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Civil Rights Litigation After Monell

Eric Schnapper*

In the years between 1961 and 1978, when federal civil rights litigation emerged as a significant portion of the work of the federal courts and a major vehicle for developing and enforcing constitutional law, the course and outcome of that litigation was colored by the Supreme Court’s decision in *Monroe v. Pape* that cities could not be sued for damages under 42 U.S.C. § 1983 for constitutional violations. That decision ultimately came to govern not only the availability of monetary relief, but also the availability of injunctive relief against a governmental body, the applicability of state law remedial principles under 42 U.S.C. § 1988, the joinder of state law claims against such bodies, and the scope of injunctive relief available against state and local officials. The practical importance of

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1. In the first 175 years of constitutional litigation most constitutional issues involving state or local governments originated in the state courts and only reached the federal courts by appeal to, or writ of error or certiorari from, the Supreme Court. E.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Powell v. Alabama*, 287 U.S. 45 (1932); *Lochner v. New York*, 198 U.S. 45 (1905); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).


other decisions, such as those providing absolute immunity for judges,\(^8\) prosecutors,\(^9\) and legislators,\(^10\) and qualified immunity for executive officials,\(^11\) turned on *Monroe* as well. Thus, the foundation of many of these procedural and remedial rules was destroyed in June 1978 when the Supreme Court overruled *Monroe* in *Monell v. Department of Social Services*,\(^12\) and held that cities and counties could be sued under section 1983 for constitutional violations rooted in official policies.

*Monroe* and its progeny had created a situation that was historically and constitutionally anomalous. First, *Monroe* stood on its head one of the most basic remedial principles of Anglo-American jurisprudence. If the Constitution was violated by a city, damage awards, long the traditional remedy for violation of a legal duty, were denied against the city, but a prospective injunction, usually the exceptional remedy, could be obtained, albeit nominally against the individual officials. Second, the scope of possible remedies was inversely proportional to the importance of the substantive legal principles involved; damages, essential to redressing past violations and deterring new ones, were generally available under state law for a simple tort by city employees, but not for a systematic violation of "the supreme law of the land." A city or state was free to violate the Constitution with impunity, confident that if and when the violation was detected, its officials would merely be directed to refrain from such violations in the future. As a result, state and local authorities who faced a possible conflict between constitutional values and more mundane interests had every reason to cavalierly disregard the former. Third, even though the fourteenth amendment was directed primarily at the conduct of states and cities as such, and only incidentally touches the actions of wayward public employees or private individuals acting in concert with them, it was solely against such employees and individuals, if at all, that damages could be obtained. *Monell* concluded that none of this was required by the language of section 1983 or by its legislative history.

*Monell* may end the controversy over the validity of *Monroe*, but the extent to which monetary relief will be available against governmental bodies remains unclear. A series of Supreme Court and lower court decisions were required to flesh out the meaning of *Monroe* until the Supreme Court decided to abandon it. *Monell* raises an entirely new, and more complex, set of issues and calls into question the vitality of past decisions which were based on *Monroe*. The answers ultimately arrived at will determine whether the victims of constitutional violations are to have a meaningful new remedy, or whether *Monell* is to be drained of meaning by exceptions and qualifications.

This Article identifies the most important issues which must be dealt

\(^8\) Pierson v. Ray, 386 U.S. 547 (1967).


\(^12\) 436 U.S. 658 (1978).
with after Monell and attempts to resolve them. Section I considers what rules and practices are "official acts, policies and customs" subjecting a government to suit under Monell. The second section analyzes the possible defenses available to a city; it concludes that the good faith immunity afforded to executive officials should not be extended to government entities, but that such entities should be afforded a somewhat narrower defense. Section III discusses the scope of injunctive relief available in section 1983 actions against state officials. Finally, section IV urges that after Monell state law claims against cities can and should be tried in federal court when joined with section 1983 actions.

I. OFFICIAL ACTS, POLICIES, AND CUSTOMS

In Monell the plaintiffs alleged that the defendant city agencies had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons, a practice the Court had earlier declared unconstitutional. Seven members of the Court agreed that such a policy was a sufficient basis for municipal liability. Although this was dispositive of the case, the Court went further and stated that, as to other cases, some form of "official" policy or action would be required, and that liability could not be based solely on the principles of respondeat superior. The standard for deciding what is such an official policy or action will be critical to the scope and vitality of Monell.

This aspect of the Court's decision, which Justice Stevens properly characterized as "merely advisory," dealt with an issue which was not in

14. Subject to possible defenses. See text accompanying notes 133-216 infra.

The Court's opinion offered four grounds for rejecting the respondeat superior rule, but its reasoning is not persuasive. First, it suggested that the fact that § 1983 makes a city liable if it caused a violation of the Constitution implies there was to be no liability in the absence of such causation. 436 U.S. at 692. But a city takes an action that is an essential causal link in the origin of the violation merely by hiring the errant employee. The issue is why the city act causing the violation must be an official policy; no support for that limitation appears on the face of § 1983. Second, the Court asserted that respondeat superior would have raised the same constitutional objections as the rejected Sherman Amendment, which would have imposed liability on counties and cities for damages caused by certain types of riots. The key constitutional objection, according to Monell itself, was that some counties lacked authority under state law to police and control the civilian population, and that Congress could not impose such a duty. Id. at 693. But all counties certainly had the authority and duty under state law to control the conduct of their own employees. Third, the Court suggests that the policy reasons for respondeat superior—deterrence and mutual insurance—were "of the same sort" that were offered for the Sherman Amendment. Id. at 694. But as the Court itself notes, Congress did not disapprove the Amendment because opponents rejected these arguments, but because the Amendment would have created liability for private conduct over which counties had no control. Id. at 679-80. Fourth, the Court emphasized that the Amendment was criticized for imposing liability even where a city or county did not know of an impending riot or had done everything in its power to prevent it. Id. at 692-93 n.57. But a city only "knows" and "does" things through its employees, and nothing in the debates on the Sherman Amendment suggests any opponent thought it relevant which city employee knew of or failed to stop a riot, providing some city employee did.
16. 436 U.S. at 714 (Stevens, J., concurring in part).
controversy in Monell itself, which neither party had raised or briefed, and which the courts below had not addressed. The absence of such a controversy will frequently mean that there is no record to which the advisory decision can be applied, and the absence of such a concrete application to particular facts will often obscure the meaning of the decision itself. Monell is such a case. It is apparent from the opinion that a city will not be held liable merely because a city employee committed a constitutional tort in the course of his or her employment, but is not clear what more is required. The opinion recites "this case unquestionably involves official policy," but this statement seems to be no more than an assertion that the city had abandoned the issue in 1971 when it filed an Answer which failed to deny the existence of the alleged policy. If the Court thought that the actual facts of Monell constituted "official policy," the opinion does not disclose what it believed those facts to be.

Monell does contain a number of vague and somewhat different descriptions of what the Court requires in order to hold a municipality liable under section 1983, which it may have thought present:

1. "[A] policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 10

2. An action or policy that has "received formal approval through the body's official decision making channels." 20

3. An action or policy "made by its law makers or by those whose edicts or acts may fairly be said to represent official policy." 21

Manifestly, no clear or established meaning can be attached to any of these phrases; the Court does not indicate which employees are "officers," how to identify a "decision making channel," or how to assess the "fairness" of attributing a policy to the city. The discussion which follows seeks to delineate the types of actions which should subject a city to liability under Monell. It considers, first, which city employees should be regarded as "policymakers" in various circumstances. It then discusses the role of "custom" in section 1983 litigation as a separate basis for liability. This is followed by an analysis of

17. Id. at 694 (Brennan, J.).
18. Id. at 661 n.2. It seems unreasonable to attach significance to a pleading filed seven years before Monell made the existence of a "policy" of legal significance. But cf. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.20 (1977) (district court's refusal to allow questioning of decisionmakers about their motives not an abuse of discretion, even though Supreme Court subsequently held that those motives were pivotal issue). Where new substantive or procedural rules are adopted, civil litigants should ordinarily be afforded an opportunity to supplement records made or modify pleadings filed prior to that development.
19. 436 U.S. at 690.
20. Id. at 691. The quoted language appears in the Court's discussion of governmental "customs" which have not been formally approved. The implication is clear that formally approved policies are sufficient to subject a municipality to liability.
21. Id. at 694.
whether a city's liability should be affected if it adopts rules forbidding unconstitutional conduct. Finally, the question of the scope of a city's liability for "causing" a person to be subjected to a deprivation of constitutional rights will be addressed. It will become clear from this discussion that municipalities will face liability under section 1983 in a wide variety of situations.22

A. Identifying the Proper Decisionmakers

Application of this aspect of Monell must begin with the recognition that a city, county, or other governmental unit does not physically pass legislation, hire police, or teach schools. Those activities are all undertaken by natural persons, and governmental decisions and policies are in the first instance decisions and policies by individual government employees as to what they or other government employees will do. The problem is thus to decide which actions by which government employees are to be characterized under Monell as the actions of "the government." Resolving that issue would be a simple matter if the government charter, constitution, or other comparable document conferred all the government's authority for all purposes on a single individual. Such an individual could properly claim "L'état, c'est moi," and anything he or she did would be an official act or policy. While there may in fact be a few very small towns with only a single official, in virtually every city, county, and other unit of government the authority for "taking official action," for deciding which government employees will do what, is divided among a number of government employees in a variety of complex ways.

1. Final Authorities. As to any particular decision as to what "the government" will do, there must be one person, or group of persons, who in the ordinary course of government business can make the final decision over what will occur. As to that decision, that individual or group by definition exercises the authority of the governmental unit, since some individual or group must do so, and all others are either irrelevant or subordinate. Other individuals or groups may play some role, and under some circumstances their acts too may be official policy, but when the progression of possible appeals reaches a level over which no other government employees exercises line authority, the official at that level necessarily exercises the final authority of the city. Such a final policymaker is, as to the particular decision involved, in precisely the same position as the sole official of a one-official town.

The final authority of a governmental unit may be divided in a number of ways. First, it may be divided into branches—executive, legislative, and

22. This section is concerned only with identifying the governmental actions which would render a governmental defendant liable if those actions are unconstitutional or if they cause a deprivation of constitutional rights. The question of possible defenses or immunities for governmental defendants is considered separately in section II infra.
in some cases judicial. The legislature may formulate general policies, the executive may adopt more specific policies and particular actions, and the judiciary may serve in part to assure that the policies of the other branches are consistent with higher law (e.g., that city regulations do not violate city ordinances or state law), and may adopt policies of its own or elaborate on policies contained in state statutes or other laws. These final authorities often interrelate through a series of checks and balances, and there may be formal or informal interrelations between the final authorities of different government units, but the action of one authority is, as a practical matter and in common sense parlance, the action of the entity. Second, the authority may be divided by subject matter; an autonomous city treasurer may have final authority over assessing taxes or the board of education over who will teach and what will be taught, with the mayor unable to overturn their decisions. These may be separately elected officials, or may be legally independent officials or agencies comparable to, for example, the National Labor Relations Board at the federal level. Third, the division of authority may be geographic, as occurs in New York City where borough presidents exercise limited executive functions over particular portions of the city.

The nature of the division is important in determining when an individual acts as a final authority. If, for example, a city treasurer deliberately assesses the homes of blacks at a higher rate because of their race, the city would properly be held liable for the violation; but if the treasurer were to assault a black for sitting at a white lunch counter, he or she would act merely as another city employee, and would not necessarily render the city subject to suit. The issue is not whether the specific action taken is legally authorized. In a sense any violation of the Constitution is ipso facto unauthorized. But as long as there is no one in the same branch of government with the legal power to directly control an official's conduct, he or she is a final authority.

This category of employees, or more properly this category of employee action (since a final authority for one purpose may not be so for another), may well be what the Court had in mind in Monell when it referred to a "body's officers." Inclusion does not depend, however, on whether an employee is denoted an "officer" under city or state law, or enjoys any particular trappings of office. The defendants in Monell included two such final authorities: the mayor, who was alleged to be responsible for the policy administered by most city agencies, and the city board of education, an autonomous body which established its own personnel policies. Ordinarily, the determination of whether a particular employee is a final authority can be made from written statutes and other provisions. Unlike the delegation problem, discussed below, there is likely to be a fairly clear and readily

24. Ex parte Young, 209 U.S. 123, 159-60 (1907).
ascertainable rule as to who has such ultimate power, subject to two
caveats. First, an employee who asserts final authority over a question is
such a final authority so long as he actually succeeds in exercising that
power, even if the exercise ultimately is held improper. Thus in Monell, if
the mayor had directed, over the objection of the school board, that
principals fire pregnant teachers, and that direction had been obeyed,
whether the mayor had acted outside of his proper sphere of final authority
would not have been an issue of concern under section 1983. Second,
formal powers will not always reflect real authority; the mayor may have
nominal power to overrule the city treasurer, but if by tradition, or due to
political constraints, the mayor rarely if ever does so, the treasurer would
properly be regarded as a final authority.

2. Delegated Authorities. Ordinarily, the final or highest authority as
to a particular question will not be the only employee concerned with that
issue. The carrying out of the final authority’s responsibilities will involve
subordinate individuals and, at times, subordinate agencies. Occasionally,
those subordinates will have purely ministerial functions. More commonly,
however, there will be delegated to those subordinates one or more of several
types of decisionmaking authority: (a) determining the existence of certain
facts and taking specified action according to the facts; (b) devising and
carrying out a means for achieving a specified goal; 26 and (c) defining goals
and devising and carrying out means of achieving them. Decisions (b) and
(c) involve the formulation of policies as to means or ends. If an employee
exercising such delegated authority decides upon a goal or a method of
achieving it which violates the Constitution, that decision is the government
policy. If a city were not liable for the exercise of delegated policymaking
authority, but only for the acts of final authorities, Monell could be nullified
by the simple expedient of delegating responsibility for all constitutionally
suspect decisions to lower level officials.

