the typical respondeat superior situation in which a court would not hold an employer liable if its employee's actions were not

negligent. If the employee were not liable, the employer could not be held liable. Thje latter's liability could derive only from the former's. (The only exception I can think of would be in a case of infliction of harm by children or animals, for which the parent might be liable despite the fact that the child or animal could not be held to a reasonableness standard. That is not vicarious liability, however, but primary wrongfulness on the part of the parent, i.e., failure to supervise.)

In the situation of a constitutional violation, on the other hand, the officer may not be liable even though a constitutional violation has occurred. The individual officer is extricated from liability by an affirmative defense. The city might be liable because of the officer's unconstitutional conduct but despite the officer's immunity from monetary liability.

I am not persuaded by the first two arguments. The third issue would require further thought and research, but at present, it strikes me as more logical that a municipality generally would not be liable for good faith actions of its officers. Yet in some circumstances it would be reasonable to hold the municipality liable regardless of the good faith of its employees. In cases of unconstitutional procedures or laws, see Part V., infra, it is conceivable that a case would arise in which the good faith of the officer would not preclude liability of the municipality itself. In such a case, as in the case of the parent's failure to supervise, the municipality's liability would be primary, not derivative, so

the good faith of the agent would be irrelevant. Further, there is much to be said in certain types of cases for holding both the officer and the municipality liable to the victim when the officer has acted in bad faith. These various possibilities will be discussed in Part V., infra.

Although a damage remedy is aimed primarily at compensating victims, rather than erecting a deterrent to future unconstitutional conduct, the damage remedy against municipalities is said to be a more effective deterrent than awards against individual violators. Municipal Liability, supra, at 957. And because "municipal liability would not release the employee from his primary liability . . . [but rather] would only create an additional remedy against the employer", there is no argument that a shifting of liability away from the individual officer would reduce whatever deterrent effect is present in § 1983. Kates & Kouba, supra. at 142.

Finally, there is a perceived need for this remedy. The United States Commission on Civil Rights has urged Congress to impose monetary liability on municipalities. Although the recommendation is addressed to Congress rather than the Court, Justice Harlan noted in Bivens that in resolving the question whether compensatory relief is necessary or appropriate to the vindication of the interest asserted, "the range of policy considerations [the Court] may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy." 403 U.S. at 407 (Harlan, J.,

concurring). The commentators seem to be unanimously in favor of municipal liability. Kates & Kouba go to great lengths to suggest ways of imposing liability on municipalities, none of which are feasible today because of intervening doctrinal developments.[10]

I have not found any arguments denying the need for a damage remedy against municipalities. There are, however, several factors counseling against the imposition of monetary liability on municipalities. The main ones are the adverse financial impact on already distressed cities and the prospect of vexatious litigation.

The prospect of vexatious or frivolous lawsuits is not a good reason for disallowing an otherwise appropriate remedy for constitutional violations. Bivens, 403 U.S. at 410 (Harlan, J., concurring); Kates & Kouba, supra, at 143.

The financial plight of the cities and their legitimate concerns with financial integrity, though worthy of consideration, cannot be used as a total defense to the right of victims of unconstitutionality to be compensated in damages. Cf. United States Trust Co. v. New Jersey, 45 U.S.L.W. 4418 (U.S. Apr. 27, 1977). Furthermore, the financial impact on municipalities might not be significant.* Further research would be called for on this point. But it stands to reason that municipalities would not be burdened financially by damage awards in constitutional cases any more than they would be harrassed by frivolous litigation. Indeed, the two points are self-contradictory, because frivolous litigation cannot result in awards to the plaintiffs. Bivens,

403 U.S. 410 (Harlan, J., concurring).

Besides, municipalities already are subject to liability for torts in states in which they are not covered by sovereign immunity; and they are subject to liability under various civil rights statuter other than § 1983, including Title VII. The trend is toward greater governmental responsibility for harm caused by government, see K. Davis, Administrative Law Treatise § 25.17. Professor Davis urges strict liability for harm caused by government functions, on the premise that since all citizens benefit in theory from these functions, the loss inflicted on certain individuals should be shared evenly by all. This reasoning applies as well to constitutional violations as to torts, Kates & Kouba, supra, at 144; Comment, Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection, supra, at 1180, and perhaps applies with more force to constitutional violations which, unlike torts, are defined without regard to negligence. It makes more sense, therefore, to impose strict liability on municipalities for their violation.

In sum, damages are as appropriate in principle as injunctions as a remedy for constitutional violations; and municipalities no more deserve immunity from liability for constitutional violations than do individual defendants. Although I am not sure I would subscribe to the reasoning that municipalities should be liable for their agents' constitutional violations even when the agents are immune because of good faith, I can imagine that there would be circumstances in which municipal liability would be

appropriate. Those circumstances, to be discussed more fully below, would include situations in which the municipality was jointly liable with the officer who acted in bad faith and those in which the municipality could have done something to prevent the violation despite the good faith of the individual officer. Arguments against municipal liability based on the prospect of vexatious litigation or the financial plight of the cities have no more weight in this context than in any other context. This is particularly true considering the potential liability of municipalities for ordinary torts and for violations of various federal statutes.

C. Decisions of the Lower Courts

As mentioned above, the lower courts generally have been willing to grant monetary relief against municipalities for violations of the Fourteenth Amendment. In many of the cases this willingness is supported by no more than a citation to Bivens. Those cases do not aid analysis. They do indicate, however, that the notion of a Fourteenth Amendment damage action against municipalities does not go against the grain of the presently constituted federal judiciary. The collective federal sense of the lower courts is that such an action is no less proper than the Bivens action.

In some cases in which courts recognized a Fourteenth Amendment damage action against municipalities, that point was not necessary to the decision. Often the court would recognize the cause of action but hold that the plaintiff(s) had not proven a constitutional violation. The cases in which

relief actually was granted under the Fourteenth Amendment are few. I have not looked up all the cases listed in Shepard's as having cited Bivens. A rundown of the positions of each of the circuits follows.

