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jurisdiction, effectively ignoring the jurisdictional argument while producing a result that is difficult to square with the statutory jurisdictional grant.

IV. CONCLUSION

The decision of *Southland Royalty* is in one respect merely another chapter in a history of expanding jurisdiction under the Natural Gas Act. Deeper analysis reveals, however, that it presents a significant change in the judicial treatment of the Act. The decision is the first to authorize Commission jurisdiction in an area not within the express statutory categories. As such, it presents an application of quasi-judicial legislation unprecedented under the Natural Gas Act.

David G. Drumm

Cities Liable Under Section 1983: Monell v. Department of Social Services

Female employees of the city of New York brought a class action[1] in the district court of New York against the Department of Social Services and its Commissioner, the Board of Education and its Chancellor, and the city of New York and its Mayor, alleging violation of constitutional rights as protected by 42 U.S.C. § 1983.[2] The individual defendants were sued solely in their official capacities. The complaint challenged the constitutionality of the official state policy that compelled petitioners to take unpaid maternity leaves before such were necessitated by medical reasons. Petitioners sought declaratory and injunctive relief, and damages for deprivation of the right of employment as well as for back pay. The district court held that subsequent changes by these agencies in maternity leave policy mooted the claim for injunctive and declaratory relief.[3] As to the

to the interpretation that any successor in interest to dedicated gas could avoid dedication if sales were stopped on May 31, 1978.

1. Monell v. Department of Social Servs., 357 F. Supp. 1051 (S.D.N.Y. 1972). The court, in a memorandum opinion, denied plaintiffs' motion for summary judgment, but did agree to designate their claim as a class action in accordance with FED. R. CIV. P. 23.

2. 42 U.S.C. § 1983 (1976) provides:

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

3. Monell v. Department of Social Servs., 394 F. Supp. 853, 855 (S.D.N.Y. 1975). The district court held the claims for injunctive and declaratory relief were moot since the change in policy removed any definite controversy that must exist before judicial determination is appropriate. This requirement is mandated by the Constitution, which limits the

claim for lost wages, the district court concluded that while the petitioners' constitutional rights had indeed been violated,[4] there should be no recovery because, if allowed, the city of New York would bear ultimate financial responsibility, thus circumventing the immunity granted municipalities by the Supreme Court in *Monroe v. Pape*.[5] The court of appeals affirmed the dismissal,[6] concluding, first, that neither the Department of Social Services nor the Board of Education were "persons" within the meaning of section 1983 and, secondly, that although the defendant officials were "persons" under section 1983, they could not be sued for damages in their official capacity if any sum awarded would ultimately be paid by the city.[7] Upon grant of certiorari,[8] the case came before the Supreme Court. *Held, reversed*: Municipalities and other local government units were intended by Congress to be "persons" within the meaning of section 1983. Consequently, such local government units can be sued directly under section 1983 for monetary, declaratory, and injunctive relief. *Monroe v. Pape*, insofar as it holds that such local government entities are wholly immune from suit under section 1983,[9] is overruled. *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

I. THE HISTORY OF SECTION 1983

A. *Early Development*

Judicial interpretation of section 1983[10] has focused on legislative his-

exercise of the judicial power to "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1. For a discussion of the doctrine of mootness, see Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) ("[t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests"). *See also* North Carolina v. Rice, 404 U.S. 244, 246 (1971); Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union v. Missouri, 361 U.S. 363, 367 (1960).

4. 394 F. Supp. at 855. In Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), the Supreme Court held that mandatory cut off dates for maternity leaves violated the due process clause of the fourteenth amendment by creating a "conclusive presumption" that a woman in her fourth month of pregnancy is physically unable to continue employment. *See generally* Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. C.R.-C.L.L. REV. 260 (1972); Comment, *Mandatory Maternity Leave of Absence Policies—An Equal Protection Analysis*, 45 TEMP. L.Q. 240 (1972).

5. 365 U.S. 167 (1961).

6. Monell v. Department of Social Servs., 532 F.2d 259 (2d Cir. 1976).

7. *Id.* at 266. The court stated that "the mere substitution of the name of the official for the name of the city in the complaint cannot be used as a subterfuge to circumvent the intent of Congress." *See* Edelman v. Jordan, 415 U.S. 651, 663 (1974) (finding that it was well established that even though a state is not named party to action, suit will be barred where recovery will ultimately come from the state); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945) (stating that "[w]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants").