The legislative history of section 1983 supports this common sense
application of the statute. As is noted in detail below, 27 proponents of the
1871 Civil Rights Act consistently rejected arguments that only the legis-
lature was “the state” within the meaning of the fourteenth amendment;
they insisted that the state misconduct forbidden by that amendment included
action by the other branches of state government as well as by subordinate
employees. Senator Edmunds, one of the bill’s leading spokesmen, explained:

A State is a corporation; it exists only, in contemplation of law, as
an organized thing; and it is manifested, represented entirely, and
fully in respect to every one of its functions, by that department of
its government on which the execution of those functions is re-

26. Elrod v. Burns, 427 U.S. 347, 368 (1976), described “formulating plans for imple-
mentation of broad goals” as a policymaking function.
27. See text accompanying notes 49-58 infra.
spectively devolved. Therefore, if it is the duty of the executive and judicial departments of a State to enforce a law and they do not enforce it, the State does not enforce it.\textsuperscript{28}

Edmunds explained that whether a state enforced and respected constitutionally protected rights was to be ascertained by examining the actions of "the functionaries appointed by the state for that purpose." \textsuperscript{20} If "there is a State organism . . . which is intrusted with the local administration of justice," then whether the state has met its constitutional obligations must be measured by the conduct of that entity.\textsuperscript{30}

The policy involved in Monell itself was adopted by a lower city official exercising delegated authority. City regulations did not require in all cases that a pregnant employee go on leave after her fifth month of pregnancy, but merely directed that if the employee wished to work after the fifth month she had to secure "agency medical approval to work and the approval of the agency head."\textsuperscript{31} Within the Department of Social Services the Commissioner's discretion on such matters had been generally delegated to an Assistant Deputy Administrator for Personnel Management.\textsuperscript{32} There were no written standards as to how the Assistant Deputy Administrator exercised that discretion; in practice he permitted any woman to work in the sixth and seventh months if physically able, allowed pregnant employees to work in their eighth month only if their jobs were "unusually important to the Department," and prohibited any employee from working during her ninth month.\textsuperscript{33} After the complaint in Monell was filed, the Deputy Mayor expressly forbade imposing leaves of absence on women "able to work," asserting that agencies following policies to the contrary had "misunderstood" the "discretion" afforded to each agency under city regulations.\textsuperscript{34} Nonetheless the Supreme Court apparently had no doubt that what the Assistant Deputy Administrator was doing met the "official policy" requirement established by Monell.\textsuperscript{35}

Several other Supreme Court decisions also illustrate this principle. In

\begin{itemize}
\item\textsuperscript{28} CONG. GLOBE, 42d Cong., 1st Sess. 696 (1871).
\item\textsuperscript{29} Id. at 697.
\item\textsuperscript{30} Id. at 756. Five years after the adoption of § 1983 the Supreme Court noted, "A corporation can act only by its agents or servants . . . . A municipal corporation may act through its mayor, through its common council, or its legislative department by whatever name called, its superintendent of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge." Barnes v. District of Columbia, 91 U.S. 540, 545 (1876) (emphasis added). In Monroe, Justice Frankfurter urged in dissent that the action of a city official was only "under color of law" if the official had authority at state law. Monroe v. Pape, 365 U.S. 167, 224-46 (1961). Such authorization was not limited, in his view, to statutes, but included sanction by any state organ "responsible . . . for the formulation and administration of local policy." Id. at 237. This admittedly still-born doctrine seems analogous to the delegated authority rule suggested here.
\item\textsuperscript{31} Defendants Notice of Motion to Dismiss, Exhibit A, Monell v. Department of Social Servs., 394 F. Supp. 853 (S.D.N.Y. 1975).
\item\textsuperscript{32} See Stipulation of May 16, 1974, at 2.
\item\textsuperscript{33} Id.
\item\textsuperscript{34} Defendants Notice of Motion to Dismiss, supra note 31, Exhibit A.
\item\textsuperscript{35} See 436 U.S. at 694.
\end{itemize}
Tinker v. Des Moines Community School District, the Court upheld an action for injunctive and monetary relief against a school board and its directors because the principals of the Des Moines schools had adopted a policy of forbidding students to wear armbands to protest the war in Vietnam. Although there was no indication that the board itself had taken any action, adopting such a prohibition was presumably within the delegated policymaking discretion of a principal. Similarly in Bounds v. Smith, the Court affirmed an injunction against the North Carolina Department of Correction, directing the adoption of certain remedial measures because only one of the state’s seventy-seven prisons had a law library and that library was inadequate. Nothing on the face of the opinion suggested that the Department itself had affirmatively prohibited such libraries; the officials to whom the Department had delegated responsibility for each prison apparently had exercised their authority over their individual appropriations and decided not to buy law books.

In Monell itself the complaint alleged that the Department of Social Services had a policy of requiring pregnant employees to take unpaid leaves of absence. Although there was also an allegation of a “citywide” policy, presumably including other agencies, nothing in the Court’s opinion suggests that the official policy of a city department, acting within its presumed authority to regulate its own personnel matters, would not be a sufficient basis for liability. Indeed Monell’s reference to “the body’s official decision-making channels” suggests that the existence of an official policy should be determined by an inquiry into the body’s rules and practices for delegating authority to make decisions for the particular governmental unit involved.

Three related distinctions must be kept in mind in applying this principle. First, the issue under Monell is whether a particular decision involves the making of policy, not whether the official who made it might generally be characterized as a policymaking official. An official who formulates a single unconstitutional policy is not outside the scope of Monell because he does not frequently make such decisions; conversely, an official who often makes fundamental city policies does not necessarily subject the city to suit when he acts outside that area of delegated policymaking authority. Second, not all delegated authority is policymaking authority. If the employee is authorized to exercise discretion to choose ends or means, either from a

36. 393 U.S. 503 (1969). Tinker was among the cases cited by Monell as upholding § 1983 jurisdiction against school boards despite Monroe. 436 U.S. at 663 n.5 & 6.
37. Justice Black stated that the order was issued by “the elected school officials and the teachers vested with state authority to do so.” 393 U.S. at 516 (dissenting opinion). The reference to the elected officials appears to be erroneous.
39. 436 U.S. at 660-61.
40. Id. at 691.
specified list or without such limitation, and the employee selects a goal (e.g., segregation) or a method of achievement (e.g., denial of due process) that violates the Constitution, then the government faces liability under Monell. But if there is no such discretion, and the end or means is dictated by an objective rule based on what the employee believes the facts to be, then the employee does not have formally delegated policymaking authority. If the employee makes an error of fact, and a constitutional violation results, that would not by itself give rise to municipal liability; but if the objective rule itself mandates a violation under certain circumstances, the application of that rule would result in liability, though the policy involved would have been made by the higher official promulgating that rule. Third, "policymaking" does not require the adoption of a rule of general application; Monell refers to official "acts" as well as official "policies." The issue is not the scope of the decision but the scope of the decisionmaker's mandate. If a mayor decides, in a particular case, to direct that a house be broken into unlawfully, that is official policy. The same decision is also an official policy if the authority to make it is delegated to and exercised by a subordinate official.

Determining whether an employee has acted within the scope of the authority delegated to him or her will ordinarily be more difficult than ascertaining the identities of final authorities. The issue is not whether an employee is required or forbidden to take certain action, but whether the decision has been delegated to the employee. The scope of delegated authority will frequently not be in writing, or even be the subject of a clear, well-understood though unwritten rule. Any listing of responsibilities would not ordinarily be exclusive, since an exclusive list might inhibit effective action to deal with unforeseen problems. In addition, the authority for making city or state policy as to a particular issue may co-exist at several levels within the government. But while there may be no express rules as to who may make policies, the primary responsibilities of an employee—what he or she is supposed to accomplish—will often be relatively clear. So long as a policy or action is reasonably related to carrying out those responsibilities, and so long as it has not been expressly precluded as a method of doing so, that policy or action should ordinarily be regarded as within the scope of the employee's delegated authority. The likelihood that an employee will have policymaking authority, and the scope of that authority, will generally increase with the breadth and importance of his or her responsibilities. Certainly the type of authority ordinarily exercised by the same employee, or others similarly situated, is the best guide to the scope of their actual authority, particularly where it is exercised in an open and

42. The authority delegated to an agent "is, unless the contrary manifestly appears to be the intent of the party, always construed to include all necessary and usual means of executing it with effect." J. Story, Commentaries on the Law of Agency § 58 (1839). See also id. §§ 57, 85, 97; Restatement (Second) of Agency § 34(c) (1958); F. Mecham, A Treatise on the Law of Agency §§ 280, 311 (1889).
notorious manner. The existence of a structure for appealing a type of decision by a particular official or class of officials is a recognition of the authority of that official or class to make a decision of that sort.

As a practical matter, the application of this principle will attach new consequences to the presence or absence of guidance provided to subordinate employees by supervisory or final authorities. If a sheriff in a town with no established rules or practices tells his deputy to go find evidence, the town's decision as to whether to search a house without a warrant will for all practical purposes have been delegated to the deputy; in a police department with clear and enforced rules regarding searches and seizures, an officer who breaks into a house in violation of those rules would exercise no such delegated authority. This will provide an incentive to government authorities to exercise care in choosing the employees to whom they delegate policymaking authority, and to formulate those policies that may involve constitutional problems at a higher level.

3. The Rules Rule. What has been said about delegated authority generally suggests one specific and relatively straightforward application. If a government employee establishes a rule which is to be and is in fact obeyed by other government employees, the rule should ordinarily be deemed to be within the policymaking authority of the first employee.

What government employees actually do is a substantial guide to the scope of their authority although it is not conclusive, since an employee could personally establish and carry out a policy without the knowledge of his superiors. In the case of a rule, however, that policy is not only known to other employees, but also regarded by them as so clearly authorized as to be binding on them. The existence of delegated authority is testified to by the conduct of other employees who are familiar with government practice, who have a personal interest in refusing to obey any order that may violate government policy, and who have a ready method of challenging any arguably unauthorized order. Policymaking authority is, as a practical

43. "Deeply embedded traditional ways" of making state policy, like similar ways of carrying out that policy, "are often tougher and truer law than the dead word of written text." See Monell v. Department of Social Servs., 436 U.S. at 691 n.56 (quoting Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 369 (1940)). See also text accompanying notes 60-79 infra.

44. The aggrieved individual is under no obligation to take such an appeal. See McNeese v. Board of Educ., 373 U.S. 668 (1963). Where an appeal is taken, however, attention must be paid to the allocation of authority between the initial and appellate decisionmakers, especially if the gravamen of the constitutional claim is improper motivation on the part of the former. If the appellate decisionmaker reconsiders the entire matter de novo, that will often eliminate any taint arising from the motives of the initial decisionmaker, since the same final result would have occurred regardless of those motives. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977). On the other hand, where the appellate process leaves part of the decision in the hands of the initial decisionmaker, such as by deferring to his judgment, expertise, recommendation, or fact finding, by applying a not clearly erroneous rule, or by rejecting the appeal on procedural grounds, the initial decision is an act of delegated authority for which the entity should be held responsible.

45. This is consistent with the agency rule that "it is the duty of the principal if he desires an authority to be executed in a particular manner, to make his terms so clear and unambiguous that they cannot reasonably be misconstrued." F. MacKenzie, supra note 42, § 314.
matter, not the ability to write procedures or standards on a particular piece of paper, but the power to establish a standard of conduct which will be followed by government employees regarding a particular subject matter. If final or higher authorities, by a combination of practices and rules, confer that power on an employee, so that other employees believe that the latter has delegated authority and obey rules he or she promulgates, the government cannot later assert that this delegation of power and authority was not official, or that the higher authorities whose action resulted in such a delegation did not intend that result.

This accords with the common sense notion of when an action "may fairly be said to represent official policy." Where doubt exists among subordinate employees as to which of two supervisory officials has the authority to establish policy on a given subject, the acts of employees obeying whichever supervisor they believe to have that authority must be regarded as carrying out official policy within the meaning of Monell regardless of how the dispute between the supervisors is ultimately resolved. If the Department of Social Services had a written rule, routinely obeyed by departmental managers and personnel officers, requiring the dismissal of pregnant employees, it would seem only the most peculiar of technicalities to claim that these dismissals were not the result of "official policy" because only the city civil service commission could make personnel policies. Such an assertion might be an accurate description of the legal structure of the city, but it would certainly not comport with what a disinterested observer would characterize as a fair description of official policy.

Different considerations apply to a single directive to subordinate officials and the policy that may be involved. In such a case the subordinate employees may not, as a practical matter, be in a position to question the authority of the directive, at least not without also delaying or preventing execution of the directive and thus, or otherwise, risking serious sanctions if the questioned directive was proper. If a police sergeant directs his men to break down a particular door, the fact that they obey is not conclusive evidence that they thought he had authority to issue that order. However, a series of specific supervisory instructions amounting to a pattern or practice, such as an ongoing program of burglarizing the offices of a dissident political group, would be comparable to a rule if the subordinates involved knew that such directives would continue to be issued and, despite the opportunity thus created to question the authority for such directives, did not doubt that such authority existed.

4. Responsibility for State and Federally Mandated Policies. Frequently the policies of a city are formulated in the context of the city's relationship to or joint activities with the state or federal government. At times a state or federal law expressly authorizes a particular policy. In such a case the selection of the policy remains in the untrammeled discretion of the city, and the situation is not materially different from that in which state
and federal law is simply silent. Often the state or federal government offers financial or other assistance to a city on the condition that the city adopt particular policies, especially policies pertaining to the manner in which that assistance will be implemented. Here again the city is free to reject both the aid and thus the conditions attached to it, and the decision to adopt the policies tied to that aid remains the city's responsibility. If a private party offered to give the city a park on the condition that the city forbid blacks to use it, no one would seriously question the city's liability for implementing such an exclusionary policy; the result should be no different if the donor is a governmental entity.

A distinct problem arises where state or federal law imposes on the city an absolute obligation to adopt and implement a particular policy. This is not, however, the problem to which Monell's requirement of an "official policy" was addressed, for Monell was concerned only to exclude vicarious liability for the acts of errant employees. If a city council enacts, and a mayor personally implements, a particular policy, that is an "official policy" for purposes of Monell, and the city remains a "person" regardless of whether the council and mayor acted to comply with some federal or state mandate. Imposing liability on the city under such circumstances would be no more "vicarious" than imposing liability on a subsidiary company for obeying the dictates of its parent firm. The question remains, however, whether a city whose policies have caused a constitutional violation should be able to avoid monetary liability by proving that its policies were adopted in obedience to higher authorities. As a practical measure this issue will arise primarily with regard to state laws, since most federally imposed requirements are merely conditions of federal financial assistance.

This issue would be of little importance if the states themselves were subject to suit under section 1983, for it would control only which entity was to pay the judgment. But Quern v. Jordan holds that states are not "persons" under section 1983, and thus are not available defendants. Thus if a city could defend an action on the ground that its conduct was mandated by state law, the victim of the constitutional violation involved would be left without a remedy. Such a doctrine would in effect permit a state to extend its eleventh amendment immunity to cities and counties, and thus to partially nullify repeated Supreme Court decisions that local governments are not covered by the amendment.

The Reconstruction amendments draw no distinctions between cities and states; they are all part of a single entity, and the conduct of any of their officials is state action. The state of New York and the city of New York, may, as a matter of local politics, regard one another as hostile foreign powers, but the fourteenth amendment attaches no significance to such

differences. The eleventh amendment was not intended to license constitutional violations at the hands of state officials, but merely to place the state treasuries beyond the reach of the federal judiciary. If a state wants to carry out a policy through a government entity whose treasury does not enjoy that protection, it must run the risk that that treasury will be used to remedy any constitutional violation involved. Its situation is analogous to that of a foreign corporation beyond the reach of service in a given state which chooses to direct a subsidiary within the state to take tortious action.