The Second and Ninth Circuits have declined to decide the issue. Brault v. Town of Milton, 527 F.2d 736 (2d Cir. 1975) (en banc); Aldinger v. Howard, 513 F.2d 1257, 1259 n. 1 (9th Cir. 1975). The original panel in Brault, 527 F.2d 730 (2d Cir. 1975) (Smith, Oakes; Timbers, dissenting) recognized a cause of action under the Fourteenth Amendment based on allegations that the city had taken plaintiffs' property by means of an invalid zoning ordinance, i.e., without due process of law. CA2 reiterated in Fine v. City of New York, 529 F.2d 70, 76 (2d Cir. 1975), that it had not reached the question of the Fourteenth Amendment action and would not reach it in Fine.

It appears that the existence of a Fourteenth Amendment action has been recognized by the Third, Fourth, Fifth, Sixth and Seventh Circuits. Cases in which a Fourteenth Amendment action was recognized and damages awarded are Hostrup v. Board of Junior College Dist. 515, 523 F.2d 569, 576-77 (7th Cir. 1975), cert. denied, 425 U.S. 963 (Fairchild, Swygert, Tone) (procedural due process); and Roane v. Callisburg Independent School District, 511 F.2d 633, 635 n. 1 (5th Cir. 1975) (Gewin, Ainsworth, Gee) (procedural due process).

In several cases the court of appeals has reversed the district court's dismissal of a complaint, on the ground that the defendant was not a "person" within the meaning of §§ 1983

and 1343(3), and remanded for trial with jurisdiction based on § 1331. Amen v. City of Dearborn, 532 F.2d 554, 559 (6th Cir. 1976) (Peck, McCree, Engel) (" . . . it is well-established that municipalities, councils and commissions may be sued directly for fourteenth amendment violations through the general federal question jurisdictional statute . . . .", citing City of Kenosha); Reeves v. City of Jackson, 532 F.2d 491, 495 (5th Cir. 1976) (Brown, Gewin, Morgan) (claim based on Eighth and Fourteenth Amendments states a claim without enabling statute such as § 1983); Cox v. Stanton, 529 F.2d 47, 50-51 (4th Cir. 1975) (Winter, Widener, Merhige) (cause of action for involuntary sterilization allegedly in violation of Thirteenth and Fourteenth Amendments states cause of action, citing Bivens and Dellinger article); Muskegon Theatres, Inc. v. City of Muskegon, 507 F.2d 199, 200 (6th Cir. 1974) (Celebrezze, Peck, Miller) (alleged taking in violation of Fifth and Fourteenth Amendments "presents a 'serious constitutional question' . . . clearly within the district court's 'federal question jurisdiction'"); Skehan v. Board of Trustees, 501 F.2d 31, 44 (3rd Cir. 1974) (Biggs, Gibbons, Garth) (§ 1331 jurisdiction available in suit against state college, if not shielded by sovereign immunity, for alleged procedural due process violation), vacated on other grounds, 421 U.S. 983 (1975); Foster v. City of Detroit, 405 F.2d 138, 144 (6th Cir. 1968) (O'Sullivan, Phillips, Cecil) (§ 1331 jurisdiction available for alleged deprivation of property without due process and taking without just compensation).

The cases involving the taking of property without due process or just compensation, including Jacobs v. United States, 290 U.S. 13,

> "may be rationalized on the ground that the fifth amendment's prohibition of taking of property without 'just compensation' is sui generis among constitutional rights in that it explicitly provides for a monetary remedy. . . . But insofar as takings by state action give rise to a right of action only through the fourteenth amendment, the fact that § 1983 has not been seen as a bar to awards of damages against municipalities for takings seems significant." Municipal Liability, supra, at 950 n. 51; see cases collected therein.

In some cases courts have approved a Fourteenth Amendment action but denied relief on the merits. Hanna v. Drobnick, 514 F.2d 393, 398 (6th Cir. 1975)(Edwards, Peck, Engel); Bosely v. City of Euclid, 496 F.2d 193 (7th Cir. 1974) (Phillips, Lively, McAllister).

The district courts have divided on the question whether a damage action against municipalities may be inferred from the Fourteenth Amendment, as well as on the question whether actions alleging federal officers' violations of other than Fourth Amendment rights are covered by Bivens. See cases collected in Municipal Liability, supra, at nn. 35-48 and accompanying text.

Fourteenth Amendment causes of action against municipalities for damages have alleged the deprivation of various constitutional rights. Whether all constitutional violations should be remedied by private damage actions is an open question. The precise contours of the Fourteenth Amendment damage action remain to be drawn. Although it is impossible to forecast the specific content of the cause of

action or possible limits on its scope, I shall try to identify key elements--and problems--in the last section of this memo.

V. OPEN QUESTIONS

The simplest and most straightforward approach to the Fourteenth Amendment action would be to treat suits against municipalities as though they were brought under § 1983. As was noted by petitioner in Bivens, the course under § 1983 already has been charted. There are drawbacks to this approach. The most obvious one is that because municipalities have not been subject to suit under § 1983, and because in certain respects it is possible that municipalities should be treated differently than individual officers, decisions under § 1983 do not provide adequate guidance. Whether municipalities should be held liable despite their agents' good faith is an example of the kind of issue that is not addressed in the case law under § 1983.

A more theoretical problem is that the theory of judicial inference of a damage remedy from the Fourteenth Amendment is inconsistent with an automatic adoption of all the principles pertaining to § 1983. An analogy can be drawn to the sometimes differing principles of Title VII and equal protection cases. Compare Griggs v. Duke Power Co., 401 U.S. 424, with Washington v. Davis, 426 U.S. 229. The courts might choose to follow much of the law interpreting § 1983, somewhat akin to the process by which state law is sometimes incorporated into federal law. This would be useful

particularly with respect to procedural matters, such as statutes of limitation. In theory, though, development of case law under the Fourteenth Amendment should be independent of the law under § 1983, to be consistent with the premise that the Court is not simply filling in a gap left by Congress.

The previous point buttresses one final reason for not parrotting § 1983. I have detected from some of the internal memoranda, and from other sources, that you have been concerned with finding and imposing principled limits on the scope of § 1983. In view of that concern, it would not make sense to expand § 1983 by in effect adding municipalities to the roster of potential defendants. I do not mean that the scope of § 1983 should be limited by limiting potential defendants; that would not be principled. I mean that the courts have a clean slate on which to write the content of the Fourteenth Amendment action. If you consider § 1983 too broad, then the Fourteenth Amendment action should not imitate it.

