

# THE CHANGING NATURE OF LOCAL GOVERNMENTAL LIABILITY UNDER SECTION 1983

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## I. INTRODUCTION

Cries that the Burger Court is unsympathetic to civil rights have been plentiful.<sup>1</sup> Certainly, much evidence is available to prove that these cries are not hollow.<sup>2</sup> Nevertheless, the Burger Court has taken some significant steps in the direction of facilitating civil rights litigation. None is more dramatic than the changes wrought in the law regarding the liability of local governmental entities in suits brought pursuant to Section 1983.<sup>3</sup> Less than five years ago, a plaintiff seek-

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1. See, e.g., Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977); Neuborne, *The Procedural Assault on the Warren Legacy: A Study of Repeal by Indirection*, 5 HOFSTRA L. REV. 545 (1977); Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 FLA. L. REV. 904 (1976); Comment, *Civil Rights in the Burger Court Era*, 10 AKRON L. REV. 327 (1976).

2. Court decisions concerning standing, abstention, the availability of habeas corpus relief, the nature of the interests protected by the Fourteenth Amendment, the Eleventh Amendment and the exercise of equitable relief amply support the view that the Court has been less than receptive to civil rights claims. See, e.g., Moore v. Sims, 442 U.S. 415 (1979) (abstention); Quern v. Jordan, 440 U.S. 332 (1979) (Eleventh Amendment); Stone v. Powell, 428 U.S. 465 (1976) (habeas corpus); Paul v. Davis, 424 U.S. 693 (1976) (interests constitutionally protected); Rizzo v. Goode, 423 U.S. 362 (1976) (limits on equitable relief); Warth v. Seldin, 422 U.S. 490 (1975) (standing); Edelman v. Jordan, 415 U.S. 651 (1974) (Eleventh Amendment); Younger v. Harris, 401 U.S. 37 (1971) (abstention).

3. 42 U.S.C. § 1983 (Supp. III 1979).

ing compensation for infringement of his constitutional rights by a local government official was almost invariably restricted to suing the official. Suit against the entity itself could proceed only on the basis of a little-used legal theory.<sup>4</sup> Now, however, governmental units find themselves exposed to liability under Section 1983 when they violate an individual's constitutional rights. In addition, violations of purely statutory rights not traditionally viewed as civil rights also give rise to governmental liability, both for the injury caused and for attorney's fees. Once nearly invincible to suit, governmental entities are now quite vulnerable.

This turnabout is the result of a series of Supreme Court decisions interpreting the phrase "and laws" and reinterpreting the word "person" in Section 1983;<sup>5</sup> construing the Civil Rights Attorney's Fees Awards Act of 1976;<sup>6</sup> and delineating the degree of immunity from suit which governments and various governmental officials enjoy. This Article will discuss the new rules of governmental liability created by these decisions and their implications for future litigation. Although the rules of the litigation game have clearly been substantially altered, the contours of the change may be less drastic than some have feared.

At the outset, note two important caveats. First, most of the decisions discussed in this Article involve questions of statutory construction. The Reagan administration, with the Republican-controlled Senate, may well seek to overrule or modify legislatively some or all of the decisions.<sup>7</sup> Second, it is important to distinguish between suits

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4. Some plaintiffs were able to bring suit against local governmental entities by alleging a cause of action directly under the Fourteenth Amendment. See, e.g., *Turpin v. Maillet*, 579 F.2d 152 (2d Cir. 1978) (en banc), *vacated and remanded sub nom. Turpin v. City of West Haven*, 439 U.S. 988 (1978); *Stapp v. Avoyelles Parish School Board*, 545 F.2d 527 (5th Cir. 1977); *Amen v. City of Dearborn*, 532 F.2d 554 (6th Cir. 1976). See generally *Hundt, Suing Municipalities Directly Under the Fourteenth Amendment*, 70 Nw. U. L. Rev. 770 (1975).

5. Section 1983 reads in relevant part:

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

42 U.S.C. § 1983 (Supp. III 1979) (emphasis added).

6. 42 U.S.C. § 1988 (1976).

7. There may be limits as to how far Congress could go in overruling some of these decisions. For example, were Congress to amend Section 1983 in a way that would render it ineffective, courts might well allow plaintiffs to proceed with their

brought in federal court and those brought in state court when the state is the defendant. The Eleventh Amendment immunizes states from suits for retroactive relief such as damages or back pay, but only when the suit is brought in federal court.<sup>8</sup> Although Congress can abrogate a state's Eleventh Amendment immunity,<sup>9</sup> it did not do so when it passed what is now Section 1983.<sup>10</sup> Because civil rights litigants generally view federal courts as more sympathetic to their claims than are state courts,<sup>11</sup> the protection afforded states by the Eleventh Amendment is quite significant. The Eleventh Amendment, however, does not immunize local governmental units, regardless of where suit is filed.<sup>12</sup>

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constitutional claims directly under the Fourteenth Amendment. *Cf.* *Carlson v. Green*, 446 U.S. 14 (1980) (allowing action to proceed directly under Eighth Amendment despite availability of Federal Tort Claim Act action). *See also* cases cited at note 4 *supra*.

8. *Edelman v. Jordan*, 415 U.S. 651 (1974). The Eleventh Amendment is concerned with the jurisdiction of the federal judiciary.

9. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) ("Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials.").

10. *Quern v. Jordan*, 440 U.S. 332 (1979). The majority in *Quern* recognizes that the Civil Rights Act of 1871 ceded to the federal government many important powers which had previously belonged exclusively to the states. The Court declared, however, that neither logic, circumstances surrounding enactment, nor the legislative history "warrant . . . the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States." *Id.* at 342.

11. *See generally* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); *but see* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

12. For convenience, the terms local governmental units, local governmental entities, and municipalities are used interchangeably throughout this Article. Although not all local governmental entities are municipalities, they generally tend to be treated more like municipalities than states for purposes of Section 1983. The question does sometimes arise, however, as to whether a particular governmental unit should be considered an arm of the state and therefore be accorded protection under the Eleventh Amendment. *See, e.g.*, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (bi-state authority not immunized by Eleventh Amendment); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) (local school board not immunized). *See also* *Charles Simkin & Sons, Inc. v. State University Construction Fund*, 352 F. Supp. 177 (S.D.N.Y. 1973), *aff'd mem.*, 486 F.2d 1393 (2d Cir. 1973) (New York Dormitory Authority not immunized, but State University Construction Authority immunized).

## II. LOCAL GOVERNMENTAL AND OFFICIAL IMMUNITIES UNDER SECTION 1983

### A. *Monroe v. Pape and Governmental Immunity*

The starting point for an examination of governmental immunity in Section 1983 actions must be the landmark decision in *Monroe v. Pape*.<sup>13</sup> Although the Court there paved the way for a greatly expanded use of Section 1983,<sup>14</sup> *Monroe v. Pape* did construe the statute restrictively in one respect. Section 1983 provides a cause of action against any "person" who, under color of state law, deprives an individual of any right secured by the Constitution and laws. An examination of the legislative history, however, convinced the Court that Congress did not intend that municipalities be considered "persons." Thus, municipalities were immunized from liability under Section 1983.<sup>15</sup>

Several consequences stemmed from this ruling. When Section 1983 plaintiffs sought only injunctive or declaratory relief, the holding caused some inconvenience but proved of little practical significance.<sup>16</sup> Rather than naming the local entity as defendant, plaintiffs simply resorted to suing the appropriate officials in their official capacities. Plaintiffs could then obtain full relief against them.

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13. 365 U.S. 167 (1961).

14. The Court held that state remedies need not be exhausted before suit could be filed under Section 1983. *Id.* at 183. In addition, the Court held that the "under color of law" requirement was met so long as the challenged conduct resulted from the misuse of power made possible by the wrongdoer's being clothed with the authority of state law. *Id.* at 184. The number of civil rights cases filed in federal court has skyrocketed, from 296 in 1961 to 12,944 in 1980. [1961] DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. 238 Table C-2; [1980] DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT ANN. REP. 245 (Table 28).

15. The Court based its decision primarily on the House of Representatives' rejection of the Sherman Amendment which would have created municipal liability for damages to any citizen deprived of constitutional rights by acts of violence. 365 U.S. at 188-89. It also relied on congressional expressions of doubt as to the amendment's constitutionality, *id.* at 190, and the antagonistic response of the Congress to the amendment. *Id.* at 191.

16. Some lower courts allowed suits for injunctive relief against the governmental entity directly, finding *Monroe* applicable only to suits for damages. *See, e.g.,* Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Harkless v. Sweeny Indep. School Dist., 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). The Supreme Court obliterated this distinction in *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), holding that municipalities were not subject to suits for equitable relief under Section 1983.

When plaintiffs sought monetary relief, however, complications arose. If an entity such as a local school board was the named defendant, courts had to engage in the almost metaphysical task of deciding whether the particular entity was a "person."<sup>17</sup> That question usually produced a negative answer.<sup>18</sup> If, instead, the suit named a government official, courts examined the source which would actually pay any recovery. When it appeared that a judgment would come out of the entity's treasury rather than the official's own pocket, courts held that the action would not lie under Section 1983. A plaintiff could not name the official as defendant when the real party in interest was the governmental entity, a "non-person."<sup>19</sup> On the other hand, if recovery were actually to come out of the official's pocket, the barrier of official immunity confronted the plaintiff.