If the Forty-second Congress had thought it inappropriate that cities be held liable for carrying out state mandated policies, it would not have permitted suits against cities at all, for that Congress regarded everything a city did as merely implementing such policies. Proponents of the 1871 Civil Rights Act, such as Senator Edmunds, stressed that each city and county was a "State organism" in order to establish that they were, like states, subject to the commands of the fourteenth amendment and thus to the control of Congress. Opponents of the bill, who maintained that Congress did not have power to control the affairs of the states, rejected any suggestion that cities or counties were independent or autonomous bodies. They described cities and counties as "local State governments" and "integral parts of States." Thus federal legislation which restricted the conduct of cities and counties was attacked as violating "the local rights of the States," absorbing the "jurisdiction of the States over their local and domestic affairs" and taking from the states their "local and municipal powers and duties." This equation of cities and states was developed further in opposition to the Sherman Amendment. Representative Kerr argued that local government units were merely administrative branches of the state government. "[C]ities and counties ... are a part of the machinery of a State Government. They are divisions which the State itself makes as mere agencies and instrumentalities for the purpose of enforcing its own laws and its own local policy." Several distinct arguments were founded on this analysis. First, it was urged, in what Monell viewed as the critical contention raised against the Amendment, that the then existing constitutional prohibition against federal statutes imposing duties on state officials would apply to the imposition of such duties "upon county and town organizations, the mere instrumentality for the administration of State law." Second, Representative

49. CONG. GLOBE, 42d Cong., 1st Sess. 756 (1871).
51. Id. at 337 (remarks of Rep. Witthorne). See also id. at 454 (remarks of Rep. Cox) (defends "the State governments, with their local rights").
52. Id. at 366 (remarks of Rep. Arthur).
53. Id. at 357 (remarks of Rep. Beck).
54. Id. at 793.
55. 436 U.S. at 673-83.
56. CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871) (remarks of Rep. Poland). This is the passage which Monroe v. Pape regarded as controlling the construction of § 1983. See 365 U.S. at 190. Representative Blair advanced the same argument. "It was held also in the
Bingham argued that the unlimited financial liability faced by "an integral part of the State, a county" could destroy not only the county, but would ipso facto, and impermissibly, destroy the state of which it was a part. 57 Third, it was suggested that whatever the constitutional duties of a state, it was for the state alone to determine which state agencies were to carry them out, and thus cities and counties, like any other state agencies, were "subject only to such duties and liabilities as State laws impose upon them." 58

Since Congress felt that cities and counties always acted as "mere instrumentalities of state law," it cannot have intended that this constitute a defense to an action under section 1983, because it would have nullified Congress's decision to make cities and counties liable for constitutional violations.

Such a rule, moreover, would be an irresistible invitation to evasion of Monell. A city which wanted to adopt a policy which it knew or feared was unconstitutional could avoid liability merely by having the policy 'enacted into a state statute applicable only to that city. Thus New York City would have been immune from damages in Monell if state law had required the dismissal of pregnant employees. In some states, including New York, it is common for the internal affairs of cities and counties to be regulated by state statutes applying to only a single city. If a city cannot immunize itself merely by adopting a city ordinance forbidding a particular constitutional violation, 59 surely it cannot acquire such immunity by procuring the adoption of a state statute requiring that violation. Even where such legislation was not sought for the purpose of nullifying Monell, the existence of such a defense would embroil much post-Monell litigation in disputes as to whether a city policy was mandated by state law, regulation, order, or less formal direction, and whether the existence of that command was in fact known to the city employees who adopted or implemented the policy which was or caused the constitutional violation. Both the practical and procedural consequences of permitting the existence of an unconstitutional state policy to immunize official city action are palpably inconsistent with the purposes of section 1983.

B. Customs and Usages

Persons whose actions are regarded as "official policy" are not the only ones who can subject a municipality to liability after Monell. Section 1983 provides broadly that any person who while acting "under color of any statute, case of Prigg v. Pennsylvania [41 U.S. (16 Pet.) 539 (1842)] 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 the gentlemen to show me the difference between that and commanding a municipality, which is equally the creature of the State, to perform a duty." CONG. GLOBE, 42d Cong., 1st Sess. 795 (1871).
57. Id. at 798.
58. Id. at 794 (remarks of Rep. Poland).
59. See text accompanying notes 80-98 infra.
ordinance, regulation, custom or usage of any State" violates the constitutional rights of another may be sued for appropriate redress. The civil rights acts of 1866 60 and 1870 61 had both provided for civil liability "notwithstanding" any laws and customs, and both provided criminal liability for actions under color of laws and customs, but civil liability based on custom was first imposed by section 1 of the 1871 Act. Since the earlier criminal provisions applied only to individuals, neither earlier statute concerned action by a government pursuant to custom. In view of this origin of the "under color of" clause of section 1983, it might have been urged that "custom" in that clause had no application to actions against a government entity. Monell states, however, that "local governments, like every other section 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." 62

Litigation as to what is meant by "governmental customs" may well be confused by the inclusion in Monell of quotations from two earlier opinions concerned with rather different applications of the term "customs". Monell quotes Adickes v. S.H. Kress & Co. holding that "practices . . . could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." 63 The issue in Adickes was what types of customs could render otherwise private conduct "state action" 64 and the Court there held that a custom which had the coercive force of law was necessary. But the degree of permanence required to give a custom this coercive effect on private citizens 65 bears no necessary connection to the characteristics of a custom which would render it "governmental." In Nashville, Chattanooga & St. Louis Railway v. Browning, 66 the Court had held that, "[s]ettled state practice . . . can establish what is state law." That passage, also quoted in Monell, was in the context of a decision that taxing railroad property at a higher rate than other property was not discrimination, even though not formally authorized by state statute, since the practice was so uniformly followed as to constitute a de facto amendment of the statute. Which customs are so settled as to function as such an amendment is again not the same issue as what types of customs are "governmental."

Monell also quotes a passage from Adickes which does bear directly on the question at hand. "Congress included such customs and usage [in section 1983] because of persistent and widespread discriminatory practices

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60. Ch. 31, § 1, 14 Stat. 27.  
61. Ch. 114, § 16, 16 Stat. 140.  
62. 436 U.S. at 690-91.  
64. The particular dispute was whether the refusal of Kress to serve an integrated group of customers was "under color of law . . . or custom." Id. at 162-71.  
65. In both its ordinary and legal meaning a usage, as distinguished from a custom, never has the "force of law." See note 79 infra.  
of state officials.' 67 The practice with which Congress was especially concerned was the systematic refusal of local law enforcement officials to enforce state criminal laws against members of the Ku Klux Klan and others who attacked blacks and Republicans. State law did not sanction or permit such discrimination,68 and in some cases the highest state officials were Republicans69 who opposed that discrimination, but the individual state employees who actually had to carry out the administration of the criminal law pursued that practice nonetheless. As Representative Perry noted, "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not . . . . In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection." 70 The Forty-second Congress regarded such a failure to enforce state laws as the quintessential violation of the equal protection clause.71 In some instances those state employees, especially sheriffs and deputies, actually joined in the criminal activities.72 The states themselves were criticized, not for actively supporting the violence or formally sanctioning the lack of law enforcement, but for "failing" or "neglecting" to curb this practice of non-enforcement by local judges and sheriffs.73

The unconstitutional customs with which the supporters of section 1983 were concerned were thus not "customary" or informal exercises of final or delegated authorities, but the widespread and persistent practices of ordinary sheriffs, judges, and prosecutors. That is entirely consistent with the phrase "custom or usage," because the general practices of government officials would ordinarily be described in just such terms regardless of the rank of the officials involved. The frequency and pattern of the practice alleged to be a custom or usage must be sufficient to give rise to a reasonable inference that the public employer and its employees are aware that public employees engage in the practice and do so with impunity.74 This is consistent with the agency principle well established in 1871 that principals are presumed to

67. 436 U.S. at 691 (quoting Adickes, 398 U.S. at 167).
68. Opponents of the 1871 Act argued unsuccessfully that the fourteenth amendment applied only to discrimination on the face of state statutes. See text accompanying notes 84-89 infra. See also Note, Municipal Liability under Section 1983: The Meaning of "Policy or Custom," 79 Colum. L. Rev. 304, 309 (1979).
70. Id. app. at 78.
73. See notes 149-51 and accompanying text infra.
74. See Restatement (Second) of Agency § 43 (1958). As Comment (a) notes, "Persons ordinarily express dissent to acts done on their behalf which they have not authorized or of which they do not approve." See also J. Story, supra note 42, § 87 (authority of agent can arise "by implication by numerous acts, done by the agent with the tacit consent or acquiescence of the principle").
have authorized agents to act consistent with "publically known . . . custom or usage." 75 A practice which is extremely widespread would be sufficient even though recent in origin; the official tolerance towards racial and political violence with which Congress was concerned in 1871 was thought to have arisen only in the previous year or two. 76 The rule could not sensibly be otherwise with regard to the practices of officials regarding a newly discovered problem. 77 If a practice is of long standing, a smaller rate of official participation will be necessary to qualify it as a custom. The inference would be equally warranted if a high percentage of officials engaged in the practice or if a substantial number did so, even though the pool of officials might be even larger. Thus a custom of segregating children within classrooms could be demonstrated by proof that it was practiced by half of the teachers in a school system with twenty teachers or by one hundred teachers in a system with one thousand teachers.

The gravity of the conduct is also relevant, for the greater the harm involved the greater the likelihood that a given number of unsanctioned incidents will convey an impression of official tolerance. Thus, a lower rate of police brutality would be needed to prove a police custom than the rate needed to show a custom of not reading Miranda warnings. Adickes held that a practice may be a state custom within the meaning of section 1983 though not of state-wide application, 78 and that is doubtless true of city or county customs as well. State or city laws do not always apply to all areas within their jurisdiction, and there is no reason why customs need do so. Thus, if the police gave Miranda warnings to ninety percent of all suspects city-wide, but only to fifty percent of the suspects arrested in a predominantly black neighborhood, an inference of custom would be proper as to that neighborhood but not as to the city as a whole. 79

75. F. MECHEM, supra note 42, §§76-78, 96.
77. As the Supreme Court noted in Adickes v. S.H. Kress & Co., 398 U.S. 144, 173 (1970), a plaintiff could not be expected to show that as of 1964 a Mississippi restaurant had a long standing policy of serving only the blacks in an integrated group, since until shortly before that time blacks could not have obtained service at all.
78. Id.
79. In addition to "custom," §1983 also refers to a state "usage." In ordinary speech these two terms generally regarded as synonymous. WEBSTER'S NEW COLLEGIATE DICTIONARY 280, 1288 (1973). In contractual transactions a distinction appears to exist; a "usage" being a generally accepted commercial rule which the courts will enforce unless the agreement and understanding of the parties was to the contrary, while a "custom," though possibly also originating in commercial practice, was a rule so established that the courts would enforce it regardless of that agreement and understanding. 5 WILLISTON ON CONTRACTS §649 (3d ed. 1961); see Gulf Ref. Co. v. Universal Ins. Co., 32 F.2d 555, 557 (2d Cir. 1929). In other legal contexts no clear distinction is apparent, the terms being used to describe the entire body of non-statutory law, the actual practices of judges and other officials, and practices of the public which had acquired the force or protection of the law. See 2 BLACKSTONE'S COMMENTARIES 98 (Tucker ed. 1803) ("custom" imposing limits on "fines" in tenancy); id. at 213 ("custom" dictates male preference in inheritance). Compare 7 OXFORD ENGLISH DICTIONARY 1283 (custom) with 10 id. at 467 (usage). Where adherence to the practice is not imposed or enforced by superior officials, and each employee is free to follow it or not as he pleases, the employees enjoy de facto delegated authority to decide whether to pursue the practice, a state of affairs most analogous to a usage. The authority conveyed by usage to an agent included the authority to take some action or not (e.g., sell on credit) at his discretion.
C. Prophylactic Rules

The application of section 1983 and Monell presents particular difficulty where, whatever the actual practice, there is a formal, even written, policy forbidding the particular constitutional violation. Despite such a nominal policy, violations of it are "state action" for constitutional purposes, and Monroe holds they are "under color of law" within the meaning of section 1983. But whether such practices may nonetheless be fairly described as the actions of the city within the meaning of Monell presents a different question.

If the mere existence of such a written policy were sufficient to insulate a city from liability for actions to the contrary, a city could completely immunize itself from liability by the simple expedient of adopting the language of the fourteenth amendment and other applicable constitutional provisions as a city ordinance. Indeed, a city could already argue that the supremacy clause makes the Constitution part of the city law and policy, and that any city officials who act in violation of the Constitution, including the members of the city council who adopt an ordinance, do not act on behalf of the city itself. Such an approach would render Monell a dead letter.

The legislative history of section 1983 demonstrates that the proponents of that measure attached little significance to formally adopted state policies which did not represent the actual practices of state officials. Throughout the debates on the 1871 Civil Rights Act, supporters and opponents argued about the meaning of section 1 of the fourteenth amendment, particularly the equal protection clause. This dispute arose particularly because section 3 of the Act provided that if certain forms of domestic violence should violate federally protected rights by obstructing the enforcement of state law, and if state authorities failed or neglected to protect those rights, "such facts shall be deemed a denial by such State of the equal protection of the laws." Opponents of the Act argued that section 3 was unconstitutional, and that section 1 was unnecessary, because the equal protection clause applied only to state statutes. Senator Vickers urged, with regard to that clause, "Legislation by the State is expressly referred to, and no State has the power or the capacity, to deny the rights referred to, except by legislation."  

J. Story, supra note 42, § 77. Where, however, higher officials do compel implementation of the practice, the situation is closer to a custom.

80. See Ex parte Virginia, 100 U.S. 339 (1879).
Senator Blair insisted that the proper constitutional inquiry should stop with a reading of state legislation:

[...]

Senator Thurman objected that, as used in section 5, “state” signified only “the government of the State. It is not simply some judge sitting in Alamance county; he is not the State of North Carolina; much less some constable or sheriff in Caswell county. ...” 87 Numerous opponents asserted that no statutes had been enacted by southern states which were unconstitutional on their face, 88 and insisted that the southern states had met their constitutional responsibilities because each had “a penal code to punish wicked men for their crimes and misdemeanors.” 89

But a majority of the Forty-second Congress refused to attach such conclusive significance to the adoption of legislation which gave nominal protection to the blacks and Republicans who were the victims of Ku Klux Klan violence. Congress had “no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty.” 90 Without such enforcement the rights guaranteed by the Constitution would be merely “nominal.” 91 Senator Edmunds, the Senate sponsor of the bill, rejected the limited construction of the fourteenth amendment advanced by the bill’s opponents. Actually protecting citizens, he insisted, was the obligation of the state and traditionally a matter for state judges and sheriffs, not the legislature.

