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THE OVERTHROW OF *MONROE v. PAPE*: A CHAPTER IN THE LEGACY OF THURGOOD MARSHALL

*CONRAD K. HARPER**

As the first Director-Counsel of the NAACP Legal Defense and Education Fund, otherwise known as the "Inc. Fund," Thurgood Marshall helped establish the Inc. Fund's tradition of landmark civil rights litigation. Mr. Harper discusses in this article the role played by the Inc. Fund and Justice Marshall in overthrowing Monroe v. Pape *and its curtailment of civil rights suits against municipalities. The instrument for change was* Harkless v. Sweeny Independent School District, *a suit filed on behalf of seventeen Black schoolteachers who were discriminatorily fired by a Texas school district.*

IN 1961, the Supreme Court handed down *Monroe v. Pape*,[1] and eviscerated a valuable civil rights remedy by barring civil rights suits against municipalities and local governments.[2] Since its passage in 1871, the Civil Rights Act[3] has protected all persons from the violation of constitutional rights by any "person" acting "under color" of the law of any state.[4] In *Monroe*, however, Justice Douglas, writing for the Court, reached deep into the legislative history of the 1871 Act. Buried in a debate concerning the liability of municipalities for Ku Klux Klan violence, he found justification for the premise that Congress never authorized the imposition of civil rights liability on local governmental entities.[5]

Monroe and its progeny would prove to be a frustrating barrier to civil rights litigation for many years.[6] In 1966, however, my colleagues and I

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1. 365 U.S. 167 (1961).

2. *See id.* at 191-92.

3. 42 U.S.C. § 1983 (1988).

4. The Civil Rights Act was first enacted as section 1 of the Ku Klux Klan Act of 1871. *See* Comment, Carter v. Carlson: *The* Monroe *Doctrine At Bay*, 58 Va. L. Rev. 143, 144 (1972).

5. *See* Monroe v. Pape, 365 U.S. 167, 188-91 (1961). In his vigorous dissent in *Monroe*, Justice Frankfurter found the majority's focus on the legislative history surrounding the imposition of municipal liability for the Ku Klux Klan violence in the 1871 Act to be inappropriate. Rather, Frankfurter argued, the focus should have been on the adoption of § 1983 to enforce the provisions of the Fourteenth Amendment. The use of the Fourteenth Amendment to protect an individual's constitutional rights against the unconstitutional acts of municipalities and local governmental units was supported by the legislative history of the 1871 Act and the full title of that Act: "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." *Id.* at 204-06.

6. *See* Don B. Kates, Jr., *Suing Municipalities and Other Public Entities Under the Federal Civil Rights Act*, 4 Clearinghouse Rev. 177, 177 (1970) ("One of the most irksome technical problems of litigation under 42 USC 1983 (the so-called federal Civil Rights Act) is the question of whether public entities are proper defendants, and if so, for what forms of relief.").

at the NAACP Legal Defense and Educational Fund ("Inc. Fund") embarked on a case that opened an important crack in *Monroe*.

When I arrived at the Inc. Fund in 1965, Jack Greenberg was Director-Counsel. Thurgood Marshall, the first Director-Counsel, had been away four years, first as a Second Circuit Judge, and, more recently, as Solicitor General. The ethos of that great civil rights "law firm," whose roots went back to 1935 and the legendary Charles Hamilton Houston, affected me immediately. We were in the business of breaking precedent and establishing new law.

In the 1960s, in belated response to the Supreme Court's desegregation decisions in the two *Brown*[7] cases, many school districts consolidated their formerly all-Black and all-White schools. In many areas, however, local school boards simply did not rehire Black teachers who had formerly taught in all-Black schools.

In May, 1966, the Inc. Fund began representing Black teachers in Sweeny, Texas, where seventeen out of twenty-five Black teachers had not been rehired for the next school year.[8] We drew up a fairly straightforward complaint on behalf of the teacher-plaintiffs, naming as defendants each member of the district's school board and the superintendant in both their individual and representative capacities. The case came for trial in the federal district court sitting in Galveston in 1967.[9]

During voir dire, some of the venire panel indicated that they would not assess the back pay award we had requested against the individual school board members. We made a hurried decision to dismiss the defendants as individuals, thus maintaining the action against the board members and the superintendant solely in their official capacities.[10]

The defendants moved to dismiss, arguing that, per *Monroe*, the board members and the superintendant in their official capacities were not proper defendants under section 1983.[11] The motion was carried with the case. The all-White jury returned a special verdict, finding no racial discrimination, but also finding that plaintiffs' filing of the lawsuit was a factor in the school district's decision not to rehire them.[12]

In post-trial argument we asserted that the decision not to rehire violated plaintiffs' First Amendment right to seek redress of grievances. The district court, however, granted defendants' motion to dismiss, finding that the suit against the defendants in their official capacities violated

7. *See* Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*); Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*).

8. *See* Harkless v. Sweeny Indep. Sch. Dist., 427 F.2d 319, 320 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).