### B. *Official Immunity*

In a series of cases, the Supreme Court has sought to provide government officials with some protection from the threat that their official actions might subject them to personal liability. Passage of Section 1983 did not, the Court held in *Tenney v. Brandhove*,<sup>20</sup> abolish the common law immunity from suit enjoyed by state legislators. Absolute immunity to suit under Section 1983 was also extended to judges<sup>21</sup> and prosecutors as well.<sup>22</sup> The primary justification given for such absolute immunity is that it is necessary to insure independ-

17. Compare *Wright v. Arkansas Activities Ass'n*, 501 F.2d 25 (8th Cir. 1974) (corporation administering state athletic program a "person") and *Aurora Educ. Ass'n East v. Board of Educ.*, 490 F.2d 431 (7th Cir. 1973), cert. denied, 416 U.S. 985 (1974) (school board is a "person") with *Garrett v. City of Hamtrack*, 503 F.2d 1236 (6th Cir. 1974) (city planning commission not a "person"); and *Singleton v. Vance County Bd. of Educ.*, 501 F.2d 429 (4th Cir. 1974) (school board not a "person"). See also cases cited in N. DORSEN, P. BENDER & B. NEUBORNE, *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1540-41 (4th ed. 1976).

18. *Developments in the Law - Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1194 (1977). See also cases cited at note 17 *supra*.

19. *Monell v. Department of Social Services*, 532 F.2d 259 (2d Cir. 1976), rev'd, 436 U.S. 658 (1978); *Muzquiz v. City of San Antonio*, 528 F.2d 499 (5th Cir. 1976), vacated and remanded, 438 U.S. 901 (1978).

20. 341 U.S. 367 (1951).

21. *Pierson v. Ray*, 386 U.S. 547 (1967). See also *Stump v. Sparkman*, 435 U.S. 349 (1978). Whether judges are also immune from suits for injunctive or declaratory relief has not been resolved, although the Court recently hinted that they would not be accorded such immunity. *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 735-36 nn. 13 & 14 (1980). In that case, the defend-

ent decisionmaking, unaffected by the spectre of personal liability.<sup>23</sup> As one court of appeals colorfully put it, “[e]ven though there may be an occasional diabolical or venal judicial act, the independence of the judiciary must not be sacrificed one microscopic portion of a millimeter, lest the fears of Section 1983 intrusions cow the judge from his duty.”<sup>24</sup> Thus, no matter how maliciously a judge acts toward a defendant, or how deliberately a prosecutor presents perjured testimony, he is immune from suit under Section 1983.<sup>25</sup>

Claims by other officials that they need similar protection from Section 1983 liability have met with less sympathy. Responding to such claims by police officers,<sup>26</sup> state executive officials,<sup>27</sup> school board members,<sup>28</sup> hospital administrators,<sup>29</sup> prison officials,<sup>30</sup> and federal executives,<sup>31</sup> the Court has evolved a qualified immunity test. The test consists of both a subjective and an objective element. Even if an official’s action causes the deprivation of an individual’s constitutional rights, the official will be immune from personal liability if two conditions are met: (a) he did not act with malicious intent to deprive the individual of a constitutional right or cause other injury—the subjective element; and (b) he did not know or could not reasonably have been expected to know that the action would violate

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ant judge was held liable in a suit for injunctive and declaratory relief for actions taken in his enforcement capacity. *Id.*

22. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

23. *Butz v. Economou*, 438 U.S. 478, 497 (1978); *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 426 (1976).

24. *McAlester v. Brown*, 469 F.2d 1280, 1283 (5th Cir. 1972).

25. Although labeled “absolute,” the immunity enjoyed by judges and prosecutors has some limits. Judges may be held liable for non-judicial acts or actions taken in the clear absence of jurisdiction. *See, e.g., Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980), *cert. dismissed*, 449 U.S. 1028 (1980) (judge acting as prosecutor not immune); *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (affirming \$140,000 damage award against judge who caused coffee vendor to be arrested and then berated him). Prosecutors do not enjoy absolute immunity for acts taken outside the scope of their prosecutorial function. *See, e.g., Jacobson v. Rose*, 592 F.2d 515 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1977) (prosecutor joining with sheriff in implementing wiretap not entitled to absolute immunity).

26. *Pierson v. Ray*, 386 U.S. 547 (1967).

27. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

28. *Wood v. Strickland*, 420 U.S. 308 (1975).

29. *O’Connor v. Donaldson*, 422 U.S. 563 (1975).

30. *Procunier v. Navarette*, 434 U.S. 555 (1978).

31. *Butz v. Economou*, 438 U.S. 478 (1978).

a constitutional right clearly established at the time of the action—the objective element.<sup>32</sup>

The Supreme Court has viewed this qualified immunity as striking the appropriate balance between the individual's right to compensation (for constitutional injury) and the need to protect the decision-making processes of state and local officials.<sup>33</sup> As a practical matter, the qualified immunity enjoyed by these officials has proved a significant obstacle to civil rights litigants. In numerous cases, defendant officials have avoided liability for unconstitutional actions because of their qualified immunity.<sup>34</sup>

Still other factors militate against the successful prosecution of a civil rights damage action against government officials. In some instances, plaintiffs will encounter great difficulty in identifying the particular official responsible for the injury.<sup>35</sup> Even when the responsible official is identified, juries are often reluctant to find him liable for substantial damages.<sup>36</sup> Finally, even when substantial damages are awarded, the official may be judgment proof or without sufficient assets to satisfy the damage award.<sup>37</sup>

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32. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). The volume of scholarly commentary on the issue of official immunity is enormous. See, e.g., Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977); Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 N.W. U.L. REV. 526 (1977); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1209-17 (1977).

33. *Butz v. Economou*, 438 U.S. 478, 503 (1978).

34. See, e.g., *Procunier v. Navarette*, 434 U.S. 555 (1978); *Turner v. Raynes*, 611 F.2d 92 (5th Cir. 1980), cert. denied, 101 S. Ct. 269 (1980); *Rowe v. State of Tenn.*, 609 F.2d 259 (6th Cir. 1979); *Dominguez v. Beame*, 603 F.2d 337 (2d Cir. 1979), cert. denied, 446 U.S. 917 (1980); *Walker v. Hoffman*, 583 F.2d 1073 (9th Cir. 1978), cert. denied, 439 U.S. 1127 (1979).

35. See, e.g., *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974), cert. denied, 420 U.S. 964 (1975) (jury verdict for defendant police officers upheld in part because plaintiffs failed to establish which officers had fired the allegedly fatal and wounding shots); *Howell v. Cataldi*, 464 F.2d 272 (3d Cir. 1972) (directed verdict for defendant police officers upheld because plaintiff failed to prove defendants were the officers who brutally beat him).

36. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 456-57 (1978). See, e.g., *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting); *Donoghue v. Behler*, 429 F. Supp. 403, 406 (D.N.J. 1977). See also Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 923 (1976) [hereinafter cited as Note, *Damage Remedies*].

37. *Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil*

In sum, until recently civil rights litigants confronted serious difficulties in bringing damage claims under Section 1983. Municipal immunity under Section 1983 forced litigants to proceed against the responsible government officials. Actions against government officials, in turn, required plaintiffs to surmount the problems presented by official immunity, juror sympathy, lack of a "deep pocket," and in some instances, the need to identify the responsible official. With the Court's decision in *Monell v. Department of Social Services*,<sup>38</sup> the outlook for civil rights plaintiffs began to improve.

### C. *The End of Municipal Immunity*

In *Monell*, plaintiffs charged that New York City, its Department of Social Services and Board of Education, and certain named city officials<sup>39</sup> unconstitutionally compelled them to take maternity leaves before such leaves were medically required. They sought back pay which, the district court found, would ultimately have come from the city treasury.<sup>40</sup> Because the suit was, therefore, really directed solely against the defendant governmental entities, none of which was a "person," the district court dismissed it.<sup>41</sup> The court of appeals affirmed the dismissal.<sup>42</sup> The Supreme Court reversed, overruling its holding in *Monroe v. Pape* that municipalities are not "persons" within the meaning of Section 1983.<sup>43</sup> Writing for the Court, Justice Brennan reviewed extensively the legislative history surrounding the passage of the Civil Rights Act of 1871 and concluded that Congress had intended to include municipalities within the ambit of the Act.<sup>44</sup>

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*Rights Act*, 45 S. CAL. L. REV. 131, 136-37 (1972). See *Lankford v. Gelston*, 364 F.2d 197, 202 (4th Cir. 1966); Note, *Damage Remedies*, *supra* note 36, at 923.

38. 436 U.S. 658 (1978).

39. The Mayor, Commissioner of the Department of Social Services, and Chancellor of the Board of Education were sued solely in their official capacities. *Id.* at 661.

40. 394 F. Sup. 853, 855 (S.D.N.Y. 1975).

41. *Id.* at 855.

42. 532 F.2d 259 (2d Cir. 1976).

43. 436 U.S. at 663.

44. The Court in *Monell* found fault in the inference drawn in *Monroe* from Congress' rejection of the Sherman amendment. See note 15 *supra*. In *Monell*, Justice Brennan demonstrated that congressional rejection of the Sherman amendment by no means signified a rejection of all municipal liability. 436 U.S. at 679-83. *Monell* also sets forth positive evidence of congressional intent to include municipalities within the reach of Section 1983. *Id.* at 683-90.



With the decision that governmental entities were thus subject to suit under Section 1983, there quickly arose the question of the extent to which entities should be accorded immunity from actions for damages. The Court in *Monell* deferred a decision on that question, save for announcing the logical corollary of its major holding. Governmental entities were not to be accorded absolute immunity, lest the decision that they were "subject to suit under Section 1983 'be drained of meaning.'"<sup>45</sup>

Decision regarding the proper scope of municipal immunity was not long deferred. In April 1972, the Chief of Police of Independence, Missouri was fired, amidst public accusations which, the court of appeals later found, blackened his name and reputation.<sup>46</sup> Approximately two months after the firing, the Supreme Court in *Board of Regents v. Roth*<sup>47</sup> held for the first time that a public employee allegedly stigmatized in the course of his discharge was entitled to a name-clearing hearing.<sup>48</sup> Thus, although the police chief had been deprived of a constitutional right, it was a right not clearly established at the time of the deprivation. The officials named as defendants in the former police chief's damage action were, therefore, immune from liability.<sup>49</sup> The court of appeals held that the City of Independence was immune as well.<sup>50</sup> In *Owen v. City of Independence*, a sharply divided Supreme Court reversed.<sup>51</sup>

Justice Brennan again wrote for the majority. His analysis proceeded on two lines. First, he conducted an historical inquiry, examining the status of common law immunity for municipalities at the time the Civil Rights Act of 1871 was passed and how Congress intended to affect that status.<sup>52</sup> Second, he analyzed the policy implications of conferring a qualified immunity upon municipalities.<sup>53</sup>

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45. *Id.* at 701.