But what is the State? Is it the Legislature? It is as to making law, with the aid of a Governor. As to enforcing a law, is the Legislature the State? How do Legislatures enforce laws? I had been taught in my little reading and experience in the profession of the law that the enforcement of the law belonged to the judiciary and the executive combined. ... A Legislature acting directly does not afford to any person the protection of the law; it makes the

86. CONG. GLOBE, 42d Cong., 1st Sess. app., at 118 (1871).
89. Id. at 431 (remarks of Rep. McHenry).
law under which and through which, being executed by the functionaries, citizens receive the protection of the law.\footnote{92}{Id. at 696-97. See Note, supra note 68, at 309-15.}

If section 1 applied only to legislators, he argued, "the executive and the judicial departments of the State are not prohibited from enforcing any law they please which violates the privileges and immunities of citizens of the United States."\footnote{93}{CONG. GLOBE, 42d Cong., 1st Sess. 696 (1871). See also id. at 505 (remarks of Sen. Pratt) (laws fair on their face were administered unfairly); id. app., at 116 (remarks of Rep. Shellabarger) (§ 1 of fourteenth amendment covers "administration of the law").} Representative Garfield read the equal protection clause in a similar manner: "The laws must not only be equal on their face, but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State."\footnote{94}{Id. app., at 153.} Representative Stevenson suggested that denials of equal protection were most likely to result from a failure to enforce laws fair on their face:

> Denial may . . . be either active or passive. It is more frequently passive than active. . . . Gentlemen contend that this provision will operate only where a State fails to pass equal laws and excludes a class of citizens from protection; but the language is "equal protection of the laws." The words "the laws" imply existing laws, and the benefit secured is the "protection" of the laws, and this requires their execution. Unexecuted laws are no "protection."\footnote{95}{Id. app., at 300. See also id. app., at 315 (remarks of Rep. Burchard) (if "judicial authorities wrongfully enforce the law," the state denies equal protection), 333-34 (remarks of Rep. Hoar); Note, supra note 68, at 309-13.}

This clear congressional emphasis on the actual conduct of government officials compels the conclusion that the mere adoption of fair laws or policies is insufficient to immunize a city from a duty not to violate the Constitution or from monetary liability for such violations. A prophylactic policy is only as significant as the actual practices for implementing that policy and for detecting, redressing, and sanctioning violations of it. The actual conduct of city officials is the acid test of what city policy is. Where a particular issue arises so infrequently, or where actual practices leave the nature of the city policy in doubt for other reasons, the formal policy would be of some significance. The existence of uniform and vigorous enforcement activities\footnote{96}{Frequently violations will occur with such speed or finality that the enforcement role of higher authorities would be limited to preventing, redressing, and punishing violations of the prophylactic rules. In some cases it may be possible to appeal the intended violation before it is implemented. If in such a case it is suggested that the prophylactic rule has been violated, a failure to investigate that claim would usually be fatal to a defense based on the existence of the rule. Where an investigation occurs but the violation is erroneously not discovered, inquiry must be made as to seriousness, detail, and standards of the investigation.} would strongly suggest that a written policy against a particular violation could fairly be described as that of the city. Conversely,
the very existence of such a written policy, together with well-known and tolerated violations, would be persuasive evidence that the actual policy of city authorities was to permit the practices to which the city was ostensibly opposed. The mere existence of a written prophylactic rule, however, will ordinarily add little by itself to the process of determining whether a particular constitutional violation was properly regarded as a city policy.

D. Causing a Constitutional Violation

Although Monell requires that municipal liability under section 1983 be grounded on a city policy, that policy need not itself be a violation of the Constitution. Section 1983 imposes liability on any city which "shall subject or cause to be subjected" any person to a deprivation of constitutional rights. Where the city's policy is ipso facto a constitutional violation, the city directly subjects people to such a deprivation. Congress apparently attached distinct importance to the "cause to be subjected" language (the cause clause), since it used that language selectively in some but not all provisions of the civil rights acts of 1866 and 1870. Monell itself emphasizes the independent significance of the clause, and describes the relationship between a policy and a constitutional violation in terms of causation rather than identity.

1. Interpreting the Cause Clause. On its face the cause clause could have three possible meanings: that the policy was intended to cause the constitutional violation, that the policy foreseeably caused the violation, or that the policy unforeseeably caused the violation. Under the first construction the clause would be so narrow as to add virtually nothing to section 1983; certainly in the case of discrimination on the basis of race or political affiliation, the violations with which the 1871 Act was particularly concerned, any violation would ipso facto be intentional. On the other hand, the
third construction would be too broad for it would result in a rule at least as sweeping as the respondeat superior principle rejected in Monell.\textsuperscript{108} The mere act of hiring a policeman, or maintenance of a police force, is a causal element in an incident of police brutality; liability based solely on that sort of causal connection would include liability for any act of any municipal employee.

The most plausible construction of the cause clause is that it includes official policies which entail an unreasonable foreseeable risk of causing a constitutional violation.\textsuperscript{104} What must have been foreseeable under this construction is the occurrence of the acts or omissions which constituted the violation; whether the final or delegated authorities knew or should have known that those acts or omissions were unconstitutional raises different issues which are discussed below.\textsuperscript{105}

This construction is supported by the distinction between direct and vicarious liability drawn by other provisions of the 1871 Act and recognized by Monell. The Court in Monell describes the Sherman amendment as imposing "a species of vicarious liability on municipalities since it could be construed to impose liability even if a municipality did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it."\textsuperscript{108} Section 6 of the Act, which replaced the Sherman amendment, imposed liability on any person who knew that the violations described in section 2\textsuperscript{107} "were about to be committed" and had the "power to prevent or aid in preventing the same," but nonetheless "neglect[ed] or refuse[d] so to do."\textsuperscript{108} Section 6 clearly does not require that this inaction be motivated by a desire to cause a constitutional injury; mere "neglect" is sufficient. A government that adopts a policy which foreseeably results in a constitutional violation can fairly be said to know that the violation is likely to occur and to have failed to use its power, by simply adopting a different policy, to prevent that occurrence.

The debates on the Sherman Amendment reflect a similar emphasis on whether city authorities were on notice that there was danger of a riot coupled with an intent to violate the Constitution, for that type of intent was expressly required by section 2 of the 1871 Act in different terms. See text accompanying notes 141-60 infra.

103. The application of this standard in only limited circumstances, rather than across the board, would not pose this problem. In view of the general use of tort principles, strict liability for acts or policies causing constitutional violations would be appropriate in those special situations in which there was strict liability at common law. See, e.g., Whirl v. Kern, 407 F.2d 781, 791-92 (5th Cir. 1969) (false imprisonment).

104. In the world of human events, the consequence of a policy can rarely if ever be foreseen with absolute certainty. Tort law has traditionally based direct liability on the likelihood of the threatened injury together with the magnitude of the injury involved. It might be inappropriate to impose monetary liability on a city for a policy which foreseeably entailed a one in ten chance that a city employee would be discharged without a hearing, but it would clearly be proper to impose such liability on a city for a policy which foreseeably entailed a one in ten chance that a prison guard would kill an inmate on the basis of race. The cost of avoiding the risk of constitutional injury would also be relevant to the reasonableness of the policy.

105. See text accompanying notes 133-216 infra.

106. 436 U.S. at 692 n.57.
108. Id. § 1986 (1976).
covered by section 2 and could have stopped it. Senator Stevenson objected that the Amendment imposed liability "for personal injury which no prudence or foresight could have prevented." 109 Senator Thurman urged that the state laws on which the Amendment was based required, as the Amendment did not, that the authorities had "good reason to believe that such riot or tumultuous assembly was about to take place." 110 Opponents of the Amendment objected generally that it departed from the usual requirement of neglect. 111 This argument was consistent with the allegations of state misconduct which had earlier been advanced by supporters of the Act, who had characterized that misconduct with such tort-like terms as "neglect," 112 "default," 113 and "faithless." 114 In explaining section 6 of the Act on behalf of the Senate conferees, Senator Edmunds emphasized that it imposed liability only on those who "had reasonable notice of the fact that there was a tumult, or was likely to be one, and neglected to take the means necessary to prevent it." 115 Thus a failure to use a realistic ability to prevent a foreseeable violation is the critical factor by which Congress distinguished between holding a defendant responsible for its own conduct and imposing impermissibly "vicarious" liability.

The cause clause so construed will serve an important role in assuring that high level policymaking government officials do not cavalierly disregard the constitutional ramifications of their actions. If responsible officials are aware that a subordinate is violating the Constitution and take no action to stop him, or fail to investigate substantial allegations of such violations, the city can properly be held liable for subsequent violations by that employee and by others encouraged by his unpunished example. Even absent such an individual history of misconduct, if city employees are to be placed in a position where constitutional violations are likely in the absence of adequate training or supervision, 116 either because of special pressures or particularly detailed constitutional requirements, a policy of not providing that training or supervision would render the city liable for the resulting violations. A city which authorized police officers to make searches without instructing them as to the warrant requirements of the fourth amendment would be as liable for ensuing unlawful searches as if it had an express policy of disregarding those requirements. As with the selection of an independent contractor by an employer, the city would also be subject to liability for a policy

109. CONG. GLOBE, 42d Cong., 1st Sess. 762 (1871).
110. Id. at 773. See also id. at 788 (remarks of Rep. Kerr).
113. Id. at 368 (remarks of Rep. Sheldon).
114. Id. at 389 (remarks of Rep. Elliott).
115. Id. at 821.
116. This is analogous to the liability of an employer for torts of independent contractors engaged in inherently dangerous activities. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 472-74 (4th ed. 1971).
of not exercising reasonable care in the selection of its employees.\(^\text{117}\) In some cases, such as a failure to train, understanding the consequences of that policy will require no special knowledge. Where particular knowledge\(^\text{118}\) is necessary to foresee the consequences of a policy or decision, such as knowledge of the proclivities of an errant employee, that knowledge must be in the possession of one or more of those officials "whose duty it was to repress"\(^\text{119}\) such violations or to convey that knowledge to such officials. Thus, it would be sufficient if a police officer's penchant for beating prisoners were known to his supervisors, but not if it were known only to a city file clerk to whom he was married.

The cause clause will have an important application to the types of problems involved in \textit{Rizzo v. Goode}.\(^\text{120}\) \textit{Rizzo} held that an injunction designed to prevent or redress constitutional violations could not be issued against supervisory city officials unless the officials had some personal responsibility for those violations. In light of \textit{Monell} it appears that the outcome of \textit{Rizzo} resulted in part from the fact that, under \textit{Monroe}, only the mayor but not the city of Philadelphia was then an available defendant. The legal responsibilities of a supervisor for misconduct of his subordinates have traditionally been limited to circumstances of direct involvement by the superior in the misconduct.\(^\text{121}\) But the liability of an employer for the actions of even an independent contractor has always been broader, since such an employer faces liability where it knew the contractor was likely to cause injury and failed to take preventative measures.\(^\text{122}\) \textit{Monell} describes \textit{Rizzo} as holding that "the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability."\(^\text{123}\) The implication of this sentence is that either an exercise of control or a failure to supervise would be sufficient to support such liability.

The circumstances under which a city is liable for injunctive relief may well be broader than those in which monetary relief would be ordered. \textit{City

\(^{117}\) \textit{Id.} at 469.

\(^{118}\) In some circumstances constructive knowledge would doubtless be sufficient. Although § 6 required that the defendant have "knowledge" that certain offenses were likely, Senator Edmunds explained that it included " outrages of which he had notice, or of which he might have had notice with reasonable diligence." \textit{Cong. Globe}, 42d Cong., 1st Sess. 824 (1871). The opponents of the original Sherman Amendment complained that it applied even if there were "a total absence of notice, constructive or implied." \textit{Id.} at 788 (remarks of Rep. Kerr).

\(^{119}\) \textit{Id.} at 821 (remarks of Sen. Edmunds).

\(^{120}\) 423 U.S. 362 (1976).

\(^{121}\) The principle of respondeat superior, even in ordinary tort law, has never been applied to impose liability on a supervisor for the torts of a subordinate. \textit{W. Prosser}, \textit{supra} note 116, at 458; see, \textit{e.g.}, \textit{Robertson v. Sichel}, 127 U.S. 507 (1888). A mayor or police chief is not the employer of an errant officer, but only a fellow employee of the city. \textit{See, e.g.}, \textit{Boettger v. Moore}, 485 F.2d 86, 87 (9th Cir. 1973); \textit{Wilkerson v. Mock}, 403 F. Supp. 971, 974 (E.D. Pa. 1975); \textit{Restatement (Second) of Agency § 245, Comment h} (1958).

\(^{122}\) \textit{W. Prosser}, \textit{supra} note 116, at 469.

\(^{123}\) 436 U.S. at 694 n.58.
of Kenosha v. Bruno\textsuperscript{124} holds, and Monell reaffirms,\textsuperscript{125} that the term "person" does not "have a bifurcated application to municipal corporations depending on the nature of the relief sought against them." But while cities are "persons" for both injunctive and monetary actions, this does not mean that the substantive standards for awarding such relief are identical. The defenses discussed in section II clearly apply only to actions for damages; conversely, the requirement, usually imposed in injunctive actions, of a danger of future conduct, would not limit the award of monetary relief. In applying the cause clause, a broader reading may be appropriate as to a claim for injunctive relief\textsuperscript{126} than for a claim for damages.

2. "Former" Policies as Causes. Once a government body adopts an unconstitutional policy, it does not cease violating the law simply by rescinding that policy. The government remains in violation of the Constitution so long as its other practices, even though neutral on their face and in origin, operate to perpetuate the effect of that past unconstitutional policy.\textsuperscript{127} The "remoteness in time" of that past policy is irrelevant to the legality of present practices which give it continuing effect.\textsuperscript{128} The government has an affirmative obligation to take whatever action is necessary to eliminate "root and branch" any ongoing impact which has its origin in past unconstitutional policies.\textsuperscript{129}

These established constitutional principles have two important applications under Monell. First, because such a government unit has an affirmative duty to eliminate the continued effects of its past policies, neither official neutrality nor a good faith but ineffective effort to achieve that result are sufficient to end official liability. This liability is not vicarious, for it has its origin in an official policy. A sincere though unsuccessful attempt to end such effects no more satisfies the government's obligation than an unsuccessful effort to pay an obligation to a creditor would satisfy the underlying debt.

Second, one of the most likely ongoing effects would be the continuation by subordinate officials of practices originally adopted pursuant to official policy. The mere act of formally rescinding an unconstitutional policy does not guarantee that government officials will not continue to implement it. On the contrary, such a technical rescission when not accompanied by vigorous efforts to enforce a new policy would tend to convey to lower level employees the impression that the real policy remains the same and that a pro forma change has been made solely for the sake of appearances or to avoid litigation. Even absent such a perception, a long standing unconstitutional policy may well create among government employees attitudes and

\textsuperscript{124} 412 U.S. 507, 513 (1973).
\textsuperscript{125} 436 U.S. at 701 n.66.
\textsuperscript{126} For example, a one in ten chance that a policy will result in a Miranda violation might be insufficient to award damages but sufficient to warrant an order directing a change in that policy.
practices which will, if left alone, continue unabated despite a change in both official policies and the officials who make them. The government's obligation to prevent this should include whatever affirmative steps, including procedures for aggressively detecting, punishing, and redressing new applications of the old policy, are reasonably feasible to bring about an immediate and effective end to such practices. Where an unconstitutional policy once existed, and subsequent to the formal adoption of a new policy an employee takes an unconstitutional action of the sort which would have implemented the former policy, the government should bear a heavy burden of establishing that the responsible employee would have acted in the same way even had that former policy never been in effect.

Both of these applications are illustrated by the situation which would exist if a city were to formally end an established policy of assigning black applicants only to poorly paid positions. As to blacks hired and assigned on that basis in the past, the city would remain in violation, and back pay liability would continue to accrue, until those employees were offered a meaningful opportunity to transfer to the positions they would have held but for the original discriminatory assignment. And if, subsequent to the formal change of policy, a city employee were nonetheless to engage in a similar act of discrimination, the city would be liable for any resulting damage absent a persuasive showing that the city had undertaken such a vigorous and thorough effort to effectuate the new policy that the employee's act of discrimination could not have had its origin in the old policy, but must have been solely the result of personal prejudices personal in origin.