I am not sure how the Fourteenth Amendment action should be limited. It is arguable that it would be unreasonable for it to differ from § 1983 in substantive content, in view of the fact tht § 1983 is a legislative measure for enforcing the same constitutional rights as would be enforced by the judicial remedy inferred directly from the Constitution. There would be a certain anomaly in having two distinct lines of case law applicable, respectively, to individual officers and to the municipalities for whom the officers work. Assuming, therefore, that it may not be sound or even possible to place

limits on the Fourteenth Amendment action that have not been placed on § 1983, I shall suggest some areas in which questions remain open. For the most part, these are issues that relate only to municipalities. But to the extent that these observations are not so limited, they may be relevant to § 1983 as well.

A. Limitations on the Cause of Action

A possible limit on the Fourteenth Amendment action would be to make liability depend on the seriousness of the constitutional violation. This is an unacceptable option. I can see no reason for differentiating among degrees of constitutional violations when that has not been done under § 1983.

A second possibility would be to limit the damage action to the kind of wrongs typically compensated by damages. Bivens found damages to be an appropriate remedy for an offense that resembled common law trespass. It is arguable, as mentioned in Part I.B., supra, that it might not be appropriate to compensate the victim of other sorts of constitutional violations in damages. Procedural due process and trial-type due process rights will serve as illustrations.

Violations of the right to a fair trial do not seem amenable to a damage action. The appropriate remedy for an unfair trial is a new (and fair) trial. Yet if the trial was conducted so unfairly, or if particular constitutional violations were so egregious, as to lead to a conclusion of impermissible motive or abuse of the judicial process, then an

analogy can be found in suits for malicious prosecution. Then, an action for damages might lie.

In the context of procedural due process, suits charging unlawful termination procedures or motives often are brought under § 1983 against municipalities and school boards. The plaintiffs seek reinstatement and back pay. In a case presently awaiting a cert disposition, CA2 reversed a district judge's award of $60,000.00 in pack pay to a guidance counselor who had been discharged after hearings at which she was represented by counsel, because she was not given a copy of the hearing examiner's report before the meeting at which the school board took action on her termination. CA2 reversed on the ground that the guidance counselor had not been denied due process. Even assuming that constitutionally infirm procedures had been followed, it contradicts traditional contract law to award back pay without requiring mitigation of damages. Cf. Carey v. Piphus, cert. granted, No. 76-1149/ (raises question of function of damages in § 1983 action).

It could be argued that no mitigation is required in a constitutional case because the Constitution imposes unconditional duties, unlike a contract under the "bad man" theory of contracts. (A contract is no more than a promise to pay if it is breached.) It could be argued that constitutional violations should be remedied by full compensation to the victim, regardless of failure to mitigate. Such a result could not be based on the theory that the financial harm to the public employee who is terminated without due process is any greater than the harm to a private employee whose employer commits breaches a contract. The

result would have to be justified on the ground that the Constitution imposes absolute duties, and is not just a private agreement embodying alternative promises to perform or to pay. But it seems to me that the admittedly unique nature of the Constituion does not alter the responsibility of the plaintiff to mitigate damages. It simply allows equitable relief which probably would be unavailable to the victim of a wrong committed by a private party. See Part IV.A., supra.

These two examples illustrate two notions about the Fourteenth Amendment damage action: (1) It should be available only when the alleged constitutional violation can be compared profitably with wrongs typically compensated in damages. (2) Traditional principles affecting the grant of damages should apply, unless persuasive reasons are presented on the inappropriateness of applying particular principles in a constitutional case.

B. When Might Damages be Inappropriate Per Se?

A law review comment has urged that states and municipalities be held liable in damages for their denial of the equal protection of the laws to racial minorities. Comment, Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection, 57 Calif. L. Rev. 1142 (1969). The theory is one of "reparations". See also Kates & Kouba, supra, at 139 (advocating liabiity of lawmaking bodies for harm caused by the adoption of unconstitutional laws). I would think it likely that these are kinds of municipal liability the Court would not favor--to put it mildly. Yet if the Court were to infer a damage action against municipalities

from the Fourteenth Amendment, without somehow quaifying the concept at the outset, the door would be open to this kind of lawsuit. This is a real problem, because it is hard to come up with principled reasons why this kind of suit should be barred.

A gut reaction would be to say that this kind of lawsuit would be unmanageable and the damages involved unmeasurable. A class action, for example, by the black population of a city that is held to have had an illegally segregated school system, alleging denial of educational and career opportunities and the financial benefits thereof, certainly would be overwhelming. But so are most large antitrust litigations. Except in an instinctive fashion, it is hard to pinpoint why suits alleging widespread constitutional violations with the attendant need for widespread compensation would be different.

The author of Municipal Liability, supra, at 958, suggests dealing with this problem in the guise of a form of immunity:

> "There may . . . be justification for development of some limited form of municipal immunity for cases involving generalized injuries to broad segments of the population, especially where the burden of liaility would be so great as to disrupt the functioning of local government and consequently to deprive the citizens who depend upon it for services."

I am not sure why this expected disruption and burden on the citizens differs, except in degree, from what would accompany every suit against the municipality. Of course the difference in degree is great, but so would be the difference in magnitude of the constitutional harm. I see an inconsistency

in saying that the citizenry who have reaped the benefits of government should pay for the harm done in certain kinds of cases but not others. The reason for excluding the damage action for widespread constitutional violations should be based on more clearly articulable reasons.

A possible reason would be the institutional incompetence of the judiciary to deal with such matters. "The theory for declining to entertain such a suit might be that the Constitution does not mandate judges to undertake vast redistributions of wealth to attack pervasive social ills, even where such ills may be traceable in some degree to violations of constitutional rights." Id. Although this problem may be characterized as a "special factor counselling hesitation", id.; Bivens, 403 U.S. 396, it must be explained why the judiciary should hesitate to give relief in the form of damages when it does not hesitate to grant injunctions. In this respect, the unconditional command of the equal protection clause--whose implementation requires the judiciary to prohibit prospective violations but does not require the award of retroactive relief--adds to the factors already mentioned to distinguish injunctive from monetary relief. Although much more thought is due this problem, it strikes me as an area in which damages might be inappropriate per se.

