NOTES

From Monroe to Monell: Eliminating Absolute Municipal Immunity Under §1983

In *Monell v. Department of Social Services*,[1] the U.S. Supreme Court overruled *Monroe v. Pape*[2] insofar as *Monroe* established absolute municipal immunity under 42 U.S.C. §1983.[3] By re-examining the legislative history of the enactment of §1983,[4] the Court concluded that municipal corporations were "persons" within the meaning of §1983 and thus subject to suit when official municipal policies or customs infringe upon protected civil rights.[5]

In July, 1971, the female employees of the Department of Social Services and of the Board of Education of the City of New York filed a class action under §1983,[6] alleging that their employers "had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons."[7] Plaintiffs sought both injunctive and monetary relief. The named defendants were the Board of Education and its Chancellor, the Department of Social Services and its Commissioner, and the City of New York and its Mayor. The individual defendants were sued solely in their official capacity.[8]

Prior to trial, defendants changed their maternity leave policy; the district court thus held moot plaintiffs' claim for injunctive and declaratory

1. 436 U.S. 658 (1978).

2. 365 U.S. 167 (1961).

3. 436 U.S. at 663. 42 U.S.C.A. §1983 (1974). Referred to as R.S. §1979 in *Monroe*, this section provides in full: "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." 28 U.S.C.A. §1343(3) (1976) empowers federal courts to hear §1983 cases.

4. §1983 and 28 U.S.C. §1343 had common origin in §1 of the Civil Rights Act of 1871; later, they were separated for purposes of codification. The statute (§1983 and §1343) was enacted pursuant to §5 of the Fourteenth Amendment, and was a response to the violation of the Ku Klux Klan. 365 U.S. at 171, 174. Lynch v. Household Fin. Corp., 405 U.S. 538, 543 n.7 (1972).

5. 436 U.S. at 669.

6. The complaint was later amended to allege a claim under 42 U.S.C. §2000e (1974). The district court held that §2000e does not apply retroactively. The court of appeals affirmed and certiorari was limited to the §1983 claim. *Id.* at 660 n.1.

7. 436 U.S. at 661.

8. *Id.*

relief and dismissed plaintiffs' suit for lack of subject matter jurisdiction.[9] The district court, reasoning that a damage award against any of the named defendants "would come ultimately from the City of New York," concluded that *Monroe's* municipal immunity must therefore protect all defendants from liability under §1983.[10]

On appeal, plaintiffs argued that *Monroe* did not extend to public entities such as the Board of Education and that a damage award could have nonetheless been granted against the individual defendants who were clearly "persons" within the meaning of §1983. The Second Circuit found that the Board "was not a person under §1983 because 'it performs a vital governmental function . . . .'"[11] The Second Circuit concluded further that *Monroe* prohibits a damage award against individual defendants sued in their official capacity because such a judgment would in fact be satisfied out of the public fisc.[12]

Actions brought under §1983[13] can be separated into two categories: political cases and constitutional tort cases.[14] In a constitutional tort case, the plaintiff seeks damages from a government official in his personal capacity, claiming that the tortious conduct of this individual has infringed upon the plaintiff's constitutional rights. In a political case like *Monell,* the plaintiff sues a state or local government, or an individual in his official capacity, claiming that the policies of the public entity are unconstitutional.[15] Although the *Monroe* Court limited the effectiveness of §1983 in political cases by interpreting the word "persons" to exclude municipal corporations, the Court significantly expanded the role of §1983 in the area of constitutional torts by interpreting the phrase "under color

9. Since none of the defendants were considered "persons" within the meaning of §1983, no federal jurisdiction existed under 28 U.S.C. §1343(3).

10. 436 U.S. at 661.

11. *Id.* at 662, *quoting* Monell v. Department of Social Servs., 532 F.2d 259, 263 (2d Cir. 1976). "The circuits have generally found that municipal, county, and state agencies established by statute or ordinance, or maintained by state or local government, financially or otherwise, are not 'persons" within ambit of §1983." Comment, *Federal Jurisdiction—Civil Rights Jurisdiction Under 28 U.S.C. §1343(3),* 47 MISS. L.J. 799, 801 n.25 (1976).