* * *

A court called upon to decide whether a constitutional violation was the result of a governmental policy will have to resolve an array of questions. Due consideration for rule 52(a) of the Federal Rules of Civil Procedure will require that a trial court make specific findings as to each of the matters—delegation, custom, etc.—put in issue. Where a plaintiff establishes repeated unpunished incidents of the employee conduct involved, that should ordinarily be sufficient to shift to the government the burden of proving the absence of delegated authority, custom, and usage, and of establishing

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130. Fine distinctions among the nuances of violations would not be appropriate. Where the former policy was of discrimination in employment against women, it would be of no significance that the old policy was achieved through discrimination in hiring, while the new violation was one of discrimination in promotions.


that its inaction had not caused the succeeding violations. Resolution of these issues will require a particular sensitivity to the distinction between vigorously enforced prophylactic rules and empty protestations of pious intentions calculated only to placate the courts and the victims of constitutional violations.

II. MUNICIPAL DEFENSES TO SECTION 1983 LIABILITY

The question of whether cities have any good faith defense under section 1983 was left unresolved in Monell. The Court did note, however, that cities cannot be afforded absolute immunity "lest our decision . . . be drained of meaning." Previous decisions regarding the immunities enjoyed by various government officials have proceeded from the premise that "[the legislative record of section 1983] gives no clear indication that Congress meant to abolish wholesale all common-law immunities." As a result, the Court has read an absolute immunity from damage actions for legislators, judges, and prosecutors into section 1983. In the case of cities, however, there is no available common-law immunity which can be read into section 1983. The only common-law immunity for governments was absolute, and Monell expressly precludes application of that doctrine to section 1983 cases. Thus, any municipal defense must be derived from the legislative history and purposes of section 1983.

The discussion which follows suggests that it would be inappropriate to afford a city a "good faith" defense similar to that provided to executive officials. Such a defense for cities would frustrate the purpose of section 1983 as revealed by its legislative history. Furthermore, the policy considerations supporting the particular form of immunity accorded to individuals are largely inapplicable to municipal governments. A more limited form of

133. See 436 U.S. at 695 ("We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day.").
139. Immunity cannot simply be conferred on a city whenever the responsible government officials were immune, since that would preclude any liability whatever for constitutional violations occasioned by a statute or ordinance. Legislators enjoy absolute immunity even if they knowingly adopt an unconstitutional ordinance, Tenney v. Brandhove, 341 U.S. 367 (1951), but an ordinance is the quintessential example of an "official policy" for which Monell would impose liability.
defense is proposed which reflects the purpose and history of section 1983 as well as the standards of reasonable care in tort law.

A. The Language and Purposes of Section 1983

1. The Statutory Language. Congress's failure to require proof that a section 1983 defendant has intentionally violated the Constitution is particularly strong evidence of its desire that such defendants should not be easily immunized. It is clear that this failure was not inadvertent. Unlike section 1983, which contains no reference to the motive of the defendant in a civil action, section 1985 (which was section 2 of the 1871 Act) requires that in certain criminal prosecutions there must be proof of a "purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws." This intent requirement was added by Representative Shellabarger after the original draft of section 2, which contained no such requirement, was criticized as overbroad. Section 1 of the Act (which was codified as section 1983) was similarly criticized, but no comparable amendment was adopted. The rejected Sherman Amendment also required that the rioters have acted "with intent to deprive any person of any right conferred upon him by the Constitution." If Congress had wanted the existence of such an intent to be a prerequisite to liability under section 1, it surely would have also so provided by express language. Monroe v. Pape rejected on this ground an attempt to read into section 1983 a requirement of "a specific intent to deprive a person of a federal right."
In addition, the legislative history of the Act makes clear that, except as to certain specific provisions, Congress attached no importance to the intent involved. With regard to violations of the equal protection clause, which were of particular concern, Representative Morton stressed "[i]f a State fails to secure to a certain class of people the equal protection of the laws, it is exactly equivalent to denying such protection. Whether that failure is willful or the result of inability can make no difference, and is a question into which it is not important that Congress should enter." \(^{148}\) A majority of Congress felt that the states violated the equal protection clause by refusing to prosecute or otherwise remedy Ku Klux Klan outrages, but the attitude of these states was described, not primarily as based on a desire to violate that clause, but with terms such as "indifference," \(^{149}\) "neglect," \(^{150}\) or "undutiful." \(^{151}\) Representative Arthur, who opposed the bill, asserted without contradiction that "if the Legislature enacts a law [that violates the Constitution] . . . acting under a solemn, official oath, though as pure in duty as a saint, as immaculate as a seraph, for a mere error of judgment, they are liable." \(^{152}\)

With the exception of discrimination on the basis of race or sex,\(^{153}\) most constitutional violations do not involve an intent to violate the Constitution; the intended goal of the city or state is often laudatory, but the means chosen is one which the Constitution forbids. Thus an intent requirement could never be met in the case of violations of most provisions of the Constitution;\(^{154}\) as to those provisions, reading an intent requirement into section 1983 would effectively nullify Monell.

A requirement that a city have knowingly disregarded a constitutional command before it is liable under section 1983 faces similar difficulties. Screws v. United States,\(^{155}\) a case involving section 2 of the 1866 Civil Rights Act,\(^{156}\) makes this clear. The 1866 statute had been amended in 1909 to provide that certain criminal violations must be "willful."\(^{157}\) In Screws, the Supreme Court construed this term to add a requirement that the defendant act "in

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\(^{152}\) Id. at 365. Similar assertions were made in 1866 regarding liability of judges under the Civil Rights Act enacted in that year. See note 135 supra. But the proponents of the 1866 Act replied that judges faced no such liability if they acted in good faith. See Cong. Globe, 39th Cong., 1st Sess. 475, 1758 (1865) (remarks of Sen. Trumbull).


\(^{155}\) 325 U.S. 91 (1945).

\(^{156}\) Ch. 31, § 2, 14 Stat. 27.

open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite." 158 Screws expressly conceded that both the term "willful," and any meaning it had added, were absent from the statute as enacted in 1866. The willfulness requirement in Screws appears similar if not identical to the executive immunity rule.159 Such immunity for some section 1983 defendants is entirely possible, but to afford that immunity to cities, and thus to all possible defendants in a 1983 action, would be to read into section 1983 the willfulness requirement which Congress only added to civil rights legislation of that era in express terms and which was limited to criminal prohibitions.

The proponents of the 1871 Act, moreover, were certainly aware that their construction of the thirteenth and fourteenth amendments was widely disputed; their Democratic colleagues read both provisions in a narrow and often nugatory manner.160 Although the construction advanced by those proponents has generally prevailed, Congress must have foreseen that, as actually occurred, decades would pass before the issues of construction were reached and definitely resolved by the Supreme Court.161 In view of the common-law immunities of officials, to have required that the city knew or should have known it was acting in violation of "a clearly established constitutional rule," would have been to preclude virtually any damage awards under section 1983 in the lifetimes of its proponents.

2. The Remedial Purpose of Section 1983. The central purpose of the 1871 Civil Rights Act was not to establish new substantive rights, but to provide a remedy for violations of existing constitutional rights. Thus, the measure was entitled "An Act to enforce the Provisions of the Fourteenth Amendment..."162 Proponents of the Act repeatedly described it as pro-

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158. 325 U.S. at 105.

The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees.

Id. at 106. It appears, moreover, that this limiting construction of "willful" was read into §2 primarily because it was a criminal statute, and might otherwise have been unconstitutionally vague. Id. at 101-05. That special requirement of specificity imposed on criminal statutes does not apply to the civil provisions of § 1983.

159. See text accompanying notes 177-189 infra.

160. The most recurrent disagreement was about whether the fourteenth amendment covered discrimination other than by statute. See notes 60-79 and accompanying text supra. Only five years earlier the Democrats had argued it would be unfair to prosecute a judge who refused to permit an ex-slave to testify or be a party, or imposed a greater penalty on an ex-slave because of his race, if the judge believed that the thirteenth amendment allowed this and that the 1866 Civil Rights Act was unconstitutional. See Cong. Globe, 39th Cong., 1st Sess. 500 (1866) (remarks of Sen. Cowan), 602 (remarks of Sen. Hendricks), 603-04 (remarks of Sen. Cowan), 1121 (remarks of Rep. Rogers), 1265 (remarks of Rep. Davis), 1680 (veto message of President Johnson), 1783 (remarks of Rep. Cowan).

161. For example, the question whether the fourteenth amendment applied to discrimination in the administration of a statute, as opposed to discrimination on the face of a statute, was a major point of contention in Congress. See text accompanying notes 60-79 supra. This issue was finally resolved in Neal v. Delaware, 103 U.S. 370 (1881). It has taken a much longer period of time to resolve the issues raised by Representative Bingham's view that the fourteenth amendment incorporated the entire Bill of Rights. See, e.g., Cong. Globe, 42d Cong., 1st Sess. app., at 83-85 (1871).

162. Ch. 22, 17 Stat. 13 (emphasis added).
viding or correcting the lack of a "remedy" or as a "redress for wrongs," urging that it was "the duty of the national Government . . . to provide an ultimate remedy for the redress of every wrong inflicted upon the citizen." Representative Bingham, the author of the fourteenth amendment, explained at length that that measure itself had been written and adopted to provide a remedy for violations by the states of the guarantees of the Bill of Rights. The members of the Forty-second Congress were certainly aware that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," and even opponents of section 1 recognized that damages were among the remedies provided. Congress was prompted to take action because state and local authorities had failed to provide the necessary civil and criminal remedies. That failure was not the result of a general collapse of the administration of justice, but of a selective refusal to provide redress against certain individuals, particularly against members of the Ku Klux Klan and the public officials often acting with them. These congressional concerns militate strongly against any construction of section 1983 which would leave unremedied any injury suffered as a result of a constitutional violation. The very existence of personal immunity for government officials would seem to preclude granting any immunity to the city itself, for the combined effects of the two immunities would deny to an injured plaintiff any effective remedy.

3. The Deterrent Purpose of Section 1983. Section 1983 was intended not only to redress, but also to prevent, constitutional violations. The possibility of monetary liability ordinarily "has the very desirable effect of deterring [illegal] conduct" and providing an "incentive to shun practices of dubious legality." There is substantial evidence that Congress intended

165. Id. at 368 (remarks of Rep. Sheldon).
166. Id. app., at 85; see text accompanying notes 246-50 infra.
169. "Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (remarks of Rep. Lowe) (emphasis added). See also id. at 666 (remarks of Rep. Spencer) ("[l]ong immunity from punishment" has emboldened the Klan) (emphasis added), 319 (remarks of Rep. Stoughton) (urging "no future exemption from punishment for crimes against the peace and safety of the nation").
170. In Carey v. Piphus, 435 U.S. 247 (1978), the Court noted, "The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." Id. at 258. Those purposes would be equally frustrated if the immunity afforded to city officials were combined with an immunity for the city itself so as to protect every wrong-doer involved in the constitutional violation.
the 1871 Civil Rights Act to have just such an impact. Representative Bingham argued that deterrence was a legitimate purpose of the legislation: "Are not laws preventive, as well as remedial and punitive? Is it not better to prevent a great transgression in advance, than to engage in the terrible work of imprisonment, and confiscation, and execution after the crime has been done?" 173 Representative Dunnell also predicted the bill would have a deterrent effect:

The ex-rebels have once felt the power of the Government. Let them again be assured that it will protect the citizen and make secure the rights which belong to him, protect him in his life, liberty, and property, and they will at least be less bold in their career of blood. 174

Any construction of section 1983 which significantly reduces the likelihood that a city will be held responsible in damages for municipal policies 175 will tend to frustrate this purpose of section 1983. 176

B. Executive Immunity

Reading into section 1983 the form of immunity enjoyed at common law by executive officials, the Supreme Court has held that such officials cannot be held liable in a section 1983 action unless they acted "in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule." 177 Whether a public employer should also be immune under those circumstances seems certain to be a major issue in the wake of Monell.

The very nature and contours of the executive immunity doctrine would, if extended to local governments, be incompatible with Monell. In Scheuer v. Rhodes 178 the Court explained that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office." 179 "[H]igher officers of the executive branch" enjoy greater immunity because "the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is

173. CONG. GLOBE, 42d Cong., 1st Sess. app., at 85 (1871).
174. Id. app., at 262. See also CONG. GLOBE, 42d Cong., 1st Sess. 665-66 (1871) (remarks of Rep. Spencer); id. app., at 101 (remarks of Rep. Pool) (bill will have a "repressing effect"); 182 (remarks of Rep. Mercur) (desperadoes will "modify their conduct"); 202 (remarks of Rep. Snyder) (enactment will bring "repose"); 312 (remarks of Rep. Burchard) (supports any measure that will "restore peace and order").
175. This is, of course, different from providing such an incentive to a city to control the policies and conduct of unrelated third parties, an approach Congress apparently rejected. See Monell v. Department of Social Servs., 436 U.S. at 690-93.
177. Butz v. Economou, 438 U.S. 478, 507 (1978). Although the Butz Court was discussing the immunity enjoyed by federal executive officials sued for constitutional violations, it expressly stated that it was adopting the immunity doctrine applicable to state executive officials sued under § 1983. Id. at 506-08.
179. Id. at 247.
virtually infinite." But while Scheuer seeks to afford greater immunity to
the extent that the defendant is a high policymaking official, that is precisely
the circumstance in which Monell would impose liability on the city. The
exercise of discretion which Scheuer requires as a basis of individual im-
munity is among the prerequisites of municipal liability under Monell. Thus,
extending the Scheuer immunity to cities could result in a rule that any
violation that was a policy under Monell would be immune under Scheuer;
even a more sensible reading would raise, as to any case, serious questions as
to whether one of the two requirements was not met. Certainly Congress
cannot have intended that litigants frame their complaints and proof with
the extraordinary precision necessary to fall between the Scylla of Scheuer
and the Charybdis of Monell.

In establishing the executive immunity doctrine, the Court expressed
concern over the impact of possible damage awards upon discretionary
decisions of state and municipal officials. In Wood v. Strickland, the
Court stated that the absence of immunity "would unfairly impose upon the . . . decisionmaker the burden of mistakes made in good faith in the
course of exercising his discretion within the scope of his official duties." Because a public employee receives no personal gains from a particular
decision, personal liability for good faith errors would ordinarily have a
decisively chilling effect, and would thus deter an official from acting deci-
sively to serve the public interest. The circumstances presented by an
action against a public employer are quite different, for the interests of the
city or county are advanced by particular policy decisions. The actions of
public employees are thus unlikely to be influenced by the mere possibility
of municipal liability, but only by a liability disproportionate in likelihood
and amount to the public interests at stake in the decision.