C. Immunity

The relationship between the immunity of a municipality and the good faith immunity of its officers has been mentioned above. A few more words on this problem are in order. I

shall explore the suggestion above that there may be situtions in which the two immunities will not coincide.

A municipality might be sued on several different theories. For starters, I can think of four basic situations:[11]

(1) Plaintiff sues city for failing to prevent a crime.

(2) Plaintiff sues police officer and city for police brutality, in violation of due process and equal protection clauses.

(3) Plaintiff sues school board for terminating employment without (procedural) due process or for unconstitutional reason (e.g., retaliation for plaintiff's assertion of First Amendment rights).

(4) Plaintiff sues city for actions taken against plaintiff pursuant to an unconstitutional law.

Situation (1) does not state a cause of action against either the officers or the city. Liability for failure to prevent the commission of a crime by private parties would be exactly the kind of liability rejected - justifiably - by the opponents of the Sherman amendment. Besides, there would be no state action, unless all inaction were equated with action.

In situation (2), the individual officer would be liable only if he acted in bad faith. Assume a set of facts not unlike those in Bivens, but less egregious. The police, without a warrant, enter the plaintiff's home to make an arrest. The state of the law is unclear at the time of the arrest, but some courts have held that warrantless entries to

arrest are unconstitutional. The officers avail themselves of the good faith immunity defense, in light of the unsettled state of the law. Should the municipality be liable notwithstanding the good faith of its officers? This is a hard question. On the one hand, it seems unfair not to compensate the victim. On the other hand, should the municipality be held to a higher standard of knowledge of constitutional rights than the individual officers? It can be argued that it should. Along the lines of tort theory, it would seem reasonable to say that a municipality that acts "negligently" in choosing to employ constitutionally debatable law enforcement tehniques does so at its peril. The municipality, like the unreasonable person in torts, must pay for harm caused by its actions.

What if the individual officer acted in bad faith and is held liable? If bad faith means disregard for individuals' established constitutional rights, but not action outside the scope of the officer's responsibilities, then perhaps the municipality should be held liable on the basis of respondeat superior. It is hard to imagine that an employer should be held liable for the employee's car accidents but not his constitutional torts. Even without proof of a "pattern" or "plan" of torious conduct, we hold employers liable for their employees' torts committed in the scope of their employment. The concerns of Rizzo v. Goode would not be prompted by relief in the form of damages.

The framework of situation (3) differs in one significant respect from that of situation (2). Whereas the primary

actors in (2) were agents or employees of the municipality, the wrongdoer in (3) is the government unit iself. Although government always must act through its agents, the members of a unit such as a school board are the unit. Put somewhat differently, it is more difficult to distinguish between school board members acting in their individual capacities and acting in concert as the school board than it is to distinguish between the discretionary acts of individual police officers and the official acts of police departments. /
See generally Monell, 532 F.2d at 264-65 (Gurfein, J.).
At least in the case of actions taken by the Board as a whole, it may be that the members' immunity should also cover the "Board" itself.

(4) Finally, municipalities might be sued for harm caused by the enactment of laws, ordinances, or procedures later found to be unconstitutional. The segregation cases would be one example; legal rules permitting unconstitutional searches would be another. I have noted above the suggestion to accord municipalities immunity from suit for widespread social ills like segregation. I have also noted the possible inappropriateness of dealing with the problem of such suits in the guise of immunity. The inappropriateness of judicial inference of damage awards in the context of widespread unconstitutionality seems like a better tack.

As for immunity from suit in a case like that of the hypothetical unlawful search, it would be less reasonable to grant the city immunity for the officer's actions pursuant to an unconstitutional ordinance than to protect the city with the officer's good faith immunity in a case in which the

officer acted on his own. When the individual officer acts in conformity with an unconstitutional state or local law, his conduct is actionable even under the concept of "under color of state law" that existed before Monroe v. Pape and that Justice Frankfurter would have considered actionable under § 1983. It would seem that the city as well as the officer should be held liable for this kind of constitutional violation.

D. Do Other Statutes Vitiate the Need for a Fourteenth Amendment Action?

Unlike § 1983, § 1981 and 1982 do not speak of the violation of constitutional rights by "persons". Municipalities are not outside their coverage. It may be that §§ 1981 and 1982 cover some of the causes of action that might be asserted in a Fourteenth Amendment action. I have not looked into this further because the relevance of these provisions - or other possible statutory causes of action - would depend on the facts of particular cases. It is not unlikely, however, that plaintiffs asserting a cause of action based on the Fourteenth Amendment would also utilize a statutory provision other than § 1983. This is true in County of Los Angeles v. Chavez-Salido, petn for cert. filed, No. 76-1616, where plaintiffs based their cause of action alleging alienage discrimination in county employment on § 1981 and the Fourteenth Amendment. I think the same is true in a police brutality case now pending in the Third Circuit. The Court of course would want to apply an appropriate statute before resorting to the Constitution itself.

VI. CONCLUSION

The power of the federal courts to infer a damage remedy from the Fourteenth Amendment is well-established. Congress has not precluded the inference of such a remedy against municipalities for their own or their agents' constitutional violations. Even if Congress were to declare squarely that the federal courts were not to award damages for constitutional violations by municipalities, it is unclear whether that would preclude the Court from inferring such a remedy if it were considered "necessary" to effectuate a constitutional right.

In general, policy considerations do not militate against the recognition of a Fourteenth Amendment action. Whether such considerations would impel the Court not to recognize such a cause of action in a particular case cannot be determined at this point.

Obviously, there are differences between injunctive and monetary relief. Damages are usually considered the more available remedy than equitable relief. Constitutional cases may differ from other cases, however, in that the Constitution imposes absolute obligations on the states and the United States, so that the Constitution might more appropriately be enforced by injunction than would private rights. There would not seem to be any difference, however, in this respect, between constitutional and statutory rights. In principle, therefore, damages may be as appropriate a remedy for certain wrongs as would be an injunction. A case like Bivens is a

prime example in which damages would be more appropriate than injunctive or other relief.

The content and scope of the Fourteenth Amendment action cannot be determined in advance. For this reason, it seems especially important that the Court only grant cert to consider the inference of a Fourteenth Amendment action in a case in which the cause of action and the facts are clearly developed, and both parties are represented by able counsel.