9. *See* Harkless v. Sweeny Indep. Sch. Dist., 278 F. Supp. 632 (S.D. Tex. 1968). Trial counsel were W. Haywood Burns, then an Inc. Fund staff lawyer, and now Dean of the CUNY Law School; and Weldon H. Berry, a skilled Houston practicioner; and I.

10. *See* Harkless v. Sweeny Indep. Sch. Dist., 300 F. Supp. 794, 795 (S.D. Tex. 1969), *rev'd*, 427 F.2d 319 (1970), *cert. denied*, 400 U.S. 991 (1971).

11. *See id.* at 799.

12. *See id.*

Monroe's prohibition against section 1983 suits that name municipalities as defendants.[13]

By 1969, many cases, including some in the Supreme Court,[14] had permitted section 1983 actions against local governments and municipalities without directly evaluating the impact of these decisions on the holding in *Monroe*. On the other hand, federal courts often found it easy to use *Monroe* for dismissal of actions and denial of remedies against local governmental entities.[15] In the old Fifth Circuit, it seemed foolish for us to mount an all-out attack on the then relatively recent Supreme Court holding in *Monroe*, but we could and did argue that our case was not limited by the *Monroe* decision.[16] My many happy hours in the library of the Association of the Bar, the Law Library of Congress, and the Supreme Court Library poring over old records, briefs, and Reconstruction history finally yielded a plan.

Our attack was simple. We assured the Fifth Circuit that *Monroe* did not address our situation.[17] Even though plaintiffs were requesting back pay, the remedy was essentially restitution, not damages, and therefore not covered by *Monroe*. Much of the furor surrounding *Monroe* and the legislative history of section 1983 was based on the fear that local governmental coffers would be emptied by constitutional, tort-based suits originating in the thoughtless, wrongful acts of governmental employees.[18]

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13. *See id.* at 806-07.

14. *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (plaintiffs sought equitable relief for school suspension after wearing black armbands to protest the Vietnam War; Supreme Court acknowledged that it was not deciding the propriety of the relief requested); Turner v. City of Memphis, 369 U.S. 350 (1962) (per curiam) (injunction against city for operating segregated eating and restroom facilities at the municipal airport); *see also* Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (per curiam) (Court ordered the board to cease operation of segregated schools and to establish a unitary school system); McNeese v. Board of Educ., 373 U.S. 668 (1963) (desegregation cases seeking injunctive relief against local governmental entities).

15. Suits for equitable relief, as well as damages, had been consistently dismissed by federal courts which based their decisions on *Monroe*'s broad holding that a municipality is not a "person" under § 1983. *See* Diamond v. Pitchess, 411 F.2d 565 (9th Cir. 1969) (seeking equitable relief); Sutton v. City of Philadelphia, 286 F. Supp. 143 (S.D.N.Y. 1968) (same); *see also* Gittlemacker v. County of Philadelphia, 413 F.2d 84 (3d Cir. 1969) (seeking damages), *cert. denied*, 396 U.S. 1046 (1970); Garrison v. County of Bernalillo, 338 F.2d 1002 (10th Cir. 1964) (per curiam) (same).

16. Brief for Appellants at 7-9, Harkless v. Sweeny Indep. Sch. Dist., 427 F.2d 319 (5th Cir. 1970) (No. 28188).

17. *See id.*

18. During the debates on the Sherman Amendments, senators and representatives expressed fear that any law permitting recovery of damages from municipalities would give Congress improper control of cities and could lead to the destruction of municipal governmental structure and services—with congressional attachments and sale of municipal property such as schools, jails and courthouses—to pay judgments. *See* Cong. Globe, 42d Cong., 1st Sess. 763-795 (1871); Monroe v. Pape, 365 U.S. 167, 187-190 (1961); Comment, *Injunctive Relief Against Municipalities Under Section 1983*, 119 U. Pa. L. Rev. 389, 397 (1970) ("In spite of attempts by proponents to characterize the Sherman amendment as a mutual insurance provision, most members of Congress apparently viewed it as

Monroe was essentially a suit for damages, resulting from a wrongful search and seizure, against certain police officers and the City of Chicago.[19] In our case, the Sweeny Independent School District decision not to rehire Black teachers was not a random tort but a policy decision that, we argued, deprived the Black teachers of their constitutional rights.[20]

We invoked long-standing Supreme Court decisions upholding the power of the federal government to protect citizens in the face of constitutional violations sponsored by local governmental officials in their official capacities.[21] In *Ex parte Young*,[22] a state attorney general, who attempted to enforce an unconstitutional statute, continuously but unsuccessfully challenged the district court's authority over him in his official capacity.[23] In 1913, in *Home Telephone and Telegraph Co. v. City of Los Angeles*,[24] a unanimous court found federal judicial power competent to redress the wrongs of a state official in his official capacity.[25]

Even after *Monroe*, the Supreme Court allowed the redress of constitu-

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an attempt to punish criminally a subdivision of the state for acts done within its boundaries.").