46. *Owen v. City of Independence*, 560 F.2d 925, 937 (8th Cir. 1977), remanded for consideration in light of *Monell*, 438 U.S. 902 (1978), *aff'd*, 589 F.2d 335 (8th Cir. 1978), *rev'd*, 445 U.S. 622 (1980).

47. 408 U.S. 564 (1972).

48. *Id.* at 573.

49. The individual defendants were found to have met the subjective part of the qualified immunity defense as well. 421 F. Supp. 1110, 1118 (W.D. Mo. 1976).

50. 589 F.2d 335, 338 (8th Cir. 1979).

51. 445 U.S. 622 (1980).

52. *Id.* at 638-50.

53. *Id.* at 650-57.

Looking at the common law, Justice Brennan reviewed two 19th century doctrines that provided municipalities with some protection from liability. The first was the distinction drawn between a municipality's governmental functions, for which it enjoyed immunity, and its proprietary functions, for which it did not.<sup>54</sup> The second line of distinction was drawn between discretionary and ministerial activities.<sup>55</sup> Immunity was available for the former only. Justice Brennan found, however, that despite these common law immunities, municipalities were often held liable for both governmental and discretionary activities.<sup>56</sup> Any immunity that existed for governmental activities, the Court further noted, was derived from the principle of sovereign immunity and Congress had abolished "whatever vestige" of sovereign immunity the municipalities enjoyed by including them within the purview of Section 1983.<sup>57</sup> Any immunity enjoyed at common law for discretionary activities also provided an inadequate foundation for a qualified immunity since municipalities have no discretion to violate the Constitution.<sup>58</sup>

Thus, in the majority's eyes, no common law immunity for municipalities was well established at the time Section 1983 was enacted. The failure of Congress to abolish municipal immunity explicitly was not, therefore, indicative of an intent to allow municipalities to claim a qualified immunity.<sup>59</sup> Indeed, the fact that Congress intended Section 1983 to provide a "broad remedy for violations of federally protected civil rights"<sup>60</sup> evidenced a contrary legislative design.

The Court also found support for its holding in public policy and the goals of Section 1983. Damage actions, said the Court, are a vital part of any scheme for vindicating constitutional rights, as they provide redress to victims of governmental misconduct.<sup>61</sup> In addition, they serve to deter future constitutional violations. When an entity knows that its actions may subject it to liability, it will strive to minimize the likelihood of unconstitutional behavior.<sup>62</sup> In light of the

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54. *Id.* at 644-47.

55. *Id.* at 648-49.

56. *Id.* at 646-49.

57. *Id.* at 647-48.

58. *Id.* at 649.

59. *Id.* at 638.

60. *Id.* at 650.

61. *Id.* at 651.

62. *Id.* at 651-52.

immunity afforded government officials, the extension of a qualified immunity to municipalities would militate against fulfillment of the twin goals of vindicating constitutional rights and deterring future violations. Therefore, qualified immunity should be accorded municipalities only if strong countervailing considerations are present.<sup>63</sup>

The considerations traditionally cited as supporting a qualified immunity for officials were, however, deemed by the majority to be less compelling when applied to municipalities. First, the Court perceived no injustice in holding governmental entities liable for the injuries they inflict. To the contrary, modern notions of cost allocation hold that it is fairer to require the taxpayers to bear the cost of government rather than only burden the injured individual.<sup>64</sup> Second, although the threat of *personal* liability might inhibit an official in the execution of his responsibilities, little or no such effect will occur when it is the governmental entity that will bear liability.<sup>65</sup>

Justice Powell's dissent disputed almost every point in the majority opinion.<sup>66</sup> He found in 19th century common law a "substantial tort immunity" for municipal actions.<sup>67</sup> In addition, the dissent rejected as implausible an interpretation of Section 1983 under which congressional silence signified acceptance of the immunity of officials but abrogated the immunity of municipalities.<sup>68</sup>

Of apparently even greater significance was the fear that the Court's decision would convert local governance "into a hazardous slalom through constitutional obstacles that often are unknown and

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63. *Id.* at 651.

64. *Id.* at 654, 657.

65. *Id.* at 656. A third rationale, the fear that the threat of personal liability might deter individuals from serving in public office, was found irrelevant to the issue of municipal liability. *Id.* at 654 n.38.

66. Joining Justice Powell in dissent were the Chief Justice and Justices Stewart and Rehnquist. In addition to differing with the majority over its immunity analysis, the dissent argued that plaintiff had not suffered any constitutional injury. *Id.* at 658-64.

67. *Id.* at 676. Justice Powell noted that the majority relied on *Thayer v. Boston*, 36 Mass. 511 (1837), as its principal authority. He believed that reliance was misplaced due to several later Massachusetts decisions which limited *Thayer*. In particular, Justice Powell cited *Hill v. Boston*, 122 Mass. 344 (1877), which repudiated *Thayer* and limited municipal liability to acts performed in the municipality's proprietary interest. See note 65 and accompanying text *supra*. With *Thayer* so limited, Justice Powell saw little support for the majority's views of the common law.

68. *Id.* at 667.

unknowable.”<sup>69</sup> Officials, knowing that their employer will be held strictly liable when their actions are later judged to be unconstitutional, will be intimidated in their decisionmaking just as if they were to be held personally liable for their official actions.<sup>70</sup> Furthermore, Justice Powell argued, fairness dictates a qualified immunity for municipalities. Liability should not attach when entities act in good faith, only to subsequently have their conduct deemed unconstitutional.<sup>71</sup> Finally, given the reality of municipal finance, substantial unanticipated judgments could prove ruinous to many municipalities.<sup>72</sup>

A detailed analysis of the two opinions is beyond the scope of this Article.<sup>73</sup> A few brief points should be made, however, for neither opinion is without its weaknesses. For example, when explaining why common law sovereign immunity cannot serve as the basis for a Section 1983 qualified immunity, Justice Brennan resorts to *ipse dixit*.<sup>74</sup> A sovereign may enact a statute which renders a municipality amenable to suit, thus abrogating the sovereign immunity. Congress, by enacting Section 1983, abrogated any immunity enjoyed by municipalities.<sup>75</sup> Yet that was precisely the question before the Court—to what extent did Congress intend to abolish municipal immunity?

The majority opinion is internally inconsistent as well. On the one hand, the opinion asserts that the threat of municipal liability, unlike the threat of personal liability, will not inhibit effective and fearless decisionmaking.<sup>76</sup> On the other hand, the Court claims that the threat of municipal liability will encourage officials to err on the side of protecting constitutional rights and to implement rules and procedures designed to minimize the likelihood of future constitutional infractions.<sup>77</sup> Thus the Court tries to have its cake and eat it too,

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69. *Id.* at 665.

70. *Id.* at 668-69.

71. *Id.* at 669.

72. *Id.* at 670.

73. For a more detailed analysis, see Levinson, *Suing Political Subdivisions in Federal Court: From Edelman to Owen*, 11 U. TOLEDO L. REV. 829, 846-63 (1980).

74. This Latin phrase refers to a bare assertion resting on the authority of an individual.

75. 445 U.S. at 647-48.

76. *Id.* at 655-56.

77. *Id.* at 651-52. The dissent chides Justice Brennan for this inconsistency. *Id.* at 669 n.9.

claiming that the threat of strict municipal liability will not affect officials' decisionmaking processes, while also contending that the effect on the decisionmaking processes will be beneficial.

Whether the effect of decisionmaking will be as great as the dissent contends is, however, highly debatable. For many public officials, the threat of personal liability is likely to be of significantly greater concern than is the threat of municipal liability. The "governmental paralysis" predicted by the dissent has certainly not been evident in the year since *Owen* was decided.<sup>78</sup> More important, however, is Justice Powell's failure to address the majority's point that officials should consider the constitutionality of contemplated actions. Providing an incentive to err on the side of protecting constitutional rights may, after all, be good policy. Finally, the dissent's apprehension that local governments may be unable to withstand substantial unanticipated judgments rings hollow. Given the glacial pace of civil litigation today, it will be rare indeed that a municipality fails to anticipate a substantial judgment well in advance of its occurrence.<sup>79</sup>

Although *Owen* will never stand as a model of judicial craftsmanship, it is nonetheless significant, because it greatly furthered the transformation of municipal liability started in *Monell* only two years earlier. *Owen*, however, was only the first of two Supreme Court decisions last term that expanded governmental liability under Section 1983.

### III. LIABILITY FOR NON-CONSTITUTIONAL VIOLATIONS

#### A. *The Meaning of "And Laws"*

That Section 1983 provides a cause of action for constitutional violations has long been clear. Less certain, however, has been whether claims for the invasion of statutorily-created rights come within its

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78. *Id.* at 669.