12. 436 U.S. at 662. The court of appeals in *Monell* concluded that an award of back pay was not a mere adjunct of equitable relief. 532 F.2d 259, 265 (2d Cir. 1976).

13. "The two requisites for a §1983 cause of action are: (1) an allegation that the conduct complained of subjected the complainant to a deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States, and (2) an allegation that the conduct complained of was done or caused to have been done by a person acting under the color of law." Jennings v. Davis, 476 F.2d 1271, 1275 (8th Cir. 1973) (citation omitted).

14. *See* Levin, *The Section 1983 Municipal Immunity Doctrine,* 65 GEO. L.J. 1483 (1977).

15. *Id.* at 1485-86. The development of various personal immunities have limited the effectiveness of §1983 in the constitutional tort area. *See* Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute immunity for state prosecutors); Scheuer v. Rhodes, 416 U.S. 232 (1974) (provides executive officials with qualified immunity when they acted in good faith); Pierson v. Ray, 386 U.S. 547 (1967) (policemen enjoy immunity for their good faith enforcement of unconstitutional laws). Note that qualified immunity applies only to damages and not to equitable relief. Wood v. Strickland, 420 U.S. 308, 314-16 n.6 (1975).

of" law to include acts of a state official while performing his duties, even if unauthorized by state law.[16]

Plaintiffs in *Monroe* filed suit for damages against the City of Chicago and certain police officers in the federal district court, alleging invasion of their constitutional rights in a particularly outrageous warrantless search and subsequent unauthorized detention of Mr. Monroe.[17] The district court found that a cause of action under §1983 did not exist against either the city or the individual officers, and the Seventh Circuit affirmed.[18] The Supreme Court reversed the district court in part, finding that a federal remedy did exist against the individual officers despite the availability of a state court remedy, but affirmed the dismissal of the municipal defendant.[19]

Since the *Monell* decision overruled only that part of *Monroe* which established municipal immunity under §1983, this casenote will focus only on the restrictive impact of *Monroe* on civil rights litigation.

During the seventeen years between *Monroe* and *Monell*, §1983 plaintiffs pursued a number of strategies aimed at holding municipalities liable for their civil rights violations. On three occasions,[21] the U.S. Supreme Court expressly affirmed *Monroe* while simultaneously dismissing various attempts to narrow *Monroe's* protective shield. The brief overview of this period that follows will illuminate the continuing ambiguity that surrounded the effective limits of municipal immunity, the importance of *Monell* as a clarifying measure, and the limited practical impact of *Monell*.

A significant limitation on municipal immunity initially emerged as courts interpreted a footnote[22] in the *Monroe* opinion as prohibiting suits against municipalities for damages but not for injunctive relief.[23] Despite the support for this interpretation among the circuit courts, the Supreme Court, in *City of Kenosha v. Bruno*[24] struck down this bifurcated application of municipal immunity. The Court concluded that the legislative history discussed in *Monroe* and the language of §1983 indicate that municipalities are outside the ambit of §1983 "for purposes of equitable relief

16. 365 U.S. at 172, 183-87.

17. *Id.* at 187.

18. Monroe v. Pape, 272 F.2d 365, 366 (7th Cir. 1959).

19. 365 U.S. at 187, 192.

20. Initial commentary on *Monroe* focused almost exclusively on the court's "color of law" interpretation. It was immediately evident that federal courts could take a more active role in constitutional tort cases. In *Monell*, Justice Rehnquist referred to *Monroe* as "the fountainhead of the torrent of civil rights litigation of the last 17 years." 436 U.S. at 724.

21. 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).

22. 365 U.S. at 191 n.50.

23. *See, e.g.*, Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968). This interpretation found support in Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) and Turner v. City of Memphis, 369 U.S. 350 (1962).