If the presentation in this memo seemed unbalanced (that is, weighted in favor of inferring a cause of action from the Fourteenth Amendment), it is only because I found very little in opposition in the literature or the case law. Because my personal bias is in favor of inferring such a cause of action, but my rational tendencies warned me that there might be inordinate unforseeable problems with turning the Constitution into another § 1983, and thereby potentially degrading it, I tried to find arguments in opposition. Except for the potential problems of frivolous lawsuits and financial disaster for the cities (especially in huge suits seeking "reparations" for past denial of equal protection), I did not find any impediments to recognition of a Fourteenth Amendment action for damages. The most obvious problem--Monroe v. Pape and the Sherman amendment debates--do not strike me as posing a problem at all.

If there are aspects of this issue not covered adequately in the memo, or points on which you would like elaboration, I would be happy to pursue them further.

N.B.

ss

FOOTNOTES

1. In turn Justice Harlan noted in his concurring opinion in Bivens that the exercise of judicial power to imply a remedy in J.I. Case v. Borak, 377 U.S. 426, in the absence of any express statutory authorization of a federal cause of action, "simply cannot be justified in terms of statutory construction, see Hill, Constitutional Remedies, 69 Col. L. Rev. 1109, 1120-21 (1969); nor did the Borak Court purport to do so. See Borak, supra, at 432-434."

2. Professor Hill contends that "[it may be fairly assumed that the founding fathers did not contemplate a new species of constitutional tort." Hill, supra note 1, at 1132. Rather, they assumed that the transgression of a government officer would be a trespass, i.e., a common law violation to be sued on in state court. Hill concludes, however, tha "it does not follow that the state was necessarily to be master of the action in trespass founded upon unconstitutional behavior." Id. The question would become one of federal law, reviewable by the United States Supreme Court. See also Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1538-39 (1972). This is consistent with Justice Harlan's view, 403 U.S. 400 n. 3, that "the authors of the Bill of Rights assumed the adequacy of common-law remedies to vindicate the federal protected interest." This is

because there was no general federal question jurisdiction in the district courts before the Act of March 3, 1875, § 1, 18 Stat. 470.

3. If the Court were simply remedying the anomaly, contrary to what has been said above, there would be a good argument that the Bivens theory applies to every right covered by the Bill of Rights, including due process and equal protection under the Fifth Amendment. But it may be that by reading Bivens, as I have, as an independent exercise of federal remedial power unrelated (in theory) to § 1983, the Court would remain free to evaluate each asserted cause of action to determine whether it stated a valid constitutional cause of action, and whether damages were the appropriate remedy. For example, cases like Brown v. Board of Education, 347 U.S. 483, establish the federal courts' equitable powers under the equal protection clause of the Fourteenth Amendment and under the Fifth Amendment due process clause, Bolling v. Sharpe, 347 U.S. 497, but they do not necessarily require the imposition of damages. This is because damages may not be an appropriate remedy. See Part V, infra. The question has not come up in suits against the federal government or the states because of sovereign immunity and the Eleventh Amendment, but it could come up in suits against municipalities. I am not aware the Court has answered this question in the context of § 1983. It would be more relevant in a Fourteenth Amendment action against a municipality than in a suit

against individual officers in a Bivens action or a § 1983 action, because individual officers would be unlikely to have the kind of financial resources that could satisfy a judgment in such a suit.

4. Although the comprehensiveness of a congressional implementation statute might suggest that the area is not one in which the Court should imply a remedy, the Court implied a remedy in Borak "in an area where federal regulation has been singularly comprehensive and elaborate administrative enforcement machinery had been provided." Bivens, supra, 403 U.S. at 402 n. 4 (Harlan, J., concurring).

5. The second version of the Sherman amendment, which was proposed in response to the objections to the strict liability of the original Amendment, had the same object: "to aid in the repression of these outrages by tumults and conspiracies". Cong. Globe, 42d Cong., 1st Sess. 820 (1871) [hereinafter cited as Cong. Globe]. The new provision, now 42 U.S.C. § 1986, imposed liability only on those who had, or should have had, knowledge of "these outrages", meaning private conduct now proscribed by 42 U.S.C. § 1985. It sought to make every citizen with knowledge of illegal activities a "peace officer". Id. Like the original Sherman amendment, the substitute proposal sought to make persons other than the actual tortfeasors liable for the latters' wrongs. It differed, however, in its requirement of knowledge or notice of

imminent illegality and of failure to prevent the infliction of harm by other private parties.

6. Representative Butler of Massachusetts considered the substitute provision objectionable, however, because it would be a mockery and "not the slightest pretext of remedy." He gave as an example the case of a man who had been shot:

> "What is the remedy in that case? His wife is to do down there and sue. Whom is she to sue? She is to find out first who did the deed; then who knew it was to be done and did not tell of or aid in preventing it. She is to find out next whether they have property; she is to find out whether they informed; and then she has a civil suit for remedy, and that tried before a jury who must have a sympathy with the people of that county as against a stranger, though it may be a loyal jury. Does anyone believe this remedy will be a vital one; that this remedy will be an adequate and useful one? Not at all. . . If you had permitted the suit against the county you could find the county; but can you find these sheet clad, masked Ku Klux in the night time, or those who connive at them and are their abettors, going to declare who they are to the man who is unjured?"

Cong. Globe, supra, at 807 (emphasis added). In contrast, the broad, amorphous concept of liability embodied in the Sherman amendment was as much a virtue to its supporters as it was an objection to its opponents. It is interesting to note that the underlined portion resembles the point of view of the plaintiffs in Rizzo v. Goode, 423 U.S. 362.

7. Congress' preeminence in the commerce area has as much to do with the wording of the commerce clause as with the institutional roles of the respective branches of

government. Unlike the Fourteenth Amendment, which first states certain rights and then gives Congress power to enforce them, the commerce clause simply grants Congress the power to regulate commerce. Congress may choose not to impose on the states a uniform rule respecting certain aspects of commerce, choosing instead to allow a local diversity. On such a matter, the Court will not substitute its judgment for Congress'. Although the Court has filled in gaps in the absence of legislation pursuant to the commerce clause, the Court has withdrawn when Congress explicitly ruled on the matter to permit state regulation. That it permits diversity does not mean that Congress is not regulating commerce. On the other hand, if Congress were to abdicate its power to enforce the Fourteenth Amendment, the rights guaranteed therein would not fade away. Enforcement necessarily would fall to the Court, as it did from the time of enactment of the Amendment until recently.