79. As an example of the adverse effects the Court's decision will have on municipal fiscs, Justice Powell noted, *id.* at 670 n.11, an Alaskan case in which a jury awarded nearly \$500,000 to a policeman accused of racism and brutality and removed from duty without notice or an opportunity to be heard. *Wayson v. City of Fairbanks*, No. 77-1581 (Alas. Fourth Dist. Super. Ct., Jan. 24, 1979), reported in 22 ATLA L. Rptr. 222 (June 1979). The case, however, hardly supports his position. The accusations leveled against the officer were admittedly false, and punitive action was taken against him by the City Manager against the advice of counsel. Thus, even if the City had been accorded qualified immunity, it would have been found liable. Furthermore, punitive damages against the City Manager accounted for \$200,000 of the award.

ambit. Although the statutory language seemed straightforward enough—it mentions deprivations of “any rights, privileges, or immunities secured by the Constitution *and laws*”<sup>80</sup>—the convoluted legislative history of Section 1983 clouded the issue.<sup>81</sup> More than a century passed without definitive resolution of the question.<sup>82</sup> Finally, last Term, the Court provided its answer, in *Maine v. Thiboutot*.<sup>83</sup>

The plaintiffs in *Thiboutot* were welfare recipients, collecting benefits under the federal-state AFDC program.<sup>84</sup> They claimed that the Maine Department of Human Services was not paying them benefits to which they were entitled under the governing federal law, Title IV-A of the Social Security Act.<sup>85</sup> Alleging that they had been deprived of a right secured to them by a federal statute, they argued that Section 1983 provided a cause of action.<sup>86</sup> The Maine courts agreed and awarded them injunctive relief and retroactive payment of the correct benefits.<sup>87</sup>

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80. 42 U.S.C. § 1983 (Supp. III 1979) (emphasis added).

81. When originally enacted, as § 1 of the Civil Rights Act of 1871, Section 1983 provided a cause of action for constitutional violations only. “And laws” was added three years later as part of an effort to consolidate all the federal laws. The Civil Rights Act of 1871 also contained a jurisdictional provision, granting jurisdiction to the district and circuit courts. In the 1874 revision, the jurisdictional portion of the Act was split, conferring jurisdiction upon the district courts over actions brought to redress violations of rights secured “by the Constitution of the United States, or . . . by any law of the United States,” REVISED STATS. § 563(12). In contrast, the grant of circuit court jurisdiction referred to rights secured “by the Constitution of the United States or . . . by any law providing for equal rights of citizens of the United States.” REVISED STATS. § 629(16). In 1911, Congress abolished circuit courts, transferring their authority to the district courts. In so doing, however, Congress retained the more limited definition of jurisdiction that had been used to describe the circuit court jurisdiction. That language is now found in 28 U.S.C. § 1343(3). See note 91 *infra*. For a further discussion of the legislative history of section 1983, see Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).

82. Lower courts that considered the issue generally permitted statutory claims to be pursued via Section 1983. See *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 226-27 n.36 and cases cited therein. The ability of individuals to proceed directly under the right-granting statute by means of implied causes of action, see text accompanying notes 142-47 *infra*, also diminished the urgency of obtaining resolution of this matter.

83. 448 U.S. 1 (1980).

84. *Id.* at 3.

85. 42 U.S.C. § 602(a)(7) (1976).

86. 448 U.S. at 2-3.

87. 405 A.2d 230 (Me. 1979).

Thus the issue was squarely put to the Court. Does a Section 1983 action lie for a non-constitutional claim? By a six to three margin<sup>88</sup> the Court held that it does. Once again Justice Brennan penned the majority opinion, with Justice Powell writing the dissent.

The majority opinion relied upon the plain language of the statute, upon dicta in several earlier cases,<sup>89</sup> and upon the fact that, in a number of previous cases, the Court had decided claims raised under the Social Security Act.<sup>90</sup> The dissent argued, however, that "and laws" referred only to equal rights legislation, not to all federal laws. The legislative history demonstrated, in Justice Powell's view, that Congress intended Section 1983 and its jurisdictional counterpart, Section 1343(3),<sup>91</sup> to be coincidental in scope. Because the Court had concluded only a year before that Section 1343(3) encompasses only those statutory claims arising under laws providing for equal rights,<sup>92</sup> this prior decision required the Court to similarly constrain the reach of Section 1983.

The dissent also focused on what it considered the unfortunate ramifications of the Court's holding. No longer would Section 1983 actions be confined to traditional civil rights claims. Henceforth, Section 1983 would subject state and local governmental entities and officials to liability whenever they deprived an individual of a right secured by any federal law. And, as Justice Powell noted, hundreds of federal laws may provide such rights:

The States now participate in the enforcement of federal laws

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88. Justice Brennan delivered the opinion of the Court, in which Justices Stewart, White, Marshall, Blackmun, and Stevens joined. Justice Powell filed the dissenting opinion, which was joined by Chief Justice Burger and Justice Rehnquist.

89. 448 U.S. at 4-5. The cases suggest that the § 1983 remedy encompasses not only violations of constitutional law but also violations of federal statutory law. See *Mitchum v. Foster*, 407 U.S. 225 (1972), and *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), which noted that the predecessor of § 1983 was enlarged to provide protection for rights under federal laws.

90. *Id.* The majority asserted that Section 1983 was necessarily the basis for suit in the cases raising claims under the Social Security Act (SSA) because the Court had held in *Edelman v. Jordan*, 415 U.S. 651 (1975), that no private right of action could be implied under that Act. This is incorrect, as *Edelman* held only that Congress had not authorized suit against the states under the SSA in such a manner as to constitute a waiver of the states' Eleventh Amendment immunity. *Id.* at 674.

91. 28 U.S.C. § 1343(3) (1976) grants jurisdiction to the district courts in actions to redress deprivation of rights secured by the Constitution "or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

92. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979).

governing migrant labor, noxious weeds, historic preservation, wildlife conservation, anadromous fisheries, scenic trails, and strip mining. Various statutes authorize federal-state cooperative agreements in most aspects of land management. In addition, federal grants administered by state and local governments now are available in virtually every area of public administration.<sup>93</sup>

Nor would the list of laws consist only of those involving cooperative federal-state programs, as many federal rights are created outside the context of such programs.<sup>94</sup>

*Thiboutot's* significance extends beyond the fact that it permits a Section 1983 cause of action for a wide range of statutory violations. The types of suits thus permitted may well end up being much more costly to governmental entities and officials than are traditional Section 1983 actions. Most constitutional damage actions involve relatively small sums. Because constitutional rights have no inherent value,<sup>95</sup> an individual whose constitutional rights have been violated may collect only nominal damages, absent proof of actual harm.<sup>96</sup> Such harm, however, is often difficult to establish. Damages may be much easier to prove in statutory actions where the individual has been denied a tangible benefit. In addition, suits brought to enforce rights under cooperative regulatory and grant programs in areas such as welfare, transportation, housing, and health care will often be in the form of class actions. Thus, even where individual damages are small, when aggregated for a class of thousands, large sums of money may be involved. Finally, the overall cost of the entity may still be substantial despite a small damage award, due to the Court's second holding in *Thiboutot*, which widened the scope of suits for which municipalities may be liable for attorney's fees.

### B. *The Civil Rights Attorney's Fees Awards Act of 1976*

In response to the Supreme Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*,<sup>97</sup> which instructed courts not to award attor-

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93. 448 U.S. at 22-23.

94. *Id.* at 23.

95. *See* *Carey v. Phipus*, 435 U.S. 247, 254 (1978).

96. *Id.* at 254. The Supreme Court recently ruled that punitive damages may not be awarded against a municipality. *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748 (1981).

97. 421 U.S. 240 (1975).



ney's fees to civil rights litigants absent statutory authorization, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976.<sup>98</sup> The Act authorizes the award of attorney's fees to the prevailing party in any action to enforce enumerated civil rights statutes, including Section 1983.<sup>99</sup> In *Thiboutot*, the Court, reviewing briefly the language and legislative history of the Act, held that fees are available in *any* action brought pursuant to Section 1983.<sup>100</sup> Thus, if a plaintiff prevails on a purely statutory, non-civil rights claim, he may be awarded attorney's fees so long as he has pleaded that claim under Section 1983.<sup>101</sup>

The courts' approach to the awarding of attorney's fees has been generally liberal, in accordance with the Act's legislative history. A prevailing plaintiff is entitled to fees unless "special circumstances would render such an award unjust,"<sup>102</sup> while a prevailing defendant may receive fees only when plaintiff's suit is "frivolous, unreasonable, or groundless."<sup>103</sup> To prevail, a plaintiff need not fully litigate the issues or obtain a judicial determination that his rights have been violated. Vindication of his rights through a settlement or consent judgment is sufficient for a fee award.<sup>104</sup> Courts may also award fees when a defendant unilaterally acts to redress a plaintiff's grievance as a result of the commencement of the litigation.<sup>105</sup> In appropriate circumstances, fees may be awarded for time spent in state administra-

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98. 42 U.S.C. § 1988 (1976).

99. The Act provides:

In any action or proceeding to enforce a provision of section 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

100. 448 U.S. at 9.

101. Where a pendent constitutional claim is involved, a plaintiff may collect attorney's fees even when the statutory claim is not brought under Section 1983. *Maier v. Gagne*, 448 U.S. 122, 132 n.15 (1980). See generally *Wolf, Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fee Awards Act*, 2 W.N. ENG. L. REV. 193 (1979).

102. *Roadway Express, Inc. v. Piper*, 100 S. Ct. 2455, 2462 (1980), quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

103. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

104. *Maier v. Gagne*, 442 U.S. 122, 129 (1980).

105. Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COL. L. REV. 346, 362 & n.110 (1980).

tive proceedings.<sup>106</sup> The amount of fees awarded is often substantial, sometimes far outstripping any damage award.<sup>107</sup> Plaintiffs' lawyers, therefore, will undoubtedly plead statutory claims under Section 1983 routinely, thereby exposing the governmental defendant to liability for attorney's fees.<sup>108</sup> The rules regarding governmental liability for attorney's fees have thus undergone a radical transformation in the past five years. Though the award of attorney's fees was once the exception, it is now the rule.