24. 412 U.S. 507 (1973).

as well as for damages."[25]

Other courts interpreted *Monroe's* immunity as applicable only when the governmental entity was clothed in immunity by its parent state.[26] Thus, if the municipality could be held liable under state law, the §1983 litigant could rely on 42 U.S.C. §1988,[27] which authorizes the incorporation of state law in federal civil rights acts where the federal law does not "furnish suitable remedies." In *Moor v. County of Alameda,*[28] the Supreme Court rejected this derivative use of §1983, reasoning that §1988 "cannot be used to accomplish what Congress clearly refused to do in enacting §1983."[29] The Court in *Moor,* however, left open the possibility that state law claims against municipalities might be heard in federal court in conjunction with §1983 claims against municipal officials under the doctrine of pendant jurisdiction. The court resolved this uncertainty in *Aldinger v. Howard*[30] by rejecting the plaintiff's claim against the city. Again focusing on the legislative history discussed in *Monroe,* the Court interpreted the congressional intent behind §1983 as prohibiting pendent-party jurisdiction over governmental entities.[31]

After *Kenosha,* §1983 plaintiffs frequently avoided municipal immunity through official capacity suits.[32] Plaintiffs' action in *Monell* illustrates this strategy. Plaintiffs filed their action against the Department of Social Services and the Commissioner in his official capacity. Typically, the agency would have been dismissed as a defendant for lack of subject matter jurisdiction,[33] leaving the Commissioner as the sole defendant.[34] However, since the Commissioner ultimately would have been responsible for the maternity leave policy, a court order binding the Commissioner would have been, in effect, an injunction against the Department of Social Services.[35] Furthermore, the district court could have granted plaintiffs' plea

25. *Id.* at 513. The Court's decision in *Monell* does not alter the conclusion reached in *Kenosha*—§1983 was not intended to have a bifurcated application depending on the nature of the relief sought. 436 U.S. at 701 n.66.

26. *See, e.g.,* Carter v. Carlson, 447 F.2d 358, 368-69 (D.C. Cir. 1971), *rev'd on other grounds sub. nom.,* District of Columbia v. Carter, 409 U.S. 418 (1973).

27. 42 U.S.C.A. §1988 (1974).

28. 411 U.S. 693 (1973).

29. *Id.* at 710. The Court's decision in *Monell* does not affect *Moor's* conclusion on the proper use of §1988. *See Monell,* 436 U.S. at 701 n.66.

30. 427 U.S. 1 (1976).

31. *Id.* at 17-18 n.12.

32. Lytle v. Commissioners of Election, 541 F.2d 421, 426 (4th Cir. 1976); Thomas v. Ward, 529 F.2d 916, 921 (5th Cir. 1975); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 288 (6th Cir. 1974).

33. Since the agency is a "nonperson" within the meaning of §1983, jurisdiction cannot be based upon 28 U.S.C. §1343.

34. If the officer sued in his official capacity leaves office during pendency of an action, his successor is automatically substituted. *See* FED. R. CIV. P. 25(d).

35. Maria Santiago v. Corporation de Renovacion Urbana Y Vivienda, 554 F.2d 1210, 1213 (1st Cir. 1977).

for back pay as an equitable reimbursement, and thus would have reached the public fisc through a judgment against the Commissioner.[36] Technically, the agency would have been immunized by *Monroe,* but in reality, plaintiffs' action against the official would have been simply another way of pleading an action against the public entity.[37]

Courts have justified this official capacity loophole through a narrow interpretation of the rationale behind *Monroe-Kenosha,* and through an analogy to *Ex Parte Young.*[38] In *Young,* the U.S. Supreme Court held that the Eleventh Amendment's sovereign immunity did not protect a state official in an action to enjoin him from enforcing an unconstitutional statute.[39] This legal fiction obviously encouraged plaintiffs to file their injunctive suits directly against the state's officials, with the plaintiff's relief limited only by the court's equity power.[40] The possibility of using a similar pleading device to avoid municipal immunity was immediately evident at the time of the *Kenosha* decision. Thus, when *Kenosha* foreclosed equitable actions against municipalities, §1983 litigants sought to determine whether federal courts would nonetheless entertain equitable actions against municipal officials. All the circuits gradually did take the position that *Kenosha* had not barred official capacity suits,[41] and the Supreme Court confirmed this interpretation in *Bishop v. Wood.*[42]

Initially, it seemed that the official capacity suit would result in the effectiveness of *Monroe's* immunity being limited to actions seeking only damages, and that municipalities, through their officials, would be subjected to injunctive decrees and ancillary monetary relief. The Supreme Court, however, in *Edelman v. Jordan,*[43] interpreted *Young* as allowing only prospective injunctive relief, and not retroactive awards requiring a present disbursement of public funds.