8. The main difference between the two would seem to be that the supervisory power applies only to the federal courts, whereas constitutional common law would apply, at least prima facie, to the state courts as well. But Monaghan contends to the contrary, at 39-40. He seeks to explain your opinion in Apodaca v. Oregon, 406 U.S. 404, 366, by saying that common law components of a constitutional right "do not necessarily carry over" to the states. Perhaps the difference between the supervisory

power and constitutional common law is that the supervisory power applies to procedural implementation of constitutional rights whereas constitutional common law also extends to defining the particular incidents of constitutional rights. The line is hard to draw.

Monaghan regards the decision in Calandra as illustrative of the principle of constitutional common law, especially in the statement that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." 414 U.S. at 348.

9. The reasoning behind the holding of the district court in Bell v. Hood, 71 F. Supp. 813, 819 (S.D. Cal. 1947), on remand from 327 U.S. 678 (1946), was that the availability of equitable relief to vindicate constitutional interests is evidence that damages are unavailable, because if there existed an adequate remedy at law, an injunction could not issue. Thus federal law did not provide for the relief (damages) sought by plaintiffs. The fallacy of this reasoning lies in the assumption that the historical existence of equitable relief must have been premised on a decision against legal relief; this assumption ignores the fact that the question of the availability of legal relief has not been decided. "Certainly the remedy at law is inadequate when there is none, but that is the question for decision." Katz, supra, at 6.

10. They suggest:

> "(1) suits against any public entity for injunctive relief; (2) damage actions against non-municipal public entities; (3) damage actions against public entities in states which have abolished municipal immunity; and finally, (4) damage claims under state law against any public entity when joined with a Section 1983 claim under the doctrine of pendent jurisdiction."

45 S. Calif. L. Rev. at 147. Option (1) is foreclosed by City of Kenosha, supra; (2) probably is foreclosed by Monell; and (3) is foreclosed by District of Columbia v. Carter, 409 U.S. 418. Option (4) is still available but it depends on stae law. The availability of a cause of action in some states does not obviate the need for a federal remedy, because the vindication of federal rights should not be made to depend on the vagaries of state law. That was one of the major points of Bivens.

11. It goes without saying that the plaintiff must allege a constitutional violation, not an ordinary tort. There must be "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state law.'" Monroe v. Pape, 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326).

IV. A. 1.

* Obvious that he wasn't talking about wrongful acts performed by the indiv.

to tax a State municipal corporation. I think my friend will have to search very far, very wide, and very long to discover any case where a municipal corporation has been attempted to be taxed by the Government.

Mr. MAYNARD. I do not say taxed; but to be dealt with, recognized, treated with.

Mr. POLAND. I cannot stop to argue with my friend, as I have only fifteen minutes. The principle of this law is taken from the old hue and cry or hundred law. The liability there was only a contingent liability. When property was taken in a hundred all the officers and all the inhabitants were immediately to make hue and cry, on foot and horse, for the purpose of arresting the offender. If they did arrest the offender there was no liability on the hundred. So it is with the riot law which makes the community liable in case they fail to find the offender. In the case of those English early and later statutes there was no absolute liability fixed upon the community, upon the county or any municipality. It was made the duty by law of the officers of the hundred and all the inhabitants of the corporation to arrest the offender. If they arrested him that was the end of their liability.

Nearly all those statutes have become obsolete. They exist now only in a modified form, and were never adopted in this country until recently. It is true that in one or two of the large States, where they have large cities with large population living compact together, and where they might easily put down riots, this principle has been adopted. New York and Massachusetts have done so. I am not aware that it exists in any other New England State except Massachusetts. All those statutes, instead of being like this, enact this provision as a part of the police system. The first thing is to provide officers, prescribe their duties, and they may call everybody within their jurisdiction out and help put down the riot. If they fail to put down aggression upon the right of the people, for their neglect they may be made liable to the extent of damages done to property.

The gentleman from Ohio [Mr. SHELLABARGER] said this morning that the Supreme Court has decided in favor of this power on the part of Congress. It has done no such thing. Where a State has authorized a city or county to make a contract, and when, under the law of the State, they have made a contract binding themselves, the Supreme Court of the United States has said that they were liable to be sued for the enforcement of that contract. That is all the Supreme Court of the United States have ever decided in regard to the liability of municipal corporations. When the State which created them has authorized them to bind themselves by a contract, and they have done so, the court has very properly said that the courts were open for the enforcement of such contracts, as for enforcing the contracts of other parties. I presume, too, that where a State had imposed a duty upon such municipality, and provided they should be liable for any damages caused by failure to perform such duty, that an action would be allowed to be maintained against them in the courts of the United States under the ordinary restrictions as to jurisdiction. But the enforcing a liability, existing by their own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever. But, strange as it may appear, gentlemen seem to have confounded their liability to suits on their contracts as being the same thing with what is now attempted. Nothing but a failure to give reasonable thought to the subject could have allowed any man to fall into such gross error.

But municipalities did have the obligation, under the 14th A., to provide dp & EP.

Some gentlemen, and among them the gentleman from Tennessee, [Mr. MAYNARD,] seem to have failed entirely to notice the distinction between these municipal organizations and ordinary business corporations, and to suppose that the national Government can deal with one precisely as with the other. A business corporation, as a bank, railroad company, or manufacturing corporation, is in effect nothing but a partnership. It is an association of persons for a business venture or enterprise. The corporate character given to it is for mere business convenience, to give it more permanent existence, to prevent dissolutions on the death of a member, to facilitate the transfer of interests in it, and enable it to sue without joining all the partners or share-owners as parties, and save its suits from abatement by death or transfer of interest. In fact and substance it is a mere private partnership, may be taxed and otherwise dealt with by the General Government in the same way and to the same extent as a firm. Counties and towns are subdivisions of the State government, and exercise in a limited sphere and extent the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State, and are subject only to such duties and liabilities as State laws impose upon them. In a sense they are corporations, but with only such powers and subject to such burdens as the State may deem advisable.