8. Monell v. Department of Social Servs., 429 U.S. 1071 (1977). Certiorari was denied, however, on plaintiffs' motion to apply 42 U.S.C. § 2000e (Supp. V 1975) retroactively. The Supreme Court restricted certiorari to the questions regarding § 1983.

9. The Court reaffirmed *Monroe* as to its holding that a municipality cannot be held liable under § 1983 on a respondeat superior theory.

10. Section 1983 was originally enacted as Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13.

tory in an effort to determine what Congress intended when it passed the statute.[11] Therefore, to facilitate an understanding of recent cases, an analysis of the historical setting and the congressional debates from which section 1983 emerged is necessary.[12] The Reconstruction period that followed the Civil War witnessed Southern resistance to the idea of extending constitutional protection to former slaves.[13] Such resistance often took the form of deliberate inactivity by state and local officials in the wake of denials of personal liberties that enabled organized terrorism to gain momentum.[14] The Forty-second Congress responded to this situation by enacting the Civil Rights Act of 1871.

Section 1983 of the Civil Rights Act of 1871 was designed broadly to enforce the guarantees and protections expressed in the Constitution,[15] specifically, the thirteenth, fourteenth, and fifteenth amendments,[16] by adding civil remedies to the criminal penalties established by the Civil Rights Act of 1866.[17] The uncontroversial nature of section 1983 led to its passage in Congress as introduced, with little debate.[18] Consequently, legislative history relating specifically to section 1983 is limited; however, other provisions of the statute were extensively debated both as to the wisdom and constitutionality of such legislation, and, thus, provide much of the historical background of the entire Act.[19]

In particular, extensive debate focused on a proposed amendment to the

11. *See, e.g.*, Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 581-86 (1976); Imbler v. Pachtman, 424 U.S. 409, 433 (1976) (White, J., concurring); Rizzo v. Goode, 423 U.S. 362, 384-85 (1976) (Blackmun, J., dissenting); City of Kenosha v. Bruno, 412 U.S. 507, 517-20 (1973) (Douglas, J., dissenting); Moore v. County of Alameda, 411 U.S. 693, 704-10 (1973); Monroe v. Pape, 365 U.S. 167, 167 (1961).

12. *But see* Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 533 (1964) ("[h]istory does not provide the answers to the problems of today; it merely helps to frame the questions"). *See generally* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 200 (1969).

13. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1153-56 (1977).

14. *Id.* Congressional concern was exemplified by the remarks of Rep. Lowe: "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective." CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871). Atrocities committed by the Ku Klux Klan caused great concern among congressional members. *Id.* at 153-57, 198-202, 236-40. *See generally* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 279-80 (1965).

15. *See* CONG. GLOBE, *supra* note 14, at 569. ("[Section 1983 is] so very simple and [is] really reenacting the Constitution.") (remarks of Sen. Edmunds). *See generally* Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333 (1969).

16. U.S. CONST. amend. XIII (abolishes slavery and involuntary servitude); U.S. CONST. amend. XIV (guarantees privileges and immunities of citizenship, due process, and equal protection); U.S. CONST. amend. XV (guarantees right of citizens to vote).

17. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140 (now codified at 42 U.S.C. § 1981 (1976)); Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (now codified at 42 U.S.C. § 1982 (1976)). Congressional debates showed no constitutional objection to the addition of civil penalties through § 1983. *See* CONG. GLOBE, *supra* note 14, at 824 (remarks of Sen. Thurman). *See also* CONG. GLOBE app., 42d Cong., 1st Sess. 67-71 (1871) (remarks of Rep. Shellabarger). *See generally* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1488 & n.14 (1969).

18. *See* CONG. GLOBE, *supra* note 14, at 522, 709.

19. 436 U.S. at 665.

Civil Rights Act of 1871 by Senator Sherman.[20] The Sherman Amendment proposed to make both municipalities and its citizens strictly liable under the Civil Rights Act of 1871.[21] Opponents of the Sherman Amendment argued that Congress had no authority to impose a new obligation on municipalities to keep the peace.[22] *McCulloch v. Maryland*[23] and *Kentucky v. Dennison*[24] were urged as support for the position that Congress was prohibited from imposing on state officers new duties that might interfere with state activity. Opponents further distinguished imposition of a new duty from an imposition of civil liability for failure to enforce the Constitution. Since the federal courts had enforced the contract clause[25] against municipalities,[26] reasoning such enforcement merely vindicated the Constitution, critics of the amendment conceded that Congress did have the constitutional power to confer jurisdiction on the federal courts to hold

20. *See* CONG. GLOBE app., *supra* note 17, at 220, 335-36 (remarks of Sen. Thurman). The Sherman Amendment was not an amendment to § 1983 but was to be a separate section of the Act.