The decisions of the Fifth Circuit in *Muzquiz v. City of San Antonio*[44] and the Second Circuit in *Monell*[45] evidenced the subsequent contractive

36. Owen v. City of Independence, 560 F.2d 925, 932 (8th Cir. 1977); Burt v. Board of Trustees, 521 F.2d 1201, 1205-06 (4th Cir. 1975).

37. 436 U.S. at 690 n.55.

38. 209 U.S. 123 (1908).

39. *Id.* at 159-60.

40. The Supreme Court rejected the application of the *Young* fiction to suits for monetary damages. Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).

41. For citations see Levin, *The Section 1983 Municipal Immunity Doctrine,* 65 GEO. L.J. 1483, 1500-01 n.65 & 67 (1977).

42. 426 U.S. 341 (1976) (jurisdiction recognized in §1983 action in which police chief in his official capacity was the only named defendant).

43. 415 U.S. 651, 667-68 (1974) (5-4 decision).

44. 528 F.2d 499 (5th Cir. 1976) (en banc panel adopted Justice Godbold's dissent. *See* 520 F.2d at 1008-10 for discussion of *Edelman*). Initially, *Muzquiz* appeared to prohibit any kind of declaratory or injunctive relief against local government officials, but *Thurston v. Dekle* interpreted *Muzquiz* as prohibiting only *Edelman*-like restitutionary and damage recoveries. 531 F.2d 1264, 1269 (5th Cir. 1976).

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

impact of *Edelman* on §1983 actions. Both cases, relying upon an analogy to *Edelman,* interpreted *Monroe-Kenosha* as explicitly barring suits for equitable relief, nominally brought against governmental officials, if that relief would have some impact on the public fisc.[46] In conflict with the Second and Fifth Circuits, the Fourth Circuit continued to entertain §1983 actions involving equitable reimbursements.[47] By refusing to consider the impact of *Edelman,* the Fourth Circuit openly resisted any narrowing of the scope of remedies available against public entities in civil rights litigation.

Although the official capacity suit generally circumvented municipal immunity when the plaintiff sought injunctive relief, certain §1983 actions typically involved only damage claims and thus necessitated a different attack on *Monroe.* For example, when a policeman's conduct violated a person's constitutional rights (*e.g.,* false arrest, malicious prosecution, physical abuse, etc.), an action for damages could have been filed against the policeman in his personal capacity and against the municipal employer.[48] But, in these cases and other constitutional tort cases, *Monroe* consistently shielded the municipality from liability under §1983.[49] Numerous courts, however, relying on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,*[50] again mitigated the impact of *Monroe* by holding that the Fourteenth Amendment itself authorizes the judicial creation of a remedy in damages against the municipality.[51] Thus, when a plaintiff asserted a *Bivens*-type action, the pivotal issue was no longer whether the court had subject matter jurisdiction over the municipality, but whether the plaintiff had stated a claim upon which relief could be granted. If the court recognized that the plaintiff had a substantive cause of action arising directly under the Constitution, then jurisdiction was available under 28 U.S.C. §1331[52] instead of §1343.[53] These lower courts at least implicitly decided that the exclusion of municipal liability under

46. 528 F.2d at 500; 532 F.2d at 265.

47. *See* Burt v. Board of Trustees, 521 F.2d 1201 (4th Cir. 1975); Thomas v. Ward, 529 F.2d 916 (4th Cir. 1975).

48. *See, e.g.,* Clark v. State of Ill., 415 F. Supp. 149 (N.D. Ill. 1976); Riley v. City of Minneapolis, 436 F. Supp. 954 (D. Minn. 1977).

49. *See, e.g.,* Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975); Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977). Various personal immunities would also limit the plaintiff's available relief.

50. 403 U.S. 388 (1971).

51. *See* Skehan v. Board of Trustees, 501 F.2d 31, 44 (3d Cir. 1974); Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977); Amen v. City of Dearborn, 532 F.2d 554, 559 (6th Cir. 1976); Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 576-77 (7th Cir. 1975); Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975); Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 805 (9th Cir. 1975). The Second Circuit has not resolved this issue. *See Monell,* 532 F.2d at 260 n.1.

52. 28 U.S.C. §1331 (1966) permits claims arising under the U.S. Constitution which satisfy the $10,000 amount in controversy requirement.