Other purposes served by the executive immunity doctrine are also
inapplicable to suits against government entities themselves. Such immunity
protects public officials from having to choose at their peril between dis-
regarding the "legal obligations" of their position and being sued for damages
for violating the Constitution, but this consideration is manifestly irrelevant
where the potential defendant is the very city which established those legal
obligations. Similarly, the possibility of municipal rather than personal
liability obviously will not deter capable candidates from seeking public office.188

Extending executive immunity to public employers would also defeat one of the purposes of the absolute immunity afforded to legislators. In Tenney v. Brandhove187 the Court noted that absolute legislative immunity is intended to protect individual legislators from the "inconvenience and distractions of a trial . . . as to [their] motives."188 If an executive immunity defense were available in an action against a city grounded in an unconstitutional ordinance, the plaintiff would be obligated, and thus authorized, to put on trial both the members and the motives of the city council or other legislative body. Increased intrusions into the motivations of both city prosecutors and city judges might also be required.189 Thus creating for cities a new form of immunity, similar to that of executive officials but unknown at common law, would inevitably derogate the common-law immunities of legislators, judges, and prosecutors.

Rejection of executive immunity for cities is thus consistent with the nature and purposes of that doctrine, as well as with the language and purposes of section 1983. Rejection of good faith immunity for cities does not, however, mean that their financial interests will be wholly disregarded in section 1983 litigation. The following subsection suggests that settled principles of tort law are easily applicable to section 1983 actions against cities, and that these principles are adequate to safeguard legitimate municipal interests.

C. The Tort Defense

1. The Proposed Standard. Although "§ 1983 is to be read in harmony with general principles of tort immunities and defenses,"189 there was no nineteenth-century principle of partial municipal immunity that could be imported into section 1983, and the legislative history and purpose of the 1871 Act do not support the creation of such immunity. There was and is, however, a relevant tort defense. Tort law does not ordinarily require a defendant to pay for every injury which may be caused by his or her conduct, but only for those injuries that are the result of negligence or of an intent to do harm. Although the standard of conduct of the law of negligence is often articulated merely in terms of what a reasonable person would do, the standard in fact

188. Id. at 377.
189. Ordinary, of course, the knowledge and motives of city legislators would be irrelevant to the constitutionality of an ordinance, except where the claim is that the statute was framed to discriminate against a racial or other group. Establishing the knowledge and motives on the part of legislators raises difficult and delicate problems. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 (1977). Such "judicial inquiries into legislative or executive motivation represents a substantial intrusion into the workings of other branches of government." Id. n.18. There is no reason to believe that the Forty-second Congress intended to mandate such an intrusion in order to increase the possibility that a city could avoid paying damages for a violation of the Constitution.
involves weighing four distinct considerations: (a) the likelihood that the conduct would cause injury, (b) the magnitude of the possible injury, (c) the importance of the goal at which the conduct is directed, and (d) the availability of alternative methods of achieving that goal.  

These standards can readily be applied to a section 1983 action against cities subject to but one change. Since the harm with which that action is concerned is a constitutional one, it is apparent that the first standard ought to be altered to "the likelihood that the conduct will cause a constitutional injury," a standard that encompasses consideration of the likelihood that the conduct will be held unconstitutional as well as the probability that it will result in damage.

The application to section 1983 litigation of such an adaptation of the usual tort standard of negligence is supported not only by the invocation of tort standards in *Carey v. Piphus* and the statement in *Monell* that the gravamen of the action is a "constitutional tort," but also by the repeated references to tort analogies during the debates of 1871. *Monell* recognized that Congress enacted section 1983 because state officials "were deliberately indifferent to the rights of black citizens"; it seems reasonable to assume that Congress was as concerned with indifference to the possibility that a policy would be held unconstitutional as it was with indifference to the possibility that a policy would bring about a state of affairs whose unconstitutionality was already clearly established. And *Monroe* emphasized, in rejecting a willfulness requirement, that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

Application of this modified tort standard resolves the practical problems raised by *Monell* in a sensible way. For example, under this standard, liability would not be imposed retroactively when an established constitutional precedent is overturned by the Supreme Court, since prior to the decision involved there would have been little foreseeable risk of constitutional injury. In other cases a court will be able to consider not merely the degree to which the unconstitutionality of conduct could have been foreseen, but other sensibly relevant facts. A given degree of risk may be

195. 436 U.S. at 68 n.43.
197. The likelihood that a practice will be found unconstitutional cannot be calculated with any great precision. It will generally be difficult to do more than place a practice into rough categories: (a) practices which are unconstitutional under established law or would be absent some new exception, see, e.g., *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265 (1977); *Bounds v. Smith*, 430 U.S. 817 (1977); (b) practices as to whose constitutionality reasonable attorneys would differ; (c) practices which cannot be held unconstitutional unless existing law is overturned, see, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977); and (d) previously unchallenged practices whose constitutionality raises novel issues, see, e.g., *Roe v. Wade*, 410 U.S.
insufficient to impose liability where the injury was minor and the disputed conduct was the only way to protect an important city interest, but may warrant an award of damages where the city could have foreseen that the conduct would cause serious harm and had alternative methods to protect its interests. More importantly, this standard provides an incentive to the city, in areas where the law may be unclear, "to self-examine and to self-evaluate" its practices, to choose methods with a lower risk of constitutional infirmity, and to reconsider the importance of goals whose achievement will necessarily involve such risks. Under the executive immunity rule, a city which knew that the constitutionality of its practices was in serious doubt would be free to cavalierly continue those practices, despite whatever serious harm they might be causing, until the Supreme Court finally heard and decided a case resolving the constitutional issue involved. The tort standard permits a court to distinguish such a city from one seeking in good faith to achieve its goals with a minimum risk of constitutional infraction.

The use of this standard to define the scope of a city's defense will mean that in some cases the city will face liability under federal law even though the responsible official does not. That, however, is not inappropriate. Officials may reasonably be afforded greater immunity for two reasons. First, the amount of potential financial liability will often be immense compared to the personal resources of the official, especially a high official who sets policies affecting large numbers of people. Personal risks of that magnitude can have a catastrophically chilling effect on an individual; even a small risk of a $100,000 judgment will be sufficient to deter an exercise of entirely proper discretion. A city, on the other hand, can afford to run such risks, and in fact does so on a daily basis in the management of municipal affairs. Second, once such a risk appears, an individual official has no personal interest in bearing it, unless of course he or she is faced with a Hobson's choice between personal liability and dismissal. An official will not run the risk of a $10,000 judgment against him or her even if the policy involved could save the city $100,000,000. But the city itself is presumably receiving some substantial benefit from the policy at issue, and can therefore weigh the importance of that benefit against the risks involved. Thus, the same financial risks which might well deter an official from taking neces-

113 (1973). Practices of the first sort will ordinarily meet the tort standard, and those of the third ordinarily will not. As to practices in the second category, the other tort factors will usually be controlling. Practices in the fourth category might be treated as in the third until the city is sued or otherwise put on notice as to the existence of a constitutional challenge, and thereafter as in the second category.

198. In Moore v. City of E. Cleveland, 431 U.S. 494 (1977), the city sought to enforce a city ordinance which literally prohibited individuals not members of a single family from living in the same house. Although the provision was apparently intended to deal with communal living arrangements involving unrelated adults, it was successfully challenged as applied to two minor first cousins. While the outcome of the case might have been difficult to predict, the interest of the city in immediate enforcement was trivial, especially since such family groupings were doubtless rare. In addition, enforcement of the ordinance would have broken up a family unit as well as causing additional living expenses. Had the city actually succeeded in doing so, an award of damages would have been entirely appropriate.

sary and proper steps will have a far more modest effect on the city itself, forcing it only to consider constitutional values along with the other interests with which it is concerned.\textsuperscript{200} This greater degree of protection for officials than for government bodies is consistent with modern civil rights legislation; in applying the Civil Rights Attorneys Fees Awards Act of 1976, for example, the Supreme Court noted with approval that while the Act imposed liability for counsel fees even absent bad faith it authorized such awards against the city or state rather than the individual officials involved.\textsuperscript{201}

2. \textit{Applying the Standard: Governmental Litigation}. The operation of the suggested standard may be illustrated by considering a common form of governmental action—the conduct of criminal and civil litigation. For reasons similar to those recited in \textit{Pierson v. Ray}\textsuperscript{202} and \textit{Imbler v. Pachtman},\textsuperscript{203} no damage action existed at common law for injury suffered as a result of good faith litigation. But unlike the immunity afforded judges and prosecutors, the common-law protection for ordinary litigants was limited to those who acted in good faith. Litigants who acted in bad faith could be sued for malicious prosecution or, more recently, abuse of civil process.\textsuperscript{204} Even in the course of bona fide litigation, obdurate or bad faith conduct could give rise to a judgment of civil contempt. Similar liability for improperly motivated civil or criminal litigation or tactics seems appropriate against a city, even though it is not available against the officials involved. Of course in many cases those abuses will not involve an official policy or custom, but only an errant individual, and thus no cause of action would exist under \textit{Monell}. But if, for example, a mayor were to direct the commencement of a suit for unconstitutional purposes, or a district attorney were personally involved in the destruction of exculpatory evidence, an award of damages against the governmental entity involved would be appropriate.

Special considerations apply to government activity outside of, but related to, litigation. Frequently the government will need to take or refrain from certain actions in order to generate or maintain its right to litigate at all. Thus a city cannot test the validity of an ordinance without enacting it, and in some cases bringing a civil or criminal action. To impose liability for the injury incident to these steps would be to obstruct access of the government to the courts, and to deter good faith efforts to ascertain the constitutional authority of the government itself. The legislative history of section 1983, however, reveals not hostility toward government efforts to

\begin{itemize}
\item \textsuperscript{200} The lower courts have generally recognized the differing impact of such awards. \textit{See}, e.g., Owen v. City of Independence, Mo., 560 F.2d 925, 940 (8th Cir. 1977), \textit{vacated and remanded}, 438 U.S. 902 (1978); Kostka v. Hogg, 560 F.2d 37, 41 (1st Cir. 1977); Hander v. San Jacinto Junior College, 519 F.2d 273, 277 n.1 (5th Cir. 1975). \textit{See also Note, Damage Remedies Against Municipalities for Constitutional Violations}, 89 \textit{Harv. L. Rev.} 922, 957 (1976).
\item \textsuperscript{201} Hutto v. Finney, 437 U.S. 678, 699 n.32 (1978).
\item \textsuperscript{202} 386 U.S. 547 (1967).
\item \textsuperscript{203} 424 U.S. 409 (1976).
\item \textsuperscript{204} W. PROSSER, \textit{supra} note 116, § 119, at 834-85.
\end{itemize}
litigate constitutional theories, but an affirmative desire to open the courts for the resolution of constitutional disputes.\textsuperscript{205} The process of government is of greater public importance than ordinary private conduct, and while it may be appropriate in some cases to deter the government from taking actions of dubious constitutionality, it is not appropriate to deter the government from seeking in good faith to remove that constitutional cloud.\textsuperscript{206} Accordingly, liability should not be imposed on a city for taking in good faith the steps minimally necessary to test the constitutionality of a desired policy or action.\textsuperscript{207}

This consideration will ordinarily dispose of claims of a person who is denied, or could not meet, bail between his criminal conviction and the date when he is released because of a successful constitutional challenge to that conviction. A constitutional claim is asserted in a substantial portion of all criminal appeals, and the state has a substantial interest in obtaining incarceration pending appeal. Such incarceration is necessary to assure that the imposition of sanctions is swift as well as certain, and a convicted criminal is far more likely to flee the jurisdiction than one merely awaiting trial. The state could not effectively test its constitutional authority to incarcerate an individual if he had fled pending appeal, nor test its constitutional authority to incarcerate him promptly if bail on appeal was required in all cases. Moreover, where a conviction is overturned but a new trial permitted in light of the constitutional claim, a possible damage claim for the period of incarceration during the appeal would raise additional problems. The prosecutor would be deterred from dropping the charges, and a new and inappropriate element would enter into plea bargaining negotiations. Even if the defendant were retried and acquitted, in many cases it would

\textsuperscript{205} See text accompanying notes 251-60 infra.  
\textsuperscript{206} The nature of this limitation is illustrated by United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). There the legislatures of New Jersey and New York enacted legislation which effectively modified the terms of bonds issued by the Port Authority by permitting it to spend its funds for mass transportation. The Governor of New York, while expressing serious reservations as to the validity of the legislation, signed it so that the matter could be resolved in the courts. \textit{id.} at 14 n.12. The Supreme Court ultimately held that the legislation violated the contract clause. \textit{id.} at 17-32. The mere act of passing the legislation appears to have had some impact on the value of the bonds, \textit{id.} at 19, but this was a necessary incident of the states' desire to test their authority to adopt the legislation, and an award of damages to a bondholder who sold at this lower price would have been inappropriate. If, however, the Port Authority had proceeded during the litigation to spend funds unlawfully, thus permanently lowering the value of the bonds, some compensatory remedy might well have been proper. A somewhat different situation might have existed if the immediate expenditure of funds, \textit{e.g.}, to prevent the deterioration of a roadway, had been essential to the mass transportation project. Thus in Linmark Assocs. v. Town of Willingboro, 431 U.S. 85 (1977), a two year delay in implementing the limitation on for sale signs which encouraged panic selling might well have totally defeated the purpose of the ordinance.  
\textsuperscript{207} Several limitations inherent in this formulation are essential to avoid abuse of this rule. First, the city must establish that the actual purpose of those steps was in fact to create the case or controversy necessary for litigation, a requirement that will invariably necessitate a showing that the action was taken on the advice of counsel. Second, the protection must be strictly limited to those steps actually necessary to bring about an adjudication of the city's authority. In many circumstances a simple action for declaratory relief will be sufficient to achieve this purpose, and no substantive measures whatever will be necessary. Finally, the city must take all reasonable steps to bring about a prompt judicial resolution of the controversy it has deliberately precipitated.
be difficult to say, in light of the passage of time and other differences between the two trials, whether the first conviction, and thus the incarceration, was caused by the constitutional violation. Thus, as a general matter, incarceration pending appeal is ordinarily among those measures minimally necessary for a city or state to litigate its contention that a defendant was properly convicted.

A different situation arises, however, where a defendant contends that he cannot constitutionally be prosecuted for his actual or alleged conduct. These cases, of course, occur relatively infrequently; most involve claims that the conduct involved was constitutionally protected, but double jeopardy claims would also be included. Unlike a procedural or evidentiary violation, where the purpose of the relevant constitutional provision is merely to control investigatory or trial conduct, in these cases the purpose of the constitutional provision is to prevent the incarceration of the defendant. In many instances, such as prosecutions alleged to violate the first amendment, incarceration pending appeal will aggravate the constitutional violation by chilling protected conduct by others, and the risk of flight will often be minimal. For these reasons the bad faith prerequisite to damages for incarceration should not apply to incarceration for conduct ultimately held to be constitutionally protected or to have been the subject of a previous prosecution; in such cases the general tort standard described above should apply. In the case of constitutionally protected conduct the official policy requirement of Monell will almost always be met by the adoption of the statute or ordinance involved. In double jeopardy cases the prosecutor will ordinarily be exercising delegated authority, thus subjecting the governmental unit to liability, but it may be possible to prove the contrary.