21. The Sherman Amendment would have imposed strict liability on the municipality and its citizens for the actions of each citizen irrespective of whether the constitutional deprivations were perpetrated under color of state law. The original version of this amendment is stated in CONG. GLOBE, *supra* note 14, at 663. Although the Senate passed the amendment, the House refused to accept the change, forcing the bill to a conference committee. The first committee substitute exempted citizens from liability, and allowed municipal liability only where a judgment recovered by a plaintiff remained unsatisfied. CONG. GLOBE, *supra* note 14, at 749. This amended version was again rejected by the House. Note, *Damage Remedies Against Municipalities For Constitutional Violations*, 89 HARV. L. REV. 922, 947 n.132 (1976).

22. Rep. Blair stated this position:

> [T]here are certain rights and duties that belong to the States . . . 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. . . .
>
> . . . [I]t is not within the power of the Congress . . . to lay duties upon a State officer. . . .

CONG. GLOBE, *supra* note 14, at 795. Although legislative debate never specifically focused on what exactly this new duty entailed, the major concern was that it mandated more than what was required by the Constitution. Rep. Burchard argued:

> [T]here is no duty imposed by the Constitution . . . 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. . . . [B]ut they [the counties] do not have any control of the police. . . .

Id. at 795. Whatever this new duty specifically involved, it was clear that Congress was concerned that imposing new obligations on the officials would make them so overburdened with federal duties, that they would neglect their state obligations. *Id.* at 799.

23. 17 U.S. (4 Wheat.) 316 (1819).

24. 65 U.S. (24 How.) 66 (1861).

25. U.S. CONST. art. I, § 10, cl. 1, which provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

26. For cases upholding the power of federal courts to enforce the contract clause against municipalities, see Board of Supervisors v. United States *ex rel.* Durant, 76 U.S. (9 Wall.) 415 (1870); United States *ex rel.* Benbow v. Mayor of Iowa City, 74 U.S. (7 Wall.) 313 (1869); Board of Supervisors v. United States *ex rel.* Rogers, 74 U.S. (7 Wall.) 175 (1869); Board of Comm'rs v. Aspinwall, 65 U.S. (24 How.) 376 (1861).

cities liable.[27] Since, however, the Forty-second Congress viewed section 1983 as merely imposing liability on municipalities for using their authorized powers in violation of the Constitution, the question of whether or not a new duty was imposed was not at issue.

The Sherman Amendment, as finally passed, made any person who had knowledge of the wrongs conspired to be done and power to prevent those wrongs, but who neglected to exercise that power, liable to the person injured;[28] thus abandoning the concept of municipality liability, and thereby avoiding the previous constitutional objections.

In the absence of direct legislative history of section 1983, many federal courts applied the above background of the Sherman Amendment by negative inference, which resulted in a restriction of the scope of section 1983. These narrow, negative constructions were made despite the fact that this section was intended to provide a broad civil remedy to anyone deprived of a constitutional right under color of state law.[29] In restricting the application of section 1983, the concern seemed to be that a broad reading would allow the federal government to usurp the power of the states[30] through the imposition of new duties on municipalities, an imposition that had been flatly rejected during the Sherman Amendment debates. Narrow interpretations of the constitutional rights protected by the statute and a restrictive view of the concept of "under color" of state law[31] were the traditional methods used by the courts to limit the application of section 1983.[32] The modern trend has been to shift emphasis from the rights protected and the presence of state action to other provisions of section 1983,[33] specifically, the definition of "person" for purposes of defining the scope

27. *See* CONG. GLOBE, *supra* note 14, at 794-95 (remarks of Rep. Poland and Rep. Burchard).

28. *Id.* at 804.

29. CONG. GLOBE app., *supra* note 17, at 68 (remarks of Rep. Shellabarger).

30. *Developments in the Law*, *supra* note 13, at 1191.

31. The acts of a government official can be "under color" of state law in violation of federal civil rights even if that official's actions are not in violation of that state law. Thus, it is irrelevant to consider whether the state had authorized the wrong. *See* Monroe v. Pape, 365 U.S. 167, 183 (1961). *See also* Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18—4 (1978).