53. *See* note 3, *supra.*

§1983 should not be read into §1331.[54] Some courts have also concluded that a municipality may be held vicariously liable on a fourteenth amendment claim, even though *Monroe* interpreted §1983 as prohibiting liability under the doctrine of respondeat superior.[55]

Since the development of municipal immunity under §1983 was based solely upon an inference drawn from the rejection by the House of the Sherman Amendment,[56] the Court in *Monell* again focused on the legislative debates analyzed in *Monroe*. Justice Brennan, speaking for the majority,[57] concluded that *Monroe* had incorrectly equated congressional opposition to creating new municipal obligations with opposition to imposing civil liability on municipalities.[58] The Sherman Amendment was rejected because Congress believed that it lacked the power to obligate municipal corporations to keep the peace—a duty which most states had not delegated to their municipalities.[59] The Court, attempting to document carefully its re-interpretation, explained that the constitutional objection directed at the Sherman Amendment was grounded in the prevailing doctrine of coordinate sovereignty. Under this doctrine, the legitimate independence of a state government would be imperiled if the national government were free to impose duties upon a state's officials or instrumentalities.[60] But the Court noted that it was equally clear to the opponents of the Sherman Amendment that the federal judiciary *could* enforce the Fourteenth Amendment against those municipalities that violated it.[61]

After dispelling *Monroe's* inference that the 42nd Congress intended to shield municipalities from civil liability, the Court had still to determine whether the language of §1 [§1983] was intended to cover more than natural persons.[62] Justice Brennan concluded that the language of §1983

54. Under *Bivens*, the legislative history of §1983 would have to be interpreted as not constituting an "explicit congressional declaration" against municipal immunity. 403 U.S. at 396-97. Some courts have held that Congress intended to immunize local governmental units from monetary liability under 28 U.S.C. §1331. *See, e.g.*, Pitrone v. Mercadante, 420 F. Supp. 1384 (E.D. Pa. 1976). In Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278-79 (1977), the Court refused to resolve this issue.

55. *See, e.g.*, Santiago v. City of Philadelphia, 435 F. Supp. 136, 148-49 (E.D. Pa. 1977). *But see* Adekalu v. New York City, 431 F. Supp. 812, 820 (S.D. N.Y. 1977).

56. The Sherman Amendment was added as §7 to the 1871 Civil Rights Act, and was twice amended in conference committee. The Court in *Monroe* focused on the House's rejection of the first version of §7, which imposed civil liability on municipalities regardless of whether the municipality was "authorized to exercise a police power" or whether it could have prevented the riot. 436 U.S. at 666-68. Debate on §1 [§1983] was limited and it was passed as introduced. *Id.* at 666. Thus, the Court in *Monroe* and *Monell* used the debate surrounding §7 to determine the congressional intent behind §1 [§1983].

57. Justice Stevens joined only parts I, III, and V of the majority opinion. Justice Powell wrote a concurring opinion, and Chief Justice Burger and Justice Rehnquist dissented.

58. 436 U.S. at 665.

59. *Id.* at 673.

60. *Id.* at 676-79.

61. *Id.* at 681-82.

62. *Id.* at 683.

was intended to cover legal as well as natural persons, basing this construction on three observations. First, the supporters of §1983 intended it to be liberally construed.[63] Second, the legislative draftsmen were familiar with the *Letson*[64] principle, under which municipal corporations were treated as natural persons.[65] And last, Congress, in order to facilitate the interpretation of federal statutes, had recently passed an act which read in part: "the word 'person' may extend and be applied to bodies politic and corporate."[66]

The Court interpreted §1983, as it had in *Monroe,* to exclude vicarious municipal liability. Thus, for a municipality to be liable under §1983, the unconstitutional actions of its employees must emanate from the municipality's official policies or customs.[67] Pointing first to the language of §1983 ("any person who . . . shall subject, or cause to be subjected"), the Court stated that a causal relationship must exist between the public entity and the violation of the constitutional rights.[68] Furthermore, Congress' rejection of the elements of vicarious liability found in the Sherman Amendment indicated to the Court that Congress did not intend vicarious liability to be read into §1983.[69]