#### IV. POSSIBLE LIMITS ON GOVERNMENTAL LIABILITY

To the local governmental official, the post-*Monell*, *Owen*, and *Thiboutot* world must indeed look grim. The near-invincibility to Section 1983 litigation recently enjoyed by governmental entities is now gone. Still, the extent of the change wrought, while substantial, should not be overestimated. Limits still exist on municipal liability. Indeed, much of the litigation in the coming years likely will focus on establishing and defining such limits.<sup>109</sup> The following section explores theories that have been or may be urged as governmental defendants seek to limit the impact of *Monell*, *Owen* and *Thiboutot*.

##### A. *What Constitutes Official Policy or Custom?*

The *Monell* holding that municipalities were "persons" for purposes of Section 1983 was certainly a blow to local governmental entities. The *Monell* Court did, however, hold out a bone to municipalities, for it also ruled that municipal liability could not be predicated on a respondeat-superior theory. In order for liability to accrue, said the Court, the unconstitutional action must be one that "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated" or amounts to a "gov-

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106. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980).

107. Attorneys for plaintiff Kenneth Donaldson, for example, were recently awarded approximately \$273,000 for their efforts in *Donaldson v. O'Connor*, which included a trip to the Supreme Court. 14 CLEARINGHOUSE REV. 909 (1980). In contrast, the jury had awarded the plaintiff only \$38,500. 422 U.S. 563, 570 (1975).

108. *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980) (Powell, J., dissenting).

109. The process of establishing and defining the limitations on municipal liability continued in two recent Supreme Court decisions. *Middlesex County Sewage Auth. v. National Sea Clammers*, 101 S. Ct. 2615 (1981), states that courts must inquire whether a statute is one which created enforceable "rights" under § 1983. In *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748 (1981), the Supreme Court held that a municipality is not liable for punitive damages under § 1983.

ernmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."<sup>110</sup>

When a plaintiff's challenge is to the constitutionality of an ordinance or officially adopted policy of the entity, this latter *Monell* holding will, of course, provide little solace to the defendant government.<sup>111</sup> This was, in fact, the type of claim pressed in *Monell*, where formal, written policies were involved.<sup>112</sup> When a challenge is raised, however, to conduct not embodied in a written policy, ordinance, regulation or officially-adopted decision, the question of municipal liability becomes much more problematic.

Although *Monell* rejected vicarious liability for governmental entities, it did state that liability may be founded on "edicts or acts" that "may fairly be said to represent official policy"<sup>113</sup> as well as on governmental custom. Already, in numerous cases, courts have had to decide whether the allegedly unconstitutional conduct of a public employee should be attributed to his governmental entity.<sup>114</sup> Unfortunately, courts are encountering a great deal of difficulty in establishing guidelines for resolving this issue. The cases are, by and large, long on description and short on analysis. Some general trends are, nevertheless, discernible.<sup>115</sup>

In deciding whether a governmental entity should be responsible for its employee's action, courts frequently scrutinize the employee's position of authority. When an official at the highest level of authority acts, his actions almost invariably will be viewed as establishing governmental policy. As one court of appeals commented:

Thus, at least in those areas in which he [the official], alone, is

110. 436 U.S. 658, 690-91 (1978).

111. See, e.g., *Citizens for a Better Environment v. City of Chicago Heights*, 480 F. Supp. 188 (N.D. Ill. 1979) (liability premised on ordinance regulating peddling); *Milwaukee Mobilization for Survival v. Milwaukee County Park Commission*, 477 F. Supp. 1210 (E.D. Wis. 1979) (liability premised on county ordinance regulating use of public parks).

112. 436 U.S. at 713 (Powell, J., concurring).

113. *Id.* at 694.

114. See cases cited at notes 116-124 *infra*.

115. For some earlier views on this question see Kramer, *Section 1983 Liability: Selected Issues Two Years After Monell*, 12 URBAN LAW. 232 (1980); Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213 (1979); Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304 (1979).

the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under Section 1983.<sup>116</sup>

An official need not, however, function at the highest level of authority in order for his action to be deemed to represent official policy. The greater the authority and discretion delegated to an official, the greater the likelihood that the governmental entity will be held responsible for his actions. For example, a state university vice-president's rejection of a gay student group's request to register as a student organization was held to be actionable against the university.<sup>117</sup>

By the same token, the lower the employee is located on the ladder of authority, the less likely it is that his action will constitute official policy. Thus, in *Sterling v. Village of Maywood*,<sup>118</sup> the fact that "ordinary employees in the Village Water Department were responsible" for the decision not to reinstate plaintiff's water service prompted the Seventh Circuit to dismiss plaintiff's claim against the Village.<sup>119</sup>

Even actions taken by low-level employees may, however, result in governmental liability. A second factor that courts consider is the frequency with which the act occurs. A "persistent and widespread" practice,<sup>120</sup> in the absence or even in contravention of formal pol-

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116. *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980). *See also* *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 448 (2d Cir. 1980) ("Surely the mayor is the one city official whose edicts and acts represent municipal policy . . ."); *Goss v. San Jacinto Junior College*, 588 F.2d 96, 98 (5th Cir. 1979) ("As President of the Junior College, Dr. Spencer is surely one 'whose edicts or acts may fairly be said to represent official policy.'"); *Halsworth v. Hatfield*, 487 F. Supp. 751, 753 (D. Or. 1980) (Director of Data Processing Authority may be one whose edicts and acts represent official policy). *But see* *Hoopes v. City of Chester*, 473 F. Supp. 1214 (E.D. Pa. 1979) (municipality not liable where mayor allegedly demoted a police officer because he cooperated with federal authorities in investigation and prosecution of mayor).

117. *Gay Student Services v. Texas A & M Univ.*, 612 F.2d 160 (5th Cir. 1980), *cert. denied*, 449 U.S. 1034 (1980).

118. 579 F.2d 1350 (7th Cir. 1978).

119. *Id.* at 1357.

120. *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970). *See also* *Knight v. Carlson*, 478 F. Supp. 55, 59 (E.D. Cal. 1979), which distinguishes between the meaning of "custom" and "usage" under Section 1983. Custom is a "deeply imbedded traditional way of carrying out . . . policy," while usage is "the regular and repeated response to

icy,<sup>121</sup> will be considered a governmental custom for which the entity will be liable. When an act is frequently repeated or is but a part of a pattern of conduct, courts reason that it is more probably being performed with the tacit approval of the entity. It is, therefore, reasonable to hold the entity liable.<sup>122</sup>

When it is the isolated act of a lower-level employee that has caused an injury, neither factor points to governmental liability. In such instances, therefore, victims have sought to predicate governmental liability on the basis of the entity's failure to act. Many of these "failure to act" cases arise in the context of police misconduct, with plaintiffs claiming a failure to adequately train or supervise the lower-level employees. Courts are, by and large, unreceptive to such actions, demonstrating a strong reluctance to allow them to reach a jury.

One technique utilized by some courts to dismiss such cases has been to place detailed pleading requirements on plaintiffs.<sup>123</sup> More frequently, however, courts have dismissed cases because plaintiffs fail to allege more than a negligent failure on the part of the entity to train or supervise. These courts have typically required allegations of deliberate or gross negligence.<sup>124</sup> While this result may ultimately be

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a situation." Usage may be present without custom, but custom may not exist without usage.

121. See, e.g., *Shuman v. City of Philadelphia*, 470 F. Supp. 449, 453-54 (E.D. Pa. 1979), in which a police officer was dismissed for refusing to answer questions propounded during an internal police investigation on the ground that they constituted an invasion of privacy. Although the City Charter provided only that refusals to answer based on Fifth Amendment rights would result in dismissal, the court found that it was Police Department policy to dismiss officers who failed to answer any questions, regardless of the reasons given for the refusal to respond.

122. Cf. *Magayanes v. City of Chicago*, 496 F. Supp. 812 (N.D. Ill. 1980) (isolated incident, "however reprehensible or true, does not indicate systematic, city-supported abuses . . ."); *Popow v. City of Margate*, 476 F. Supp. 1237, 1246 (D.N.J. 1979) (single incident of police brutality insufficient to establish municipal liability). But see *Turpin v. Maillet*, 619 F.2d 196 (2d Cir. 1980), cert. denied, 101 S. Ct. 577 (1981).

123. See, e.g., *Smith v. Ambrogio*, 456 F. Supp. 1130, 1136-37 (D. Conn. 1978) (requiring particularized fact pleading); *Edmonds v. Dillin*, 485 F. Supp. 722, 728 (N.D. Ohio 1980) (must "identify what training procedure was inadequate and in what way").

124. See, e.g., *Turpin v. Maillet*, 619 F.2d 196 (2d Cir. 1980), cert. denied, 101 S. Ct. 577 (1981); *Reeves v. City of Jackson*, 608 F.2d 644 (5th Cir. 1979); *Owens v. Haas*, 601 F.2d 1242 (2d Cir. 1979), cert. denied sub nom. *County of Nassau v. Owens*, 444 U.S. 980 (1979); *Feldman v. City of New York*, 493 F. Supp. 537 (S.D.N.Y. 1980); *Moomey v. City of Holland*, 490 F. Supp. 188 (W.D. Mich. 1980); *Mayes v. Elrod*, 470 F. Supp. 1188 (N.D. Ill. 1979); *Randle v. Gokey*, 469 F. Supp. 452 (N.D. Ohio

justifiable, the rationales invoked by the courts are seriously flawed.