32. *Developments in the Law*, *supra* note 13, at 1156-61, 1191. Cases narrowly interpreting the constitutional rights protected include: United States v. Stanley (Civil Rights Cases), 109 U.S. 3 (1883) (held legislation unconstitutional as beyond the power of Congress to enforce the fourteenth amendment because it was directed against private discrimination); United States v. Cruikshank, 92 U.S. 542 (1876) (held the fourteenth amendment could reach the conduct of state governments and officials, but could not reach that of private persons); Butchers' Benevolent Ass'n v. Crescent City Live-Stock Landing (Slaughterhouse Cases), 83 U.S. (16 Wall.) 36 (1873) (held interests protected by the fourteenth amendment were limited to only those rights related to the existence of the national government). Cases claiming deprivations "under color" of state law usually involved actions clearly within a command of state law. *See, e.g.*, Giles v. Harris, 189 U.S. 475 (1903); Bowman v. Chicago & N.W. Ry., 115 U.S. 611 (1885); Carter v. Greenhow, 114 U.S. 317 (1885).

33. *See Developments in the Law*, *supra* note 13, at 1191. Decisions have begun to require requisite states of mind before finding liability. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976). Other decisions have created limits on availability of relief once liability is established. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967).

and extent of liability under section 1983. Such a significant restriction of "person" occurred in *Monroe v. Pape*; thus, further analysis of the meaning of the word "person" must begin with consideration of that case.

B. *Monroe v. Pape*

In *Monroe v. Pape* Chicago police officers illegally entered the Monroes' home, harassed the family, and ransacked the house.[34] The family brought suit against the policemen and the city of Chicago under section 1983.[35] The Supreme Court held that while the complaint stated a cause of action against the police officers, the city was not a "person" within the meaning of section 1983, and therefore, was immune from suit.[36]

Justice Douglas, writing for the majority, relied solely upon legislative history of the Civil Rights Act of 1871 in determining that cities were immune from the coverage of section 1983.[37] Congressional objections to the constitutionality of the Sherman Amendment[38] were interpreted by the Court to mean that the congressional intent of the Civil Rights Act of 1871 was not to impose liability upon municipalities. Justice Douglas concluded that "[t]he response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the [Civil Rights] 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."[39]

C. *Post-Monroe Development*

Many circuit courts attempted to avoid the restrictive holding in *Monroe*. The most significant attempt was to apply *Monroe* only to suits for damages.[40] The Supreme Court in *City of Kenosha v. Bruno*,[41] however, struck down such a "bifurcated" approach to municipal liability,[42] although it did implicitly appear to state that jurisdiction for purposes of municipal liability could be proper under 28 U.S.C. § 1331.[43] Thus, sev-

34. 365 U.S. 167, 169 (1961).
35. *Id.* at 170.
36. *Id.* at 187-92.
37. *Id.* at 170-91.
38. *See* CONG. GLOBE, *supra* note 14, at 804 (remarks of Rep. Poland). *See also* text accompanying notes 20-28 *supra*.
39. 365 U.S. at 191 (footnote omitted).
40. *See, e.g.*, Harkless v. Sweeny Independent School Dist., 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961).
41. 412 U.S. 507 (1973).
42. Justice Rehnquist concluded that the definition of "person" was not "intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought." *Id.* at 513. By contrast, Justice Douglas's dissent viewed *Monroe* as resting on congressional concern that only damage liability would seriously interfere with local government activity. Justice Douglas, therefore, read *Monroe* as "containing dicta that a remedy by way of declaratory relief or by injunction is barred by § 1983." *Id.* at 516.
43. 28 U.S.C. § 1331(a) (1976) provides that: "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of