3. Three Exceptions. In most cases, the standard suggested here will represent the best accommodation of the interests of both municipal defendants and injured plaintiffs in section 1983 actions. There are some circumstances, however, where it would not do so, and where those interests would be better served by different standards. First, the tort standard defense should not be available to the extent that the monetary relief sought would leave the city or state no worse off financially than if the violation had never occurred. This will include cases where the government has taken or withheld funds from the plaintiff; such an action is more analogous to replevin than to tort. In such a case the city should be held strictly liable regardless of the usual considerations regarding "due care" for damages up to the amount of its gain from the constitutional violation. In Vlandis v. Kline, for example, the Court affirmed a district court order directing the refund of excess tuition charges which had been collected in violation of the due

209. See text accompanying notes 22-40 supra.
211. 412 U.S. 441 (1973).
process clause. The same principle would apply to the extent that the violation had produced a net profit for the government, albeit from another source. Clearly a city or state will not be seriously deterred from taking any possibly legitimate action if it knows that, at worst, a section 1983 action may deprive it of all ill-gotten gains, and such liability obviously poses no threat to the fiscal integrity of a government.

The second exception is suggested by Regents of the University of California v. Bakke. In most cases a constitutional violation will occur in the performance of ordinary governmental functions. But in light of Bakke it is possible that a good faith effort to remedy a constitutional violation may itself be a constitutional violation. Thus a governmental employer with a history of actual or arguable employment discrimination against blacks may have a right or duty, possibly of different scope, to implement a race-conscious hiring or promotion policy as a remedy, but, if it adopts such a policy in the wrong form, or in the wrong manner, the government may violate the constitutional rights of whites. The elaboration of the constitutional limitations on affirmative action promises to be a lengthy and complex process, and one best implemented solely by prospective injunctive relief. Similar problems might be posed by a state shield law, intended to protect the first amendment interests in preserving the confidentiality of a reporter's sources; such a statute might be claimed to violate a criminal defendant's sixth amendment right of confrontation. In enacting section 1983, Congress cannot be presumed to have intended to authorize awards of damages for good faith efforts to comply with or implement the Constitution, since the possibility of such suits would deter the voluntary actions which section 1983 was intended to encourage.

Finally, as is set out in detail above, it is possible for a given action or practice to be an official policy within the meaning of Monell even though nominally forbidden by an unenforced prophylactic rule. This might occur, for example, where a city has a nominal rule prohibiting firing non-policy-making officials on the basis of political affiliation, but such practices are in fact widespread and well known. A violation of even nominal city or state law is not among the exercises of discretion which are to be left unencumbered by section 1983, whether the defendant is an individual official or the government itself. Thus either defendant should be held liable for injuries occasioned by unconstitutional conduct which clearly violates state or local law, even if it occurred before such conduct had been declared a constitutional violation.

212. Id. at 445.
214. See particularly Justice Powell's somewhat surprising conclusion that even where adoption of a race-conscious program is required to remedy a constitutional violation, voluntary adoption of that required remedy may itself be a constitutional violation if not preceded by an appropriate judicial decision. Id. at 307-10.
215. See text accompanying notes 171-74 supra. See also Railway Mail Ass'n v. Corsi, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring).
III. SECTION 1983 ACTIONS AGAINST STATE OFFICIALS

Each of the opinions in Monell studiously avoids discussing whether states, like cities and counties, are "persons" within the meaning of section 1983. Edelman v. Jordan had earlier held that states could not be sued under section 1983, but this holding was based on the premise, established in Monroe but overturned by Monell, that no government units were "persons." The availability of states as defendants in section 1983 actions was inconclusively debated by several members of the Court in Hutto v. Finney a few weeks after Monell, and was the subject of a somewhat opaque per curiam decision in Alabama v. Pugh, decided ten days after Hutto. The question of whether a state is a "person" was finally resolved in the 1978 Term in Quern v. Jordan, which held that there was insufficient evidence that the Forty-second Congress intended to abrogate the immunity of states from suit in federal court and that the term "person" should thus not be construed to include a state.

Although Quern reaffirms the established bar to section 1983 actions against states as such, it is also a watershed in the development of injunctive remedies available against state officials. This section discusses the expanded scope of injunctive relief now available in section 1983 actions, and shows that it is consistent with the purposes expressed by Congress.

1. The Cases. To understand the change in the law reflected in Quern, it is necessary to compare it with the far narrower rule announced at the turn of the century in Ex parte Young. In Ex parte Young the plaintiff had sought a federal injunction forbidding the Attorney General of Minnesota from taking any steps to enforce certain state-imposed railroad rates.
The Attorney General claimed that an action seeking to restrain a state official in the performance of his or her official duties was in effect an action against the state itself, and thus outside the jurisdiction of a federal court. In rejecting this contention the Supreme Court insisted that a state official who sought to act in violation of the Constitution could enjoy no valid state authority to do so, and that an injunction against such conduct was therefore in no sense an injunction against the state.\(^\text{224}\)

In the Court's view this doctrine was necessarily subject to two important limitations. First, the defendant official must be in some way responsible for the violation at issue; otherwise the plaintiff would be "merely making him a party as a representative of the state, and thereby attempting to make the state a party."\(^\text{225}\) Second, the relief available against a state official was limited to either a prohibition against unconstitutional conduct or a direction that the official perform some act "merely ministerial in nature" "not involving discretion"; "no affirmative action of any nature" could be required.\(^\text{226}\) Both of these restrictions were closely related to the legal fiction underlying *Ex parte Young*. Simply prohibiting an official from violating the Constitution might fairly be described as interfering with no valid state authority, but the same could not be said of an order requiring that official to use his official powers to redress some resulting injury. And even though one official had violated the Constitution, and had in that respect acted beyond his or her authority, the fiction of *Ex parte Young* was manifestly insufficient to support the granting of any injunctive relief against another official who had not done so.

Notwithstanding the importance of these limitations to the rationale of *Ex parte Young*, it is clear that they are no longer adhered to by the Supreme Court. *Quern v. Jordan*,\(^\text{227}\) for example, arose in 1971 because the Director of the Illinois Department of Public Aid had been guilty of excessive delays in the processing of certain social security claims, in violation of the Social Security Act and the federal regulations thereunder. But the particular Director responsible for that violation was Edward Weaver, who was still in office when the violation ceased in 1972 at the direction of the district court. After the violation had ended, Weaver was succeeded by Joel Edelman, who was replaced by James Trainor, who in turn was replaced in 1978 by Arthur Quern. In 1979 the Supreme Court unanimously upheld an injunction against Quern, even though he was not responsible in any way for the underlying violation, and had not taken office until seven years after the violation occurred. This aspect of the *Quern* order, though a particularly striking departure from the *Ex parte Young* standard, was illustrative of the general practice of the Court declining to inquire into whether the state official

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224. *Id.* at 159-60.
225. *Id.* at 157.
226. *Id.* at 158-59.
against whom an order is to run is the same person as the official responsible for the original violation. 228

Similarly, the injunctions available against state officials are no longer limited to those which prevent violations of the Constitution or federal law. In Quern the disputed order directed the state official to notify certain past social security applicants of their right to appeal the denial of benefits that had resulted from the illegal delays. The officials questioned whether this amounted to a money judgment, 229 but the Supreme Court held it did not, since there was no certainty that benefits would result from the issuance of the notice. But no one questioned the authority of the district court to issue an injunction whose sole purpose was to bring about compensation for a monetary injury sustained several years before. The order upheld in Quern was thus outside the scope sanctioned by Ex parte Young in two respects. Not only was it affirmative rather than merely prohibitory in nature, but it sought, not to end a violation of federal law, but to remedy injuries sustained as the result of a violation long past.

The compensatory nature of the order in Quern represents the most radical departure from Ex parte Young, and reflects a relatively recent change in the articulated standard, though not necessarily the practice, of the Court. In 1975 the Supreme Court emphasized in Edelman v. Jordan that Ex parte Young had only directed "the Attorney General of Minnesota ... to conform his future conduct of that office to the requirement of the Fourteenth Amendment." 230 Equitable restitution of unlawfully withheld benefits was said to be outside the scope of Ex parte Young because it was sought not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. ... It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials. 231

But three years later in Milliken II 232 the Court upheld a decree against state officials directing them to redress the harm caused by past school segregation by providing the victims with remedial education. Milliken II
expressly held that the injunctive relief to which the victims were entitled included redressing past violations as well as preventing future ones. Reiterating the standard applied in earlier actions against local government officials, the Court explained that federal court decrees might properly be aimed at any condition that “violate[s] the Constitution or . . . flow[s] from such a violation.” 233

By the nature of the antecedent violation . . . the victims of Detroit's de jure segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. . . . That the programs are also “compensatory” in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment. 234

Thus the requirement that a decree be prospective, which in Edelman referred to whether the decree was aimed at violations occurring after the decree, in Milliken II meant only that the mandated compliance activities were to occur after the entry of the decree.

The doctrine of Ex parte Young is thus inadequate to explain the compensatory injunctions the Supreme Court is now upholding or to provide significant guidance for the lower courts in framing injunctions against state officials. Other developments since Ex parte Young, however, offer a solution to this difficulty. In deciding Ex parte Young the Court regarded itself as presented with a question purely constitutional in nature—what form of injunctive relief is permitted against state officials under the eleventh amendment. If that were still the sole issue it would be necessary to devise a new construction of the amendment that would rationalize the distinctions emerging in Quern and Milliken II. But Fitzpatrick v. Bitzer, 235 decided between Edelman and Milliken II, held that Congress, acting under section 5 of the fourteenth amendment, could lift the eleventh amendment immunity of the states. Thus, whether a particular type of injunction may be issued against a state official in a section 1983 action involves the construction of the statute as well as, or perhaps rather than, the eleventh amendment.

Quern, of course, resolves two issues of statutory construction, holding that section 1983 does not authorize suits against states in their own name or injunctions, such as that in Edelman, directing state officials to pay damages to private plaintiffs out of state funds. But while Quern considers the legislative history of the statute with regard to such suits or injunctions, it does not purport to decide what other forms of injunctive relief Congress

233. Id. at 282.
234. Id. at 290.
might have intended to authorize against state officials. More fundamentally, Quern does not purport to read the 1871 Civil Rights Act as generally incorporating the then existing eleventh amendment case law. This is not surprising, since there was little such case law at the time, and what there was indicated that any relief whatever was possible against a state official so long as he or she was sued in his or her own name. Thus the availability of forms of injunctive relief other than the sort of “equitable restitution” rejected in Quern and Edelman remains a question to be resolved in the light of the purposes and legislative history of section 1983 as well as those of the eleventh amendment.

2. The Legislative History of Section 1983. Providing a remedy for constitutional violations by state officials was a primary purpose of section 1 of the 1871 Civil Rights Act. The measure was entitled an act to “enforce” the fourteenth amendment, and the specified defendants were persons acting “under color of any statute, ordinance, regulation, custom, or usage, of any State.” Senator Edmunds, the Chairman of the Senate Judiciary Committee and the leading proponent of the bill, said of the Act:

The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any state law, and it is merely carrying out the principles of the [1866] civil rights bill, which have since become part of the Constitution.

Representative Shellabarger, the House sponsor and Chairman of the House Select Committee that drafted the bill, said that section 1 was “in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of State laws which abridge these rights.”

236. This rule was adhered to in Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 857 (1824), and Davis v. Gray, 83 U.S. (16 Wall.) 203, 220 (1872). Between Osborn and Davis the Court held that an action naming only “The Governor of Georgia” by title, but not by name, was an action against the state, Governor of Ga. v. Sundry African Slaves, 26 U.S. (1 Pet.) 110, 123 (1828), because the governor was sued “not by his name, but by his style of office.” This decision, however, was not extended to suits against officials in their own names for half a century. The possibility of evading the eleventh amendment by suing state officials in their own names was first questioned in Louisiana v. Jumel, 107 U.S. 712 (1882). Justices Field and Harlan dissented, relying heavily on Osborn and Davis. Id. at 728-69. Earlier the same Term, in United States v. Lee, 106 U.S. 196, 207-08 (1882), the Court apparently still adhered to the nominal party rule. The headnotes of United States v. Lee, reportedly written by Justice Miller, clearly follow that rule. See C. Jacobs, The Eleventh Amendment and Sovereign Immunity 191-92 (1972). The rule of Osborn and Davis was not openly rejected until In re Ayers, 123 U.S. 443 (1887). The Court there expressly noted that the new rule was established by “recent decisions” and was “not in harmony” with Osborn and Davis. Id. at 487. Although Osborn and Davis are no longer good law, they represented “the reigning constitutional theory of [the] day” when the Civil Rights Act of 1871 was debated and enacted. See Quern v. Jordan, 99 S. Ct. at 1146 n.14 (quoting Monell v. Department of Social Servs., 436 U.S. 658, 676 (1978)).


240. Id. app., at 68.
Section 2 of the 1866 Civil Rights Act, after which section 1983 was modeled, was itself intended to “furnish redress against State laws and proceedings” and to protect certain basic rights from “governmental interference.”

Monell relied on certain remarks of Representative Bingham as demonstrating the intent of Congress to provide a remedy for constitutional violations by cities. In fact, the remarks referred to by the Court place far greater emphasis on the need to remedy state misconduct. Bingham, as Monell noted, explained that section 1 of the fourteenth amendment was drafted because under Barron v. Mayor of Baltimore, a “city [could take] private property for public use, without compensation . . . and there was no redress for the wrong.” But Bingham continued: “before the ratification of the fourteenth amendment, the State could deny to any citizen the right of trial by jury, and it was done. Before that the State could abridge the freedom of the press, and it was so done in half of the States of the Union.”

Monell reads Bingham’s further remarks as “clearly indicat[ing] his view that such takings by cities, as had occurred in Barron, would be redressable under § 1 of the bill.” But the passage apparently referred to is again concerned with remedying violations by states:

Why not in advance provide against the denial of rights by States . . . ? As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy.

... [T]he negative limitations imposed by the Constitution on States can be enforced by law against individuals and States . . .

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241. Ch. 31, § 2, 14 Stat. 27 (1866).
245. See, e.g., 436 U.S. at 685 n.45.
248. Id. The violations of free speech were of particular concern to Bingham and the other Republicans, since the victims were frequently northern abolitionists speaking in southern states. See Cong. Globe, 42d Cong., 1st Sess. 335 (1871) (remarks of Rep. Hoar).
249. 436 U.S. at 687.
250. Cong. Globe, 42d Cong., 1st Sess. app., at 85 (1871). Although this is the page cited in Monell, there is no express reference to takings of property by cities as such. In view, however, of the then prevailing view that cities were but agencies of the states, see text accompanying notes 49-58 supra, the reference to uncompensated takings by states doubtless includes such takings by cities.
As *Monell* held, these passages demonstrate Bingham's understanding that the bill provided such a remedy; his argument would otherwise have been irrelevant to the desirability of the bill. That understanding, though encompassing actions against cities, was primarily concerned with providing remedies against the states themselves.