The rationale most frequently employed is that the Supreme Court's rejection of respondeat-superior as a basis for liability means that claims of mere negligence are inadequate. Such an argument is premised on a misunderstanding of the doctrine of respondeat-superior. Under traditional tort theory, an employer's own conduct is immaterial to a respondeat-superior claim. An employee's negligence will be imputed to his employer regardless of whether the employer has done anything to aid or encourage the employee in his conduct. In fact, the employer will be liable even if he has done everything in his power to prevent the conduct.<sup>125</sup> In contrast, an allegation of negligent failure to train or supervise is directed at the entity itself.<sup>126</sup> The claim is that the entity's own negligent conduct caused the alleged constitutional violation. Although a plaintiff may ultimately find it difficult to prove that the inadequacy of the training program proximately caused his injury, the inapplicability of respondeat-superior to Section 1983 actions should not bar his claim.

A second rationale used to dismiss this type of claim is that such failures to act do not constitute official policy.<sup>127</sup> It is unclear what this rationale demands of plaintiffs. Police departments generally are delegated the authority to hire, train and supervise individual officers. The manner in which a police department chooses to hire, train and supervise its officers must, therefore, constitute the type of act which may fairly be said to represent official policy. It is inconceivable, for example, that a police department's refusal to hire or train women would not be considered official policy.

Other courts find justification for requiring more than mere negligence in *Rizzo v. Goode*<sup>128</sup> and *Estelle v. Gamble*.<sup>129</sup> In *Rizzo* the Court held that the granting of injunctive relief against the defendant supervisory personnel was erroneous because plaintiffs failed to show

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1979)); *Leite v. City of Providence*, 463 F. Supp. 585, 591 (D.R.I. 1978); *Sirmans v. City of South Miami*, 86 F.R.D. 492 (S.D. Fla. 1980).

125. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 69 (4th ed. 1971).

126. To be more accurate, the claim is directed at the conduct of those supervisory officials whose conduct would appropriately be deemed to constitute official policy.

127. *See, e.g., Jones v. City of Philadelphia*, 491 F. Supp. 284, 287 (E.D. Pa. 1980) (claims of gross and reckless negligence in failing to adequately train, supervise and discipline officers do not constitute allegations of unconstitutional official policy).

128. 423 U.S. 362 (1976).

129. 429 U.S. 97 (1976).

a causal connection between the various instances of police misconduct and any action by the defendants.<sup>130</sup> *Estelle* held that a plaintiff must allege deliberate indifference to a prisoner's serious medical needs in order to state a claim under the Eighth Amendment.<sup>131</sup> Taking these decisions together, courts have concluded that proof of gross negligence or deliberate indifference by a police department in the training or supervision of its officers is required to establish governmental liability when a plaintiff claims a failure to act.<sup>132</sup> These cases do not, however, provide adequate justification for this conclusion, either alone or in tandem.

*Rizzo* did establish, and *Monell* affirmed, that an entity's right to control an employee is an insufficient basis for the entity's liability.<sup>133</sup> The Court in *Monell* made it clear, though, that *Rizzo* involved "the mere right to control without any control or direction having been exercised and *without any failure to supervise*."<sup>134</sup> Thus *Rizzo* hardly governs a case where the plaintiff explicitly alleges a failure to supervise.

Similarly, the *Estelle* opinion cannot be controlling where the claim is not one of cruel and unusual punishment. The Court's decision in *Estelle* rested on its opinion that, in the medical context, the Eighth Amendment reaches only the "unnecessary and wanton infliction of pain."<sup>135</sup> As the negligent failure to provide adequate medical care cannot be said to amount to "unnecessary and wanton infliction of pain,"<sup>136</sup> allegations of mere negligence are inadequate to state a claim of cruel and unusual punishment. The Court, however, did not hold, either in *Rizzo* or *Estelle*, that negligent conduct may never be the basis for Section 1983 liability. Indeed, late last

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130. 423 U.S. at 371.

131. 429 U.S. at 106.

132. See, e.g., *Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1980) (two fundamental requisites for § 1983 liability, one of which is a showing of deliberate indifference); *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077 (3d Cir. 1976) (required showing of deliberate indifference to deprivation of a prisoner's constitutional right to medical attention); *Norton v. McKeon*, 444 F. Supp. 384 (1977) (negligence in supervision and training of police officers sufficient to state a § 1983 cause of action).

133. *Rizzo v. Goode*, 423 U.S. 362, 378. See Brief for Respondents at 34-35.

134. *Monell v. Department of Social Services*, 436 U.S. 658, 694 n.58 (1978) (emphasis added).

135. 429 U.S. at 105.

136. *Id.*

Term, the Court recognized that at least some Section 1983 actions may be predicated on negligence. In *Parratt v. Taylor*,<sup>137</sup> respondent's contention that prison officials had violated his due process rights by negligently depriving him of property was held to state a valid due process claim.<sup>138</sup> Thus, Mr. Justice Rehnquist's prior warning that the question of whether Section 1983 actions may be based on negligence "may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations"<sup>139</sup> was proved true. Courts may be correct in requiring more than negligence in failure to train and supervise cases. But it is clear that more than citation to *Rizzo* and *Estelle* is needed to justify such a conclusion.<sup>140</sup>

### B. *Limiting the Reach of Thiboutot*

Although *Thiboutot* has expanded the scope of governmental liability by holding that Section 1983 provides a cause of action for purely statutory claims, several grounds for attempting to limit *Thiboutot's* impact are available to defendants.

#### 1. Reviving Implied Cause of Action Analysis

Prior to *Thiboutot*, individuals were not necessarily barred from bringing suit for statutory violations. Although many statutes failed to provide explicitly that an individual litigant could bring suit, courts often implied the existence of a private cause of action.<sup>141</sup> Congressional intent was the primary factor that courts were instructed by the Supreme Court to consider in determining whether a

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137. 451 U.S. 527 (1981).

138. *Id.* at 536-37.

139. *Baker v. McCollan*, 443 U.S. 137, 139-40 (1979).

140. Regardless of the standard ultimately settled upon, most plaintiffs will encounter great difficulty in establishing that their injury was caused by a failure to adequately train or supervise. As one court noted, even the most minimal training should be sufficient to warn officers against beating individuals. *Feldman v. City of New York*, 493 F. Supp. 537, 539 (S.D.N.Y. 1980).

141. *Texas & P.R. Co. v. Rigsby*, 241 U.S. 33 (1916), established the broad proposition that a private right of action may be implied in appropriate circumstances. In the well-known case of *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the Court held that a stockholder had an implied private cause of action based upon a violation of Section 14(a) of the Securities Exchange Act. *Cf. Touche Ross & Co. v. Redington*, 422 U.S. 560 (1979) (denied implied private right of action based on Section 17(a) of the Securities Exchange Act).



cause of action should be implied under a particular statute.<sup>142</sup> Because Congress often failed to state its intent explicitly, the Court, in *Cort v. Ash*,<sup>143</sup> identified several other factors as relevant to the inquiry.<sup>144</sup> Although *Thiboutot* eliminates the need for finding that an implied cause of action exists when suit is brought pursuant to Section 1983,<sup>145</sup> courts will still have to consider some of the factors used in implied cause of action analysis.

#### a. *The Right Requirement*

Section 1983 provides a cause of action when an individual has been deprived of a right secured by the Constitution and laws. Obviously, in order to show that he has been deprived of a right, an individual must first show that the Constitution or statute has secured that right *to him*.<sup>146</sup> If he cannot do this, his action should fail. How, then, is one to ascertain whether a particular statute grants a right to a particular plaintiff? The first factor in the implied cause of action analysis considered precisely this question. "[I]s the plaintiff one 'of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff?"<sup>147</sup>

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142. *Northwest Airlines v. Transport Workers Union*, 101 S. Ct. 1571, 1580 (1981); *Universities Research Ass'n v. Coutu*, 101 S. Ct. 1451, 1461 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979).

143. 422 U.S. 66 (1975).

144. The Court listed four factors as relevant to the implied right of action inquiry. First, is the plaintiff a member of the class for whose especial benefit the statute was enacted? Second, courts are to look for any indications of legislative intent on the issue. Third, would the implication of a cause of action be consistent with the underlying purposes of the legislative scheme? Fourth, would it be inappropriate to infer a cause of action based solely on federal law due to the area being one which traditionally has been the concern of the states? *Id.* at 78.

145. 448 U.S. at 4-5. *See, e.g., Pushkin v. Regents of Univ. of Colorado*, 504 F. Supp. 1292, 1297 n.1 (D. Colo. 1981). In *California v. Sierra Club*, 451 U.S. 287 (1981), suit was brought against state and federal officials and agencies, claiming non-compliance with Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403. The Court, using conventional implied cause of action analysis, held respondents had no right of action to enforce the Act. *Id.* at 292-98. No mention of *Thiboutot* was made, apparently because respondents failed to plead a Section 1983 claim. Nor did respondents allude to *Thiboutot* in their brief to the Court.

146. *Cf. Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981) (it is an open question whether an individual's interest in having the state provide assurances to the federal government of compliance with the underlying statute constitutes a right secured by § 1983).