eral cases arose in federal courts urging that jurisdiction under section 1331 was warranted where an action against a municipality was founded upon the Constitution.[44] Most federal courts relied on *Monroe*'s finding that municipal liability was a deliberate legislative choice and, therefore, denied recovery against the city.[45] Another strategy was based on 42 U.S.C. § 1988,[46] which provides that where federal law is ineffective to implement the Civil Rights Acts, reference may be made to state law provided the state law is consistent with the Constitution and laws of the United States. The lower courts held that if the municipality was liable under state law, then, in essence, federal law was presumed to be ineffective to implement the Civil Rights Act, and thus reference to state law was allowed.[47] This approach amounted to bootstrapping of municipality liability into section 1983. In *Moor v. County of Alameda*,[48] however, the Supreme Court clearly rejected this rationale. The Court found that section 1988 was enacted merely to complement section 1983 and not to provide independent protection of civil rights.[49] The Court refused to review its holding in *Monroe* in light of policy arguments for a more liberal interpretation.[50] These Supreme Court decisions, although justified by stare decisis, have not only restricted attempted expansions of the section 1983 remedy, but have also resulted in barring claims against "entities resembling municipal corporations."[51] As a result, most component municipal agencies have been sheltered by *Monroe*'s immunity since they are merely extensions of the municipality.[52] Further, if a state agency is but a subdivision of the state so that liability would be recovered indirectly from the

$10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

44. *See* Perry v. Linke, 394 F. Supp. 323 (N.D. Ohio 1974); Smetanka v. Borough of Ambridge, 378 F. Supp. 1366 (W.D. Pa. 1974); Perzanowski v. Salvio, 369 F. Supp. 223 (D. Conn. 1974). *But see* Bosely v. City of Euclid, 496 F.2d 193 (6th Cir. 1974).

45. *See* Perry v. Linke, 394 F. Supp. 323, 326 (N.D. Ohio 1974). In Perzanowski v. Salvio, 369 F. Supp. 223, 229-30 (D. Conn. 1974), the court further rejected applicability of the analysis in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), in which the Supreme Court held that an implied cause of action for violation of constitutional rights arose under the general grant of jurisdiction to the federal courts in § 1331. The *Bivens* doctrine was rejected since § 1983 reflected an affirmative congressional judgment that cities were to be immune. *See also* Washington v. Brantley, 352 F. Supp. 559 (M.D. Fla. 1972); Payne v. Mertens, 343 F. Supp. 1355, 1358 (N.D. Cal. 1972). *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

46. 42 U.S.C. § 1988 (1976).

47. *See* Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973). *But see* Gonzalez v. Doe, 476 F.2d 680 (2d Cir. 1973); Yumich v. Cotter, 452 F.2d 59 (7th Cir. 1971), *cert. denied*, 410 U.S. 908 (1973). *See generally* Note, *Civil Rights—Section 1983—Municipality Subject to Section 1983 Damage Suit if Local Law Recognizes Municipal Liability*, 24 VAND. L. REV. 1252 (1971).

48. 411 U.S. 693 (1973).

49. *Id.* at 702-06.

50. *Id.* at 701-02.

51. *Developments in the Law*, *supra* note 13, at 1194.

52. *See* Garrett v. City of Hamtramck, 503 F.2d 1236, 1244 (6th Cir. 1974) (city planning commission); United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) (local planning board).

state, that agency has been granted immunity as well.[53] The Supreme Court sensed the tensions arising from its decision in *Monroe* and, finally, granted certiorari to hear *Monell v. Department of Social Services* in order to reconsider the question of whether municipalities and other local government units are "persons" within the meaning of section 1983.

II. MONELL V. DEPARTMENT OF SOCIAL SERVICES

In *Monell v. Department of Social Services* Justice Brennan, writing for the majority,[54] reviewed the Court's previous holding in *Monroe*, and concluded that a fresh analysis of the legislative history of section 1983 revealed that Congress did intend municipalities and other local government units to be "persons" within section 1983.[55]

In overruling *Monroe*, the Court first emphasized that section 1983 passed both the House and Senate as introduced.[56] Congressional debate centered on other provisions of the Civil Rights Act of 1871, thus evidencing congressional satisfaction with the wisdom and constitutionality of section 1983. Further, while *Monroe* placed great weight on congressional rejection of the Sherman Amendment, the *Monell* Court emphasized that the Sherman Amendment was not an amendment to section 1983, but was to be a separate section of the Civil Rights Act of 1871.[57] Therefore, at the time the House rejected the Sherman Amendment, section 1983 was not under consideration, having already been passed verbatim by both Houses.