In addition, all members of Congress agreed that judicial remedies were the preferable method of redressing a violation of the Constitution. Several opponents of the Act urged that the federal courts were the sole appropriate forum for redressing violations of the fourteenth amendment. Senator Thurman insisted that the key to the American constitutional system was that judicial redress was always available for a constitutional violation. Noting the authorization of federal question jurisdiction in article III, Thurman asserted:

> there can be no question that can arise under the Constitution that may not be made the subject of judicial decision.

> That, then, is the great idea of the Constitution, that in respect to this class of provisions, which are limitations upon the powers of the States, they are to be protected through the Federal judiciary.

Representative Slater emphasized the broad remedial authority of the federal courts to redress any violations of the fourteenth amendment.

> The Federal courts, always open with writs of *habeas corpus*, writs of restraint, and injunctions, and other remedial agencies, can at all times render efficient and ample security against actual or threatened disregard of these guarantees. Through the civil agencies and remedies of the Federal courts is to be found the means of enforcing the first section of the constitutional amendment...

Under sections 3 and 4 of the Act the President was required to intervene with the armed forces where other measures had failed and was authorized where necessary to suspend the writ of habeas corpus in order to prevent continuation of the violent abuses of the Ku Klux Klan and similar organiza-

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251. *Cong. Globe*, 42d Cong., 1st Sess. 331 (1871) (remarks by Rep. Morgan) (the remedy for an aggrieved citizen is “to go into the courts for redress against a violation of these rights”), 420 (remarks of Rep. Biggs) (if there is a denial of equal protection “the question is open to civil remedy, and the judicial power of this Government is the only power to decide the question”), 578 (remarks of Sen. Trumbull) (“in regard to all the rights secured by the Fourteenth Amendment, however extended, in time of peace, the courts are established to vindicate them, and they can be vindicated in no other way”), 645 (remarks of Sen. Davis) (“When the rights of men, either of person or property, are in issue, there is but one proper course of legislation, and that is: for the legislative power to pass proper laws to regulate them and to refer the enforcement and the execution of such laws to the courts . . . .”).

252. Id. app., at 221.

253. Id. app., at 305. See also id. app., at 259 (remarks of Rep. Holman).

tions. Any limitation on the remedial authority of the federal courts under section 1 necessarily increased the likelihood that these more drastic measures would be needed. Neither the supporters of the Act, who viewed military force as a last resort, nor its opponents, who opposed such force under any circumstances, can readily be presumed to have intended to deny to the federal courts the authority which might have enabled the courts to remedy constitutional violations without resort to military action. Equally importantly, the proponents of the bill intended that it extend as far as congressional authority could reach. Senator Edmunds urged that, if the evils in the South were as he believed, “every measure of constitutional legislation which will have a tendency to preserve life and liberty and uphold order ought to be resorted to.” Senator Pool asserted:

The reconstruction policy, by which the political and civil equality of all citizens is made a constitutional right, is meant to be enforced as a measure of national safety. If there be not sufficient constitutional power to enforce it effectually through the courts, or should the courts be obstructed or in anywise fail in its enforcement, the military power will have to be used . . .

Since sections 3 and 4 of the bill did authorize the use of military force, Pool must have understood sections 1 and 2 to authorize exercise of all the “constitutional power” of the courts. Shortly after the bill became law, Representative Perry commented that Congress had “asserted as fully as we can assert the constitutional right of Congress to legislate.”

The legislative history of section 1983 thus fully supports the broad remedial authority of federal courts recognized by Quern and Milliken II.

255. “[I]n my judgment a resort to military power, that is, to martial law, should be always avoided, if there be any other means to accomplish the result that the good and peace of the nation may require to be accomplished.” Cong. Globe, 42d Cong., 1st Sess. app., at 101 (remarks of Sen. Pool). “Obviously the court of justice is the first instrument to be used in and of the fourteenth amendment; safer, milder, surer, more in accordance with reason, with our system, and with public sentiment . . . How much better this than the array of armed men, the suspension of civil process, the dread alternative of force.” Cong. Globe, 42d Cong., 1st Sess. 459 (1871) (remarks of Rep. Coburn). See also id. at 609 (remarks of Sen. Pool).


259. Id at 609.

260. Id. at 800. See also id. app., at 196 (remarks of Rep. Buckley) (he is “willing to go to the very verge of constitutional limits to enable [the President] to protect constitutional rights”), 312 (remarks of Rep. Burchard) (“I, for one, am willing to exercise the powers we have for the protection of life and public order to the fullest extent. In a matter of doubt I am ready to go to the extreme verge of fair construction that will justify Federal intervention.”).
3. The Limits of Injunctions under Section 1983. In Quern the Court deemed this legislative history insufficient to conclude that Congress intended to authorize the most drastic form of remedy, an action for damages against a state. But that remedy strikes at the very heart of the eleventh amendment. It was such suits which were precluded by “the States’ traditional sovereign immunity,” 261 and with which the eleventh amendment was concerned. 262 The situation presented by injunctive actions against state officials who violate the federal constitution is very different. There was no common-law immunity doctrine which section 1983 would have needed to overturn, for the situation presented by the dual legal structure of our federal system did not exist in England. The problem had not arisen when the eleventh amendment was adopted in 1798 because there were then few constitutional limitations on the states, and there was no federal question jurisdiction to enforce those that did exist. Thus the issue presented by an action seeking injunctive relief against a state official is ordinarily sufficiently removed from the concerns underlying both sovereign immunity and the eleventh amendment that the remedial authority of the federal courts should properly be determined by reference to the purposes of section 1983, without resort to any presumptions against “affirmative” or other general categories of relief.

Analyzed in this manner the decisions in Quern and Milliken II upholding the compensatory injunctions there at issue make perfect sense. In both cases the injunctions were framed to achieve the traditional purpose of a remedial order—to restore the victim of the violation, insofar as possible, to the position and conditions he or she would have enjoyed had the violation not occurred. In Milliken II the injury suffered was educational in nature, and thus additional education was directed; in Quern the victims had lost social security benefits, and the order was therefore aimed at producing payment of those benefits. Restoration of the circumstances that would have existed but for the violation is both a traditional and reasonably clear standard for framing remedial decrees, and one with consequences fairly foreseeable by both courts and state officials. If, for example, state police beat a plaintiff in violation of his constitutional rights, state officials, depending on the nature of the resulting harm, might be directed to provide medical services or physical rehabilitation at a state facility. If the victim is so injured as to be unable to return to his or her previous employment, state officials could be directed to offer job training or even employment. In the case of a state employee who loses wages because of a constitutional violation, for example, by being dismissed for protected free speech activities, a court could order, in addition to reinstatement, that in the future the employee be granted an appropriate amount of compensatory time off with

pay, since such "comp time" is by now an established form of employee compensation.

*Quern,* of course, forbids one form of injunctive relief, an order that state officials pay damages with state funds, even though this too restores the victim to the position he or she would have occupied absent the violation. But, as *Edelman* emphasized, such an order, though equitable in form, is similar to the sort of damage awards that are the central concern of the eleventh amendment. The restriction of *Quern* and *Edelman* would seem to extend as well to an injunctive order that state officials provide services to the victim which bear no reasonable relation to the particular injury caused by the underlying violation. Thus while certain forms of relief noted above might be appropriate in a police brutality case, a court could not direct that the state road department pave the victim's driveway as compensation for the pain and suffering inflicted. That sort of mandated state service would have no connection to the underlying violation, other than as a functional equivalent to a cash award, and thus falls within the prohibition of *Quern* and *Edelman*. A federal court could, on the other hand, direct the state to provide such services as could be said with reasonable certainty to have been among the types of services the victim would have acquired and enjoyed but for the violation. Thus while it would be a matter of speculation whether the disabled victim of a beating by state officials might have paved his or her driveway, there would be little doubt that if able to work he or she would have used his or her wages to feed his or her family, and an order requiring the state to provide the victim with food stamps would therefore be appropriate.

The nature of the decree upheld in *Quern* makes plain the Supreme Court's abandonment of *Ex parte Young's* restrictions on injunctive relief, and deprives the distinction occasionally proffered between prospective and retrospective relief of any useful meaning. *Quern* confirms the expansion of the authority and responsibility of federal courts in actions against state officials to afford compensatory injunctive relief which is fairly tailored to redressing the underlying violation so long as it is not merely the functional equivalent of a cash award. This remedial power strikes a reasonable and intelligible balance between the remedial purposes of section 1983 and the concerns underlying the eleventh amendment.

**IV. PENDENT STATE CLAIMS**

In the years between *Monroe* and *Monell* most cities and states had or adopted laws consenting to suit in state court for some or all ordinary torts by their employees.263 Since constitutional torts are in most cases common-law torts, two attempts, both unsuccessful, were made to use these

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263. See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.00 (Supp. 1970); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 25.00 to 25.00-2 (1976).
state and local laws to obtain damages in federal court for constitutional violations. In *Aldinger v. Howard*, the Supreme Court considered and rejected a suggestion that, in a section 1983 action against a county official, the county itself might be joined as a "pendent party"; the Court reasoned that Congress could not have intended that defendants which, according to *Monroe*, Congress had expressly "excluded" from section 1983, could be brought "back within" the power of the court "merely because the facts also give rise to an ordinary civil action against them under state law." *Moor v. County of Alameda* the Court concluded that the state law liability of a county could not be incorporated into 42 U.S.C. § 1988 as a rule for fashioning remedies; the Court held that, since section 1988 precludes remedies "inconsistent with . . . the laws of the United States," such a remedial rule was unavailable under section 1988 because it would be inconsistent with section 1983 as construed by *Monroe*.

Clearly *Monell* destroys the basis of both *Aldinger* and *Moor*. The issues raised by *Aldinger* and *Moor* remain important, however, since state and city laws are often more liberal than *Monell* as to when damages can be awarded; ordinarily neither the existence of an official policy nor the probability that the practice was unconstitutional are important under these laws.

In light of *Monell*, the first issue is not, as in *Aldinger*, whether a pendent party can be added, but only whether a pendent state claim can be asserted against the city or county which is already a party. This issue is not controlled by the stringent standards announced in *Aldinger*, but by the more liberal requirements of *United Mine Workers v. Gibbs*; it is sufficient that there be a "common nucleus of operative fact" shared by the federal claim and state claim and that the federal claim be substantial. The first requirement will usually be met in any case where it is alleged that the conduct of certain officials was both a constitutional and a state law tort. The merits of the constitutional claim will involve a contention not necessary for the state law claim, that the tort violated the Constitution; whether that is a substantial claim will of course depend on the circumstances of each case. The exercise of pendent jurisdiction over a related state law claim will generally be permissible except where the federal claim must be dismissed prior to trial because the alleged conduct was not unconstitutional or because the conduct occurred at a time when it was clearly sanctioned by then established constitutional principles. Redress of the constitutional claim in a section 1983 case requires proof as to two issues not relevant to the

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266. 411 U.S. 693 (1973).
267. Id. at 706-10.
268. *Monell* intimates as much. 436 U.S. at 701 n.66.
270. Id. at 725.
271. The official policy or custom requirement, based as it is on the special legislative history of § 1983, would presumably not apply to an action under 28 U.S.C. § 1331 (federal question) or § 1332 (diversity).
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state law claim—whether there was an official policy or custom, and whether the city or state conduct involved an unreasonable danger of a constitutional violation. The first element, once alleged, would usually require an evidentiary hearing, and often will involve complex factual issues. Ordinarily, however, it would be pointless for a court to conduct a trial on these issues, since if the plaintiff can establish the other elements of his or her constitutional claim, he or she will be entitled to judgment on the state claim regardless of whether such an official policy or custom is involved and regardless of the likelihood of constitutional injury.

Where state law sets a standard less stringent than in section 1983 for the imposition of liability, imposition of the lesser standard would appear to be appropriate under Moor. Section 1988 provides that federal courts may look to state law in fashioning remedies for constitutional violations. Recent Supreme Court decisions construing section 1988 leave considerable uncertainty as to whether the courts are (a) to look primarily to federal law, fashioning a federal rule if necessary, (b) to look primarily to state law, (c) to use state law unless it is inadequate, in which case federal law is to be used or fashioned, or (d) to choose whichever law is suited to providing an effective remedy. But Moor itself approved two lower court cases involving virtually the same issue as now will arise under Monell. In both Hesselgesser v. Reilly and Lewis v. Brautigam, a sheriff in a section 1983 action was held financially liable for constitutional violations by his deputies "where state law provided for such vicarious liability." Section 1983, of course, does not itself impose such vicarious liability on a sheriff, but Moor emphasized that in each case "the cause of action was properly based on § 1983" because a sheriff, unlike a county, was an available section 1983 defendant. This seems indistinguishable from using state respondeat superior rules to impose "vicarious" liability on a county now that it, like a sheriff, is an available defendant. Monell makes it clear that for counties, as for sheriffs, the omission of "vicarious" liability from section 1983 does not involve an affirmative congressional policy to

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272. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.


274. See Moor v. County of Alameda, 411 U.S. at 704 n.17.

275. 440 F.2d 901, 903 (9th Cir. 1971).

276. 227 F.2d 124, 128 (5th Cir. 1955).

277. 411 U.S. at 704 n.17.

278. Id.
forbid any suits against cities and counties. Thus, if state or local law imposes tort liability on a government body according to the principles of respondeat superior, those principles should be applied under section 1988 in a section 1983 action.

CONCLUSION

Despite the fundamental change in section 1983 jurisprudence contemplated by Monell, it is readily apparent that the issues which remain for judicial resolution could readily be used to nullify Monell itself and to preclude as a practical matter awards of monetary relief against government bodies which violate the Constitution, just as Monroe mistakenly precluded them as a matter of law. For example, a construction of section 1983 that requires a showing of an intent to violate the Constitution, would be sufficient by itself to preclude such awards in all but a handful of cases. Other interpretations, such as severely limiting the class of officials who are deemed to "make official policy," would allow cities to maintain unconstitutional practices with impunity through a simple manipulation of their internal procedures.

Such an emasculating result would frustrate not only the purpose of Monell but the intent of the Forty-second Congress. The express achievement of section 1983, according to Representative Lowe, was that it "throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." That provision did not authorize the courts to pick and choose from among constitutional violations those which would be remedied, for Congress felt it was "the duty of the national Government ... to provide an ultimate remedy for the redress of every wrong inflicted upon the citizen." That any ambiguities in section 1983 were to be resolved in favor of assuring an adequate remedy was clearly the intent of Representative Shellabarger, the chairman of the committee that wrote the 1871 Civil Rights Act:

This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficiently construed. ... [T]he largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Monell and section 1983 should be applied and construed in that spirit in the future.

279. Both Monroe, 365 U.S. at 190, and Moor, 411 U.S. at 709, stated that Congress concluded that it lacked the constitutional power to authorize any suit against a city or county.

280. Cong. Globe, 42d Cong., 1st Sess. 376 (1871). See also id. at 459 (remarks of Rep. Coburn) ("Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors.").

281. Id. at 368 (remarks of Rep. Sheldon) (emphasis added). See also id. at 807 (remarks of Rep. Garfield) (§1983 "throws the protection of the courts of the United States over the right of every citizen to enjoy all the privileges and immunities secured to him by the Constitution," and authorizes a suit for redress "if any of these rights are denied") (emphasis added).

282. Id. app., at 68.