The national Government has the fullest power of taxation, either by the imposition of duties on imports or upon the products and business of our own country. It may punish frauds upon its revenue, derived in either form. It may provide for forfeiture of smuggled goods or of illicit distilleries. Indeed, the power of the Government in this respect has hardly a definable extent. But what would be thought of a national law which should impose a penalty upon the town in which a successful smuggler lived, or where an illicit distillery should be run, or give an action against the town for the loss of the Government in duties or taxes, by such operations? But it would equally be in the power of the national Government to do this as to enact this Senate amendment. I say again, it seems to me that legal gentlemen who support it cannot have given it proper thought.

Republicans who oppose this amendment are charged here with party unfaithfulness. Mr. Speaker, before I close, let me say a word as to that. Our own committee who reported this bill refused to attach any such provision to it. The Judiciary Committee in the Senate refused to add it. After the debate in the Senate on the bill was closed it was moved by the Senator whose name it bears, and adopted by a small majority, without debate and apparently without consideration. It seems to have been a sporadic effort of the mover, quite out of keeping with his ordinary overcautious conservatism. When it came from the Senate to the House it was defeated by an overwhelming majority, a considerable majority of the Republicans of the House voting against it. It would seem that the Senate, having once adopted it, deem themselves bound to stand by and maintain it. But I submit, Mr. Speaker, whether, under these circumstances, a Republican may not act upon his own conscientious convictions of constitutional duty without being called to account for party insubordination.

[Here the hammer fell.]

Mr. SCOFIELD. I will now yield for five minutes to the gentleman from Pennsylvania, [Mr. KELLEY.]

Mr. KELLEY. Mr. Speaker, I desire to say, in corroboration of the statement of the gentleman from Massachusetts, [Mr. BUTLER,] that we have in our laws applicable to Philadelphia the provision embodied in this law in reference to which so many conscientious scruples are expressed.

Philadelphia was seriously afflicted for a long number of years with riots growing out of popular impulses. The neighborhoods in which our colored people dwelt were more than once mobbed and burned through the whole of wide regions. When, under the impulse of Native Americanism, a popular prejudice was raised against Catholicism, the neighborhoods in which the Catholics mainly dwelt became objects of riotous demonstrations, and the dwellings of that people were burned. A riot that was almost national in its character, in which Pennsylvania Hall was burned because it had been opened to the discussion of the slavery question, was one of them. But after the provisions embodied in this law had been put upon our statute-book and executed in a few instances, every tax-payer knew that his resources were being exhausted when a riot was demolishing property. Since then every party in power in our municipality has known that the tax-payers of the next year would take notice of their want of fidelity if they permitted the riotous destruction of property. We have found that it operated like a charm. Only two instances that I can now recall have occurred since the passage of the law, and they were required to give an appreciation of the law and a knowledge of its existence to the people. I apprehend that under its influence, more than any other influence, Philadelphia, once so sorely troubled by riotous demonstrations, is now as free from them and from the possibility of their assuming any great proportions as any city or town in the world.

Having, then, seen the effect of this law; having periled my life more than once in endeavoring to protect those who were the victims of the rioters or to suppress the riots; having been engaged in administering the criminal law after the riots, I had been profoundly impressed with the danger thus occasioned in all great cities to life and property. I had become almost convinced that no law could protect the property of citizens against popular prejudice in times of great excitement. But the effect of this very provision has changed my view, and I have learned that by making the whole body of citizens insurers for the victims you will have a safeguard which no police arrangement can make, one more effective than any other that I can conceive. I did not like the original provision in the bill which allowed the assessment to fall upon the individual.* But this does commend itself to my judgment, and that not merely theoretically, but because I have observed the effect of such a provision. We cannot get a bill of this kind which will be satisfactory to all of us. I had hoped that the bill would contain a clause repealing the test-oath for juries. I believe the time has come when it should be repealed. And the bill is objectionable to me for the reason that that provision has been stricken out. But no man operating either with a great party or a great legislative assemblage can have all the provisions of a bill to meet his own judgment. But, though I deplore that change in the bill, I rejoice in that to which I have been directing my remarks, and I will support the bill all the more heartily because it is there.

Mr. SCOFIELD. How much time have I left?

The SPEAKER. Thirteen minutes.

Mr. SCOFIELD. I yield ten minutes to the gentleman from Michigan, [Mr. BLAIR.]

Mr. BLAIR, of Michigan. I regret as much as any gentleman can do that I differ with any of my political friends on a measure of so great importance as this bill. The House after very full consideration united in the passage of a bill which was satisfactory, at least to this side of it, having secured, I believe, the votes of the entire body of the Republican members. I should have been exceedingly glad if we could have gone through unitedly in this course without division upon the questions involved.

But, sir, this report which has been concurred in by the Senate brings back to us this bill with an amendment, the principle of which was rejected by the House by an overwhelming majority, only some forty-six or forty-seven votes altogether having been given for it. I

did suppose that, in view of the opinion of the House so emphasized, the Senate would have been disposed to recede from the position it had taken in that respect.

The proposition known as the Sherman amendment—and to that I shall confine myself in the remarks which I may address to the House—is entirely new. It is altogether without a precedent in this country. Congress has never asserted or attempted to assert, so far as I know, any such authority. That amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone. Now, sir, that is an exceedingly wide and sweeping power. I am unable to find a proper foundation for it. Though I am not disposed here and now to discuss it very minutely, I wish to say that thus far I am unable to see where the authority can rest. I listened with the utmost respect, and with all the attention in my power, to the argument of the gentleman from Ohio, [Mr. SHELLABARGER,] the chairman of the committee of conference, to see if I could ascertain just where he placed it, and I think I shall do him no wrong when I say that he wholly failed to show the House where the power resides. He did undertake to find some parallel in other action of the judiciary of the United States toward these municipalities, growing out of contracts; but, sir, when a municipality, under the authority given by a State, makes a contract it thereby lays itself liable to every remedy upon that contract, and it is liable to be sued by its own consent, and with the consent of the State that created it, in any court having jurisdiction of the subject matter of that contract.

This we all understand very well; but here it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am unable to assent to. The parallel of the hundred does not in the least meet the case. The power that laid the obligation upon the hundred first put the duty upon the hundred that it should perform in that regard, and failing to meet the obligation which had been laid upon it, it was very proper that it should suffer damage for its neglect. This is all there is of it.