A review of the congressional debates convinced the Court that the constitutional objections raised against the Sherman Amendment[58] did not prohibit the federal government from holding municipalities liable for infringement of federal rights as opposed to imposing new duties. The Court noted that even the opponents of the Sherman Amendment, who had contended that a new duty resulted from the imposition of liability, conceded that when a state had already imposed a duty to keep the peace, municipal

53. *See* Sykes v. California, 497 F.2d 197, 201 (9th Cir. 1974); Cheramie v. Tucker, 493 F.2d 586, 589 (5th Cir.), *cert. denied*, 419 U.S. 868 (1974). *See Developments in the Law*, *supra* note 13, at 1194 n.35. As to school districts and boards of education, most courts have held that they are not analogous to state agencies, political subdivisions, or municipal corporations and, thus, have imposed liability. *See* Aurora Educ. Ass'n E. v. Board of Educ., 490 F.2d 431, 435 (7th Cir. 1973), *cert. denied*, 416 U.S. 985 (1974); Scher v. Board of Educ., 424 F.2d 741, 743-44 (3d Cir. 1970). *But see* Adkins v. Duval County School Bd., 511 F.2d 690, 692-93 (5th Cir. 1975); Singleton v. Vance County Bd. of Educ., 501 F.2d 429, 430 (4th Cir. 1974). *See generally* Comment, *Suing the School Board Under Section 1983*, 21 S.D.L. REV. 452 (1976).

54. Justice Brennan was joined by Justices Stewart, White, Marshall, Blackmun, and Powell. Justice Stevens joined in Parts I (legislative history analysis), III (stare decisis discussion), and V (the holding), but stated that Parts II (respondeat superior analysis) and IV (limits of the decision) were merely advisory and, therefore, not necessary to explain the Court's decision. 436 U.S. at 660. (Stevens, J., concurring). Justice Rehnquist's dissent was joined by Chief Justice Burger.

55. *Id.* at 665.

56. *Id. See also* text accompanying notes 15-18 *supra*.

57. The Sherman Amendment was to be added as § 6 of the bill. *See* note 20 *supra*.

58. *See* text accompanying notes 20-28 *supra*.

liability was constitutionally permissible. Congress, therefore, could confer jurisdiction on federal courts to hear suits against municipalities based on a violation of that pre-existing duty.[59] Congress merely intended section 1983 to impose liability on a municipality for acting under color of state law in violation of the fourteenth amendment under the Constitution, a duty that the state was already obliged to meet.[60] Section 1983, unlike the Sherman Amendment, was not intended to impose a new obligation on municipalities.[61] Thus, the constitutional bar that existed for the Sherman Amendment was not present for section 1983.[62]

Secondly, the fact that some Congressmen had opposed the Sherman Amendment yet supported section 1983 convinced the Court that there was no constitutional objection to section 1983.[63] Congressional debate of section 1983, although limited, conclusively indicated it was intended to be enforced against state or municipal officials who interfered with constitutional rights while acting under color of state law.[64] Further, at the time of these debates, the Court had held that the federal government could neither impede the state nor interfere with its instrumentalities, including officers and agents.[65] Thus, the Court reasoned that those who voted for section 1983 must have believed these Supreme Court decisions posed no constitutional barrier.

Finally, the Court concluded that the doctrine of dual sovereignty did not limit the power of the federal courts in enforcing the Constitution against municipalities.[66] Where the Constitution had guaranteed a right, a remedy was required for violations of that right, and it logically followed that Congress had the power to ensure that remedy.[67] Holding municipalities liable for constitutional violations, therefore, was a proper exercise of that power and did not violate the doctrine of dual sovereignty.[68]

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59. *See* CONG. GLOBE, *supra* note 14, at 794-95 (remarks of Rep. Poland and Rep. Burchard). Congress, relying on contract clause precedents, recognized that this power to confer jurisdiction was constitutional. *See* note 26 *supra*. *See also* text accompanying notes 25-27 *supra*.

60. *See* CONG. GLOBE, *supra* note 14, at 701, 794-95, 799.

61. *See* text accompanying notes 20-28 *supra*.

62. The Court concluded that Congress did not see any constitutional barrier to holding municipalities liable for "using their authorized powers in violation of the Constitution." 436 U.S. at 679-80.

63. *Id.* at 682-83.

64. *See* CONG. GLOBE app., *supra* note 17, at 216-24 (remarks of Sen. Thurman). *See also Ex parte* Virginia, 100 U.S. 339, 345-48 (1880) (the Court held that the principle of federalism did not prohibit the enforcement of § 5 of the fourteenth amendment in suits against state officers in the federal courts).

65. *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

66. 436 U.S. at 680-82. To the 42d Congress, the doctrine of dual sovereignty placed limits on the powers of the national government in favor of protecting state prerogatives. The doctrine created an area that was exclusively under state control and an area exclusively under federal control, thus establishing two areas of sovereignty. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616 (1842).

67. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616 (1842).

68. 436 U.S. at 680-83; *see* text accompanying notes 22-24 *supra*. See also the contract clause discussion in text accompanying notes 25-27 *supra*.

Through application of appropriate rules of construction, the Court further substantiated its position by concluding that the general language of "any person" in section 1983 covers legal as well as natural persons. Since section 1983 was a remedial statute, in that it provided a civil remedy for all persons deprived of constitutional rights, rules of construction mandated a liberal reading.[69] The Court next emphasized that by 1871, the year in which section 1983 was enacted, courts were holding, albeit in different contexts, that municipal corporations were "persons";[70] further, Congress had recently passed a statute providing that the word "person" may extend to "bodies politic and corporate."[71] Thus, by 1871 it was established that municipalities should be treated as natural persons within the "plain meaning" of section 1983.[72] The Court, therefore, concluded that the usual meaning of the word "person" extended to municipal corporations, bringing such governmental units within the ambit of persons liable under section 1983.[73]

The Court, however, limited the liability of municipalities by holding that Congress did not intend such governmental units to be held liable on a respondeat superior theory whereby an employer is held liable for the torts of an employee acting within the scope of his employment.[74] The language of section 1983, "any person who . . . shall subject, or cause to be subjected," imposes liability only when a government, acting under color of law, causes an employee to violate another's constitutional rights. Further, the "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace"[75] that Congress thought was unconstitutional.[76]

The Court, applying the most stringent test for overruling a "statutory" decision,[77] found that it appeared beyond doubt that the *Monroe* Court misapprehended the meaning of section 1983.[78] The majority commented that municipalities could not assert a reliance claim to support a grant of

69. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 429 (5th ed. 1891); *see* CONG. GLOBE app., *supra* note 17, at 68 (remarks of Rep. Shellabarger).

70. *See* Board of Supervisors v. Cowles, 74 U.S. (7 Wall.) 118, 121 (1869); Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844). *See also* CONG. GLOBE, *supra* note 14, at 752 (remarks of Rep. Shellabarger), 777 (remarks of Sen. Sherman).

71. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

72. 436 U.S. at 687.

73. *Id.* at 688-89.

74. *Id.* at 691-95. The Court's explanation of respondeat superior, however, is confusing in that it provides that a "municipality cannot be held liable *solely* because it employs a tortfeasor." (Emphasis by the Court.)

75. *Id.* at 693.

76. *See* text accompanying notes 22-28 *supra*.

77. This test was proposed by the court in Monroe v. Pape, 365 U.S. 167 (1961). The test provided that "it [must] appear beyond doubt from the legislative history of the 1871 statute that . . . [the Court] misapprehended the meaning of the controlling provision." *Id.* at 192 (Harlan, J., concurring).

78. 436 U.S. at 700-01. Justice Powell, in his concurring opinion, agreed with the majority that the Court misapprehended the meaning of § 1983 in *Monroe*. *Id.* at 705. Justice Powell stated it was unlikely that Congress intended public officials to be "exclusively" liable for constitutional injury. *Id.* at 707.

absolute immunity,[79] since municipalities are not allowed to " 'arrange their affairs' on an assumption that they can violate constitutional rights."[80] The Court further concluded that there was no constitutional impediment to municipal liability, stating that " '[t]he Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment.' "[81] *National League of Cities v. Usery*,[82] therefore, was irrelevant to the Court's consideration of *Monell*.[83] The majority, consequently, found no justification for excluding municipalities from the persons subject to suit under section 1983.[84]

Justice Rehnquist, joined by the Chief Justice, dissented, stating that the Court was bound by *Monroe* by considerations of stare decisis, which are strongest when the Court confronts its previous construction of legislation.[85] The majority, however, noted that the immunity principle established in *Monroe* was itself a departure from prior practice, whereby municipalities and school boards had been held liable under section 1983.[86] The dissent concluded that *Monroe* was not a departure from prior practice since in previous decisions allowing suits against municipalities and school boards, the jurisdictional question had been passed upon sub silentio.[87] Unconsidered assumptions of jurisdiction did not outweigh *Monroe* and its progeny,[88] which refused to hold that municipalities were "persons" within the meaning of section 1983. As to congressional intent,

79. *Id.* at 699-700.

80. *Id.* at 700.