147. 422 U.S. at 78. In *Cuyler v. Adams*, 101 S. Ct. 703 (1981), plaintiff claimed that he had been transferred from a Pennsylvania prison to New Jersey without being

Thus an individual will be able to show that a statute has granted him a right when he is a member of the class that the statute was intended to aid. In other words, an individual may pursue a Section 1983 action based on a purely statutory claim only when he is able to satisfy the first factor of the implied cause of action analysis.

b. *Exclusive Statutory Enforcement Schemes*

Just a year before *Thiboutot* was decided, the Court handed down a decision dealing with another statute derived from the Civil Rights Act of 1871. In *Great American Federal Savings and Loan Assn. v. Novotny*,<sup>148</sup> plaintiff contended that he was dismissed by the Savings and Loan after he objected to the discriminatory policies it directed against female employees. He claimed that the Savings and Loan and its directors conspired to deprive him of equal rights under the law, in violation of 42 U.S.C. § 1985(c).<sup>149</sup> The Court held, however, that plaintiff could not proceed under Section 1985(c).<sup>150</sup> That section, explained the Court, creates no substantive rights. It simply provides a cause of action to redress conspiratorial violations of rights created by the Constitution or other statutes.<sup>151</sup> In *Novotny*, the substantive right in issue was created by Title VII, which itself created a detailed remedial framework. Given Congress' intent that Title VII would be the exclusive remedy for discrimination claims such as *Novotny's*, the Court held that Section 1985(c) could not be invoked to redress a Title VII violation.<sup>152</sup>

Like Section 1985(c), Section 1983 creates no substantive rights.<sup>153</sup> It, too, simply provides a remedial device when substantive rights, created elsewhere, are violated. If Section 1985(c) may not be used when Congress intended the statute from which the substantive claim derives to provide the exclusive remedy for violation of its terms, one

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afforded the procedural protections provided by the Interstate Agreement on Detainers. After finding that the plaintiff was entitled to the claimed protections, the Court declared simply that he had stated a claim for relief under Section 1983, citing *Thiboutot*. *Id.* at 712. Thus, prior to citing *Thiboutot* the Court found that the Detainer Agreement created a federal right in plaintiff's favor.

148. 442 U.S. 366 (1979).

149. *Id.* at 369.

150. *Id.* at 378.

151. *Id.* at 372.

152. *Id.* at 378.

153. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979).

must conclude that a similar restriction must be placed on Section 1983.<sup>154</sup> Thus, the need to divine congressional intent, the primary factor in implied cause of action analysis, resurfaces.<sup>155</sup> While this will provide another means of restricting *Thiboutot's* reach, its effectiveness in limiting *Thiboutot* is likely to be lessened for two reasons.

First, the congressional inquiry will be phrased in slightly different terms in the post-*Thiboutot* cases than in the implied cause of action cases. In the latter, courts ask whether Congress intended to create a private cause of action.<sup>156</sup> In Section 1983 actions, courts will frame the question in terms of whether Congress intended the enforcement scheme established by the underlying statute to be the exclusive means of enforcement. Sometimes this difference in focus will prove inconsequential,<sup>157</sup> but that will not always be the case. By requiring a finding that Congress intended the statutory enforcement mechanism to be exclusive, *Thiboutot* in effect shifts the presumption in favor of allowing plaintiff to proceed.<sup>158</sup> Thus it reverses the Court's increasing reluctance to allow such suits.<sup>159</sup>

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154. This was recently noted in *Middlesex County Sewage Auth. v. National Sea Clammers*, — U.S. —, 101 S. Ct. 2615, 2626-27 (1981). See also *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981); *Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Bd.*, 501 F. Supp. 821, 826-29 (E.D. Va. 1980); *Yapalater v. Bates*, 494 F. Supp. 1349, 1358 (S.D.N.Y. 1980). Cf. *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (Section 1983 not available for challenging fact or duration of confinement; habeas corpus proceedings are the exclusive remedy). But see *Maya v. Philadelphia Gas Works*, 8 B.R. 202, 205 (E.D. Pa. 1981).

155. Another possible way of applying *Novotny* would be to read it simply as requiring that a plaintiff exhaust his administrative remedies before bringing his action under Section 1983. At that point, he would then have the entire Section 1983 remedial arsenal at his disposal. Such an application of *Novotny* is improbable, however, for the plaintiff there had exhausted his administrative remedies, 442 U.S. at 369, and was attempting to use Section 1985(c) to obtain relief not available under Title VII. Furthermore, to the extent that the non-exhaustion of administrative remedies rule in Section 1983 doctrine is being abandoned, see, e.g., *Patsy v. Florida International Univ.*, 634 F.2d 900 (5th Cir. 1981) (en banc), this application of *Novotny* would be redundant.

156. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 23-24 (1979).

157. For example, a major factor in the decision to imply a cause of action in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), was the majority's belief that the administrative remedy available to the plaintiff there was not intended to be her exclusive avenue of redress.

158. The view that *Thiboutot* creates such a presumption was argued by Justice White in the recently decided *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 51 (1981) (White, J., dissenting).

159. *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 279 (1980). Cf. *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist J., concurring)

Second, the implied cause of action cases often inquire as to whether Congress intended to create a private right of action for a particular remedy. Courts have generally been more likely to imply a cause of action for declaratory or injunctive relief than for damages.<sup>160</sup> Section 1983, however, establishes a cause of action both at law and in equity. An individual seeking redress pursuant to Section 1983 for a statutory violation should, therefore, be equally free to seek damages as he is to seek injunctive relief.<sup>161</sup> Thus *Thiboutot* will result in the availability of damages relief to plaintiffs where they might previously have been restricted to an injunction.<sup>162</sup>

An example may illustrate more concretely the changes brought about by *Thiboutot*. The Family Educational Rights and Privacy Act of 1975 (FERPA)<sup>163</sup> requires that any educational agency or institution receiving federal funds must afford students and parents an opportunity to inspect students' own education records and must also restrict the access of third parties to such records. FERPA does not state, however, whether students and parents may bring suit to en-

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("this Court in the future should be extremely reluctant to imply a cause of action absent . . . specificity on the part of the Legislative Branch"). See also *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

160. Cf. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (implying cause of action for equitable relief under § 215 of the Investment Advisors Act of 1940, but denying cause of action for damages under § 206 of the Act); *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 40 n.26, 41-42 (1977) (implying a preference for equitable over monetary relief). See also *Meines v. State of Missouri*, 498 F. Supp. 944 (E.D. Mo. 1980) (implying cause of action for injunctive relief, but not for damages, under § 504 of the Rehabilitation Act of 1973); *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104, 1109-12 (N.D. Cal. 1979) (semble). But see *Patton v. Dumpson*, 498 F. Supp. 933, 936-39 (S.D.N.Y. 1980) (implying cause of action for both injunctive and monetary relief under § 504); *Poole v. South Painfield Bd. of Educ.*, 490 F. Supp. 948, 949 (D.N.J. 1980) (semble).

161. Thus, in *Thiboutot* the Court made no inquiry as to the appropriateness of monetary relief in the context of the Social Security Act. 448 U.S. 1 (1980). The fact that the Court had allowed plaintiffs in earlier cases to obtain injunctive relief to enforce their rights under the Act apparently was sufficient to establish that they possessed rights under the Act and that the administrative scheme erected by Congress was not intended to be exclusive.

162. Cf. *Robinson v. Pratt*, 497 F. Supp. 116, 122 (D. Mass 1980) (message of *Thiboutot* is that "a plaintiff seeking enforcement of federal rights against a state is not to be abandoned by federal courts if any reasonable remedy can be fashioned"). But see *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 29-30 (1981), in which the Court suggests in dicta that when the defendant state is found in violation of federal funding stipulations, the relief available to the plaintiff may be limited to an injunction against the further payment of federal monies to the state.

163. 20 U.S.C. § 1232g (1976).

force these rights. It merely provides that the Secretary of Education<sup>164</sup> must designate an office and review board to investigate and adjudicate violations of the Act and take appropriate enforcement action.

Thus, if a parent tried to sue a local school board for violating FERPA, absent *Thiboutot*, a court would first have to imply a cause of action in the parent's favor. Because FERPA was a floor amendment to the Educational Amendments of 1974,<sup>165</sup> evidence of congressional intent is sparse.<sup>166</sup> The only legislative history that discusses enforcement simply paraphrases the statute's charge to the Secretary of Education.<sup>167</sup> Nor does either the language or structure of the statute, or the circumstances of its enactment,<sup>168</sup> provide guidance as to legislative intent.

Absent evidence of an intent to provide a private cause of action, the existence of a legislatively mandated enforcement scheme should lead a court to refuse to imply a cause of action. The Supreme Court recently cautioned courts to be "chary" of implying a cause of action where a statute expressly provides a particular remedial scheme.<sup>169</sup> In the one reported decision concerning this issue under FERPA, the Court of Appeals for the Eighth Circuit declined to imply a cause of action.<sup>170</sup>

*Thiboutot*, however, impels the opposite result. The court would first have to consider whether the parent is alleging the deprivation of a right secured to him by FERPA. Since the parent clearly is a member of the class for whose especial benefit FERPA was enacted, this

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164. The Act originally placed these responsibilities in the hands of the Secretary of Health, Education and Welfare. When the Department of Education was created, these responsibilities were transferred to the Secretary of Education. Pub. L. No. 96-88, Title VI, § 601, 93 Stat. 696 (1979).

165. Pub. L. No. 93-380, Title V, § 513(a), 88 Stat. 571 (1974). FERPA was introduced by Senator Buckley on the Senate floor less than two weeks before the bill was passed by that body. 120 CONG. REC. 13952 (May 9, 1974).

166. The only contemporary legislative history that exists is found in the report of the Conference Committee, H. Conf. Rpt. 93-1211 at 186, and in statements made on the floor of the Senate at the time he introduced FERPA. 120 CONG. REC. 13952 (May 9, 1974).

167. H. Conf. Rpt. 93-1211 at 186.

168. The Court has examined these factors on several occasions in an attempt to divine congressional intent. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

169. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979).

170. *Girardier v. Webster College*, 563 F.2d 1267, 1277 (8th Cir. 1977).

requirement would be met. Second, the court would have to decide whether Congress intended enforcement by the Secretary of Education to be the exclusive means of enforcing FERPA. As discussed above, however, scant evidence exists concerning the congressional intent behind FERPA. Thus, it will be just as difficult to demonstrate that Congress intended to establish an exclusive enforcement scheme as it is to show that Congress intended to provide a private cause of action. Because *Thiboutot* places upon defendants the burden of demonstrating that a private suit should not be allowed, the result here should be that a private action will lie. The shift from requiring affirmative evidence of congressional intent to provide a cause of action to requiring such evidence of an intent to preclude a cause of action thus proves crucial.