I have learned, sir—perhaps I have some old-fashioned prejudices—that in the Government of the United States there is a division of powers; that there are certain rights and duties that belong to the States, that there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, I ask gentlemen to tell me where its power will stop and what obligations it might not lay upon a municipality. If gentlemen say that the powers of the General and of State governments for the protection of life, liberty, and property are concurrent and that we can go everywhere throughout the United States and do by the General Government everything that can be done by any State government, then I grant that this power might exist; but until I am shown that, I am unable to see it. As I have said, I have always supposed that there were certain powers and certain rights that belonged to the States that the General Government has no right to interfere with. This right of local self government, as I supposed, it was not the intention of the Constitution of the United States in any case to take away from the States, and I cannot see how it is possible that this power should exist without so taking it away.

Now, only the other day, the Supreme Court of the United States decided (and we had all recognized it as the law for a long time before that) that there is no power in the Government of the United States, under its authority to tax, to tax the salary of a State officer. Why? Simply because the power to tax involves the power to destroy, and it was not the intent to give the Government of the United States power to destroy the government of the States in any respect. It was held also in the case of Prigg vs. Pennsylvania (I speak from recollection only) that it is not within the power of the Congress of the United States to lay duties upon a State officer; that we cannot command a State officer to do any duty whatever, as such; and I ask gentlemen to show me the difference between that and commanding a municipality, which is equally the creature of the State, to perform a duty. The State has made these municipalities for certain objects. It has not made them for the purpose of meeting this obligation which the Government of the United States under this bill would seek to interpose and lay upon them; but I must say that I think it would be involved that if we have the right to lay this obligation upon them, to require them to meet these damages, it must draw after it the power to go in there and say, "You shall have a police, you shall have certain rules by which you may fulfill your obligation in this respect."

[Here the hammer fell.]

Mr. SCOFIELD. I took the floor at the request of gentlemen who wished to speak for the mere purpose of dividing the time between those gentlemen, about equally, who wished to speak for the bill, and those who wished to speak against it. I have no speech to make myself, and I yield the residue of my time to the gentleman from Illinois. [Mr. BURCHARD.]

Mr. BURCHARD. Mr. Speaker, a number of gentlemen on this side of the House were opposed to the amendments adopted by the Senate to the original bill. And the report of the committee of conference has not removed the objection that many gentlemen entertained to the seventh section added to the bill by the Senate. It was not opposition to the details merely, but to the principle upon which the legislation of this section is based, and the manner in which the powers claimed for the General Government were attempted to be exercised. I shall not recapitulate the arguments that have been presented, but shall merely confine myself to answering one or two points that have been made in advocacy of this report. And, in the first place, I wish to remark that the decisions that have been referred to, those of Knox vs. Lee county, and the others, go to this extent only, if I understand rightly their scope: that where a State imposes a duty upon county officers or State municipal corporations, the exercise of which is necessary to give effect to judgments or decrees of the United States courts, the latter can enforce the performance of that duty. In other words, where by the laws of a State the board of supervisors of a county, or the common council of a city, are authorized to levy a tax and collect funds to pay a judgment, for the purpose of enforcing satisfaction of the judgment, the United States court, by *mandamus* can compel those State officers, those officers of a municipal corporation, to perform that duty.

But there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by State laws, perhaps the United States courts could enforce its performance. But counties are organized, at least in most of the States, for the management of the financial affairs of the counties. The county commissioners, county court, board of supervisors, or other body acting for the county, have power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county, or justices of the peace and constables in the subdivisions of the counties and towns, &c. But still in few, if any, States is there a statute conferring this power upon the counties. Hence it seems to me that these provisions attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance.

Further than that, this bill itself contains no provisions by which the county, city, or parish can protect these rights of citizens, for the violation of which it is made responsible. It provides no means by which a county or other subdivision of the State can enforce those rights. Hence I think the main objections to this portion of the bill are not remedied by the conference committee's report.

[Here the hammer fell.]

MESSAGE FROM THE SENATE.

A message from the Senate, by Mr. SIMPSON, one of its clerks, announced that the Senate had agreed to the amendment of the House to the bill (S. No. 178) for the relief of Nicholas P. Trist, negotiator of the treaty of Guadalupe Hidalgo.

The message also announced that the Senate had passed, without amendment, House bills of the following titles:

An act (H. R. No. 425) to authorize the Secretary of War to give Wisewell barracks to the Beulah church; and

An act (H. R. No. 426) for convening the next Legislative Assembly of the Territory of New Mexico, and for other purposes.

ENROLLED BILLS SIGNED.

Mr. BEATTY, from the Committee on Enrolled Bills, reported that the committee had examined and found truly enrolled bills of the following titles; when the Speaker signed the same:

An act (S. No. 29) amending an act to reduce internal taxes, and for other purposes, approved July 14, 1870; and

An act (S. No. 178) for the relief of Nicholas P. Trist, negotiator of the treaty of Guadalupe Hidalgo.

DEFICIENCY APPROPRIATION BILL.

Mr. DAWES. I ask consent to make a report from the committee of conference upon the deficiency appropriation bill. I propose to make a brief explanation of it, and if it gives rise to any debate I will consent to withdraw it.

No objection was made.

The report was read, as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendments to House bill No. 19, making appropriations for the payment of additional clerks and messengers in the Pension Office, and for other purposes, having met, after full and free conference have agreed to recommend, and do recommend to their respective Houses, as follows:

That the Senate recede from their amendments numbered 18, 21, 32, 35, 49, 50, 63, and 64.

That the House of Representatives recede from their disagreement to the amendments of the Senate numbered 22, 45, and 47, and agree to the same.

That the Senate recede from their disagreement to the first clause of the amendment of the House to the fifth amendment of the Senate, and agree to the same in the manner following, to wit:

Strike out all of said clause, and substitute:

That the books, records, papers, and documents relative to transactions of or with the late so-called government of the confederate States, or the government of any State lately in insurrection, now in the possession, or which may at any time come into the possession of the Government of the United States, or of any Department thereof, may be resorted to for information by the board of commissioners of claims created by act approved March 3, 1871, and copies thereof, duly certified by the officer having charge of the same, shall be treated with the like force and effect as the original.

And the Senate agree to the same.