81. *Id.* at 690 n.54 (quoting Milliken v. Bradley, 433 U.S. 267, 291 (1977)); *see Ex parte* Virginia, 100 U.S. 339, 347-48 (1880).

82. 426 U.S. 833 (1976).

83. 436 U.S. at 690 n.54. The Court held in National League of Cities v. Usery, 426 U.S. 833 (1976), that Congress could not prescribe state minimum wages and maximum hours since that would amount to congressional interference with the states' functioning in the federal system of government established in the Constitution. The Court concluded Congress could not interfere with the states' control of integral governmental functions.

84. 436 U.S. at 701. Such interpretation accords with the meaning given the word "person" as used by Senator Sherman in antitrust legislation. *See* Layfayette v. Louisiana Power & Light Co., 435 U.S. 389, 394-97 (1978); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906).

85. *See* Runyon v. McCrary, 427 U.S. 160, 175 n.12 (1976); Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974). At present, *Monroe* has been cited over 1,350 times.

86. *See* Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir.), *vacated*, 350 U.S. 879 (1955); Hannan v. City of Haverhill, 120 F.2d 87 (1st Cir. 1941); City of Manchester v. Leiby, 117 F.2d 661 (1st Cir. 1941); Northwestern Fertilizing Co. v. Hyde Park, 18 F. Cas. 393 (C.C.N.D. Ill. 1873) (No. 10,336). *See also* note 53 *supra*.

87. *See* Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir.), *vacated*, 350 U.S. 879 (1955); Douglas v. City of Jeannette, 319 U.S. 157 (1943). In neither decision was the question whether a municipality is a "person" within the meaning of § 1983 raised by any of the litigants or addressed by the Court. *See also* Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974) ("when questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us").

88. *See* Aldinger v. Howard, 427 U.S. 1 (1976); City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973). *See also* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 277-79 (1977).

the dissent conceded that a closer analysis in *Monroe* of the meaning of section 1983 might have yielded a different conclusion, yet "the rejection of the Sherman Amendment remain[ed] instructive in that here alone did the legislative debates squarely focus on the liability of municipal corporations, and that liability was rejected."[89] Accordingly, the dissent would uphold *Monroe*'s immunity principle, leaving its abolition to the legislature, which is better equipped to consider the results such a drastic change in the law would have on municipalities and, in particular, on their limited treasuries and insurance premiums.[90]

In its broadest sense, the decision in *Monell* greatly expands section 1983 relief by providing plaintiffs with a wide range of financially responsible defendants. The conclusion reached by the Court in *Monell* is desirable because it is in keeping with congressional intent that section 1983 be a broad remedial device. Nonetheless, the Court's method for attaining this result may subject the Court to some degree of criticism. First, the information concerning section 1983 available to the Court was the same in both *Monell* and *Monroe*, and yet the two decisions arrive at opposite results. This is not to say that once the Court decides a point of law, it is forever bound; however, when a statute is interpreted by the Court, subsequent congressional silence is thought to signify congressional approval, or at the very least, acquiescence. Yet circumstances surrounding *Monell* reveal that in 1978 the Senate held hearings, which were recessed subject to call,[91] on a bill to remove the municipal immunity established in *Monroe*. The fact that Congress had subsequently considered such legislation and yet failed to pass it is some evidence of congressional intent to leave municipalities immune from suit under section 1983. The Court's decision, therefore, seized the issue from Congress and shifted the burden of passing legislation to the opponents of municipal liability. Where there is legislative stalemate, the Supreme Court has its way. Of more practical importance, however, are the consequences of the Court's decision, which at this time are difficult to predict. The Court specifically declined to address what "the full contours of municipal liability under § 1983 may be."[92] Thus, since questions of qualified immunity and availability of common law defenses for municipalities are left unanswered, the full resolution and interpretation of *Monell* is left to the lower federal courts.[93]

III. CONCLUSION

The decision in *Monell v. Department of Social Services* is truly landmark in that it greatly expands the availability of section 1983 relief for any citizen deprived of constitutional rights under color of state law. This decision may have a substantial impact on municipalities, their lim-

89. 436 U.S. at 723 (Rehnquist, J., dissenting).
90. *Id.* at 724 (Rehnquist, J., dissenting).
91. 124 CONG. REC. D129 (daily ed. Feb. 9, 1978).
92. 436 U.S. at 695.
93. *Id.* at 713-14 (Powell, J., concurring).