## 2. Does "And Laws" Mean All Laws?

On its face, *Thiboutot* admits of no limits to the meaning of the phrase "and laws." As the Court there stated, the question before it was whether that phrase "means what it says, or whether it should be limited to some subset of laws."<sup>171</sup> The Court's answer was seemingly unambiguous. "Given that Congress attached no modifiers to the phrase," Section 1983 "broadly encompasses statutory as well as constitutional" claims.<sup>172</sup> The dissent roundly criticized the majority for bringing within the scope of Section 1983 claims "that have little or nothing to do" with civil rights.<sup>173</sup>

Despite the sweeping language and rationale of *Thiboutot*, at least one court of appeals has interpreted "and laws" to cover less than all laws. In *First National Bank of Omaha v. Marquette National Bank of Minneapolis*,<sup>174</sup> plaintiffs claimed that defendant violated provisions of the National Banking Act<sup>175</sup> by lobbying for legislation which placed an interest ceiling on bank card credit, obtaining such legislation, and then litigating for its enforcement. This allegedly constituted a violation of the Act, which preempts the states' power to regulate the interest of national banks.<sup>176</sup> Plaintiffs brought their action pursuant to Section 1983. The Eighth Circuit held, however,

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171. 448 U.S. 1, 4 (1980).

172. *Id.*

173. *Id.* at 25.

174. 636 F.2d 195 (8th Cir. 1980).

175. 12 U.S.C. §§ 85-86 (1976).

176. 636 F.2d at 197.

that plaintiffs could not proceed pursuant to Section 1983.<sup>177</sup> *Thiboutot* involved the right to receive welfare benefits which, in the opinion of the panel, constituted an important personal right akin to the fundamental rights protected by the Fourteenth Amendment.<sup>178</sup> In contrast, the rights invoked by the plaintiffs in *First National* were merely incidental to a purely economic regulatory statute affecting only commercial institutions.<sup>179</sup> The qualitative difference in these rights was thus viewed as justification for distinguishing *Thiboutot* and thereby limiting the reach of Section 1983.

Whether other courts will follow and attempt to amplify upon this limiting principle remains to be seen. Thus far, at least, the Eighth Circuit seems to be a leader without a following.<sup>180</sup> This should not be surprising, since there is little support in *Thiboutot* for the idea of distinguishing between types of non-civil rights claims. Nor is the distinction drawn by the Eighth Circuit particularly convincing, especially in light of the Supreme Court's holding only a year before that the statute involved in *Thiboutot* was not a civil rights act.<sup>181</sup> Furthermore, other rationales were available to the court to deny plaintiffs' claim.<sup>182</sup> Nevertheless, the court's opinion does strike a sympathetic chord. Using Section 1983 to proceed upon a National

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177. *Id.* at 198.

178. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

179. 636 F.2d at 198-99.

180. *See Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980); *Maya v. Philadelphia Gas Works*, 8 B.R. 202, 204-05 (E.D. Pa. 1981); *Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Bd.*, 501 F. Supp. 821, 825 (E.D. Va. 1980); *Yapalater v. Bates*, 494 F. Supp. 1349, 1357-58 (S.D.N.Y. 1980).

181. *Chapman v. Houston Welfare Rights Org.*, 411 U.S. 600, 620-23 (1979).

182. At least with respect to defendant's lobbying activity, there appears to be no action taken under color of state law as is required by Section 1983. Defendant's litigation efforts to enforce the state law for which it successfully lobbied present a more complicated question. As was pointed out in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978), a distinction can be drawn between the "under color of state law requirement" and the requirement that there be shown a deprivation of a constitutional or statutory right. Some constitutional or statutory rights are protected only from governmental invasion. In order for there to be an invasion of such rights, state action must be proved. Other rights, such as those created by the Thirteenth Amendment, provide protection against private as well as governmental infringement. Still, a private person who violates another's Thirteenth Amendment rights must be acting under color of state law for a Section 1983 action to lie. At a minimum this requires that the individual act with the knowledge of and pursuant to a state statute. *Id.* at 156. The defendant in *First Nat'l Bank of Omaha* was not acting with the knowledge of or pursuant to a state statute when it engaged in its lobbying and litigating activities.

Bank Act claim does seem somewhat far-fetched. If attempts to limit Section 1983 are not successful via the avenues suggested above, many courts will undoubtedly be tempted to follow the Eighth Circuit's lead.

## V. EVALUATING THE IMPACT

Without doubt, local government entities stand far more vulnerable to suit now than they were five years ago. They present a considerably more attractive target for the Section 1983 litigant than do either government officials or state governments.<sup>183</sup> But the changes in the law concerning governmental liability, while substantial, should not be overestimated. Local governmental entities have by no means been stripped of all protection from suit. Courts have already begun, and will certainly continue, to develop doctrinal devices to check the impact of *Monell*, *Owen* and *Thiboutot*.<sup>184</sup> Moreover, to a limited extent, local governments were bearing the cost of successful Section 1983 litigation prior to this trio of cases. Judgments obtained against local officials quite frequently were paid by the governmental unit, even in some instances where the official was found to have acted maliciously.<sup>185</sup> In addition, as a result of the trend in the lower courts to allow suits to be brought against municipalities directly under the Fourteenth Amendment,<sup>186</sup> local governmental entities found themselves named as defendants with increasing frequency. Indeed, had *Monell* never been decided, it is likely that bringing suit

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183. In fact, some have read the Court's decision in *Quern v. Jordan*, 440 U.S. 332 (1978) as holding that states are not "persons" under Section 1983. *Id.* at 345 (Brennan, J., concurring). See also *Brown v. Supreme Court*, 476 F. Supp. 86, 89 (D. Nev. 1979); Note, *Quern v. Jordan: A Misdirected Bar to Section 1983 Suits Against States*, 67 CALIF. L. REV. 407 (1979). But see *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 231 n.65 (1980). A better explanation of *Quern* is that the Court there held only that the language of Section 1983 is insufficiently explicit to evidence a congressional intent to abrogate the states' Eleventh Amendment immunity. 440 U.S. at 343-45.

184. See note 109 *supra*.

185. See Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 811-12 (1979) [hereinafter cited as Project, *Suing the Police*]; Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Government?*, 13 URBAN LAW. 1, 17-18 (1981). Most states have statutes providing for indemnification of government officials. See Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1383-92 (1976).

186. See cases cited at note 4 *supra*.



against municipalities directly under the Fourteenth Amendment for constitutional violations would today be standard operating procedure for civil rights litigants.<sup>187</sup> Finally, to the extent that a cause of action could be implied directly under a particular substantive statute, the effect of *Thiboutot* is diminished.

Nevertheless, *Monell*, *Owen* and *Thiboutot* each increased the vulnerability of local government entities to damage actions. *Monell* obviated the need to resort to predicating one's cause of action on the Fourteenth Amendment and rendered municipalities subject to all Section 1983 actions.<sup>188</sup> *Thiboutot* removed most of the barriers posed by an increasingly restrictive implied cause of action doctrine and, by permitting attorney's fees for statutory, non-civil rights claims, provided a strong incentive for bringing such suits.<sup>189</sup> Most important of all, *Owen* refused to extend a qualified immunity to municipalities.<sup>190</sup> Collectively, they have created an atmosphere which encourages litigants to bring Section 1983 actions against local government entities.

One can only speculate as to the manner in which these developments will affect municipalities. Procuring insurance against potential liability is becoming increasingly difficult and costly.<sup>191</sup> Thus, most entities will have to shoulder directly the costs of their illegal actions and the illegal actions of the employees whom they choose to indemnify. One possibility is that they will begin to withdraw from those activities that are most likely to subject them to liability. If such a trend has started, however, it is not yet apparent. Nor are we likely to witness such a response. Those activities that are most likely to generate litigation—police protection, zoning decisions, and other activities directly affecting the citizenry—are activities that are politically infeasible to halt.

A more realistic possibility is that local governments will lobby hard for greater local control over the federal funds they receive. Lessening the number of federal standards that exist lessens the im-

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187. Such suits were gaining wider acceptance in the years immediately preceding *Monell*. See cases cited at note 4 *supra*. Had *Monell* not been decided, more courts and practitioners would have inevitably become aware of this litigation tactic.

188. See notes 43-44 and accompanying text *supra*.

189. See notes 94 & 100 and accompanying text *supra*.

190. See notes 57-63 and accompanying text *supra*.

191. Jaron, *supra* note 185 at 19. Project, *Suing the Police*, *supra* note 185, at 785 n.19.

pact of *Thiboutot*. Since the theme of less federal and more local control is one that is voiced frequently by the Reagan administration, such efforts may well prove successful.

Whether local governments will measurably change their internal operations in an attempt to minimize potential liability for infringements of constitutional and statutory rights, as was suggested by the majority in *Owen*,<sup>192</sup> is impossible to predict. Some attempts at risk management are being undertaken by some jurisdictions.<sup>193</sup> On the other hand, empirical evidence indicates that the threat of damage actions, at least in the context of police misconduct suits, generates only minimal change.<sup>194</sup>

The only safe prediction is that the response of local governments will likely be uneven. Even within the larger local governmental entities, the response is unlikely to be uniform, with some departments making efforts to minimize future liability and others doing nothing. Unlike Justice Powell, I do not foresee governmental paralysis resulting from *Monell*, *Owen* or *Thiboutot*. But neither is Justice Brennan's prediction that otherwise indifferent government officials will become vigilant in their efforts to protect the rights of citizens likely to prove true. Changes more fundamental than those worked by the three decisions would be required to accomplish such a result.

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192. 442 U.S. 622, 652 (1980).

193. See Jaron, *supra* note 185, at 21-22.

194. A study of 149 police misconduct suits filed in federal court in Connecticut concluded that the suits caused few changes in police department practices. Project, *Suing the Police*, *supra* note 185, at 812-14.

## **NOTES**