Although the majority opinion thoroughly canvassed the 1871 legislative debates and convincingly argued that the *Monroe* conclusions were ill-founded, Justice Rehnquist's dissent illustrates how the 1871 debates can be marshaled to support conflicting polemics.[70] Justice Rehnquist basically would have preferred to leave *Monroe* intact because of state decisis[71] and because of his dissatisfaction with the expansion of civil rights litigation under §1983.[72] Given these preferences, he argued that the majority had not met its burden of persuasion,[73] and that Congress should determine the merits of municipal liability under §1983.[74]

Neither Brennan nor Rehnquist, however, adequately explain what prompted the Court in *Monell* to overrule *Monroe.* Justice Powell's concurring opinion[75] sheds some light on the impetus behind *Monell.* Justice Powell noted that the Court in *Monroe* was not aware of "the implications of holding §1983 inapplicable to official municipal policies."[76] The Second

63. *Id.* at 685 n.45.
64. Louisville R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844).
65. 436 U.S. at 687-88.
66. *Id.* at 688-89.
67. *Id.* at 690-91.
68. *Id.* at 691-92.
69. *Id.* at 692 n.57.
70. *Id.* at 714 (Rehnquist, J., dissenting).
71. *Id.* at 715.
72. *Id.* at 724.
73. "*Monroe* may not be overruled unless it has been demonstrated 'beyond doubt from the legislative history of 1871 statute that [*Monroe*] misapprehended the meaning of the controlling provision.'" *Id.* at 719, *quoting Monroe,* 365 U.S. at 192.
74. *Id.* at 719, 724.
75. *Id.* at 704 (Powell, J., concurring).
76. *Id.* at 709 n.6.

Circuit's decision in *Monell* can be interpreted as crystalizing these "implications;" in *Monell* an official policy allegedly violated basic civil rights, yet the Second Circuit's decision would have left plaintiffs without a remedy. Powell, however, did not challenge the Second Circuit's reasoning. He recognized that an *Edelman* analogy would limit monetary relief in official capacity suits.[77] And, along with the majority, he conceded that *Monroe's* immunity would logically extend to a school board.[78] Going beyond the Second Circuit's analysis, Powell also noted that even the injunctive relief available under an official capacity suit conflicts with the rationale of *Kenosha.*[79] Thus, the state of the law prior to *Monell,* properly applied, could conceivably leave §1983 litigants without recourse against public entities. Finally, Powell indicated it would be better to overrule *Monroe* than to resolve the question of whether municipalities can be sued directly under the Fourteenth Amendment.[80]

Thus, Powell's concurring opinion evidences a sensitivity to the difficult and impending questions affecting the potential scope of municipal immunity, and to the remedial purpose of §1983. It seems plausible that the majority shared Powell's perspective but nonetheless realized that *Monroe* must be overruled on the basis of statutory construction.

Regardless of what prompted the majority to re-examine and overrule *Monroe, Monell* at least clarified the limits of municipal accountability under §1983. Litigants will no longer need to resort to the legal fiction inherent in official capacity suits, nor will lower courts need to determine whether an analogy to *Edelman* prohibits equitable reimbursements under §1983. An agency's liability also will no longer turn on whether it is found to be an "arm" of the municipality. Furthermore, it is now unnecessary to allege a cause of action directly under the Fourteenth Amendment, thus eliminating the need to satisfy the $10,000 amount in controversy requirement of 28 U.S.C. §1331. One potentially unsettled area of municipal liability, however, is whether some lower courts will continue to recognize vicarious liability under a *Bivens*-type action.

The practical significance of *Monell* is less clear. Since the *Monell* court refused to recognize vicarious liability under §1983, this decision will have no impact on constitutional tort cases. Injunctive relief will also essentially remain unchanged because of the prior practice of official capacity suits. Although litigants will now be encouraged to file damage suits against public entities, this type of case in the past has represented the minority of §1983 actions. Furthermore, with certain damage suits, *Monell* will simply replace a *Bivens*-type action. Finally, the Second and Fifth Circuits

77. *Id.* at 711-12.
78. *Id.* at 710-11; *see also* majority opinion at 696, 697.
79. *Id.* at 712.
80. *Id.* at 712-13.

will no longer be justified in denying equitable reimbursements under §1983.

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