19. *See Monroe*, 365 U.S. at 169. In *Monroe*, the Court allowed the action against the police officers as individuals but barred any claim that the City was federally liable for the wrong-doing of its employees which violated merely state law and police policy. *See id.* at 172-87.

20. Indeed in his dissent to the *Monroe* decision, Justice Frankfurter opined that even the random act of violence by the Chicago police may be chargeable under a form of "official capacity":

> It might also be true merely because the respondents *are* the police—because they are clothed with an appearance of official authority which is in itself a factor of significance in dealings between individuals. Certainly the night-time intrustion of the man with a star and a police revolver is a different phenomenon than the night-time intrusion of a burglar. The aura of power which a show of authority carries with it has been created by state government. For this reason the national legislature, exercising its power to implement the Fourteenth Amendment, might well attribute reponsibility for the intrusion to the State and legislate to protect against such intrusion.

Id. at 238 (Frankfurter, J., dissenting).

21. *See* Brief for Appellants at 16-21, Harkless v. Sweeny Indep. Sch. Dist., 427 F.2d 319 (5th Cir. 1970) (No. 28188).

22. 209 U.S. 123 (1908).

23. *See* Petitioner's Brief on Hearing of Rule to Show Cause at 6-8, *Ex parte* Young, 209 U.S. 123 (1908) (No. 10, Original); *see also* Wayne McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 Va. L. Rev. 1, 44 (1974) ("*Young* could still be used to justify the designation as 'individual' a suit for injunctive relief that would actually result in payments from the state treasury, despite the suit's being clearly against the officer as a state agent and not against him in any individual capacity." (footnote omitted)).

24. 227 U.S. 278 (1913).

25. *See id.* at 285-87.

> [T]he theory of the [Fourteenth] Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.

Id. at 287.

tional violations by requiring a board of supervisors to levy taxes for funds to reopen schools that had been shut to avoid desegregation.[26] We argued that this was equitable redress against the board in its *official* capacity because the board members could not levy taxes as individuals.[27]

We assured the Fifth Circuit that we were not seeking to overturn numerous federal cases. We were only asking the court to hold explicitly what was implicit in the law regarding section 1983, namely, that official illegal conduct is subject to federal judicial power and remedy.[28]

In *Harkless v. Sweeny Independent School District*,[29] the Fifth Circuit followed our reasoning and took advantage of a footnote in *Monroe*[30] to narrow its scope and to find that *Monroe* did not bar injunctive relief against school board members in their *official* capacity.[31] *Harkless* was one of the first departures from the binding authority of *Monroe* in a civil rights case.[32] By 1972, more than half of the circuits had allowed injunc-

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26. *See* Griffin v. County Sch. Bd., 377 U.S. 218, 228 (1964) ("[S]uits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment.").

27. *See* Brief for Appellant at 13, Harkless v. Sweeny Indep. Sch. Dist., 427 F.2d 319 (5th Cir. 1970) (No. 28188). The district court's attempt to avoid the result in *Griffin* on the supposition that *Griffin* was not a § 1983 action was erroneous because the request for a three-judge panel at an early stage in *Griffin* was a procedural device, not a request for jurisdiction. Further, *Griffin*'s lineal predecessor was a § 1983 case. *See* Complaint, Davis v. County Sch. Bd., 142 F. Supp. 616 (E.D. Va. 1956) (No. 1333).

28. *See* Reply Brief for Appellants at 7-8; Harkless v. Sweeny Indep. Sch. Dist., 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).

29. 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).

30. The court said:

> In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 U.S.C. § 1983 were alleged. *See, e.g.*, Douglas v. City of Jeannette, 319 U.S. 157; Holmes v. City of Atlanta, 350 U.S. 879. The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a "person" within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases.

Monroe v. Pape, 365 U.S. 167, 191 n.50 (1961).

31. Responding to the district court's reliance on footnote 50 as meaning that municipalities were not "persons" within the meaning of § 1983 for any purpose—in law or in equity—the Fifth Circuit found:

> We do not read footnote 50 so broadly. We read it within the context of the holding of the court and the text to which it is appended. We think the court was saying in the footnote that the issue of damages against municipalities under respondeat superior was a question not raised in the equitable relief cases cited and that no inference may be drawn from those cases that a municipal corporation is a person within the meaning of § 1983 for the purposes of a damage claim against it under respondeat superior. We do not perceive that the court was expanding its holding by a footnote dictum to eliminate municipalities as "persons" under § 1983 for the purpose of equitable relief, a question not expressly considered in the cited equitable relief cases.

Harkless, 427 F.2d at 322.

32. In *Harkless*, the Fifth Circuit cited to two Seventh Circuit cases where injunctions had been permitted against a municipality in § 1983 actions. 427 F.2d at 323. Those cases were Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961) and Schnell v. City

tive relief against municipalities under the statute.[33]

The Supreme Court curbed these developments in *City of Kenosha v. Bruno*,[34] holding that, because a city was not a "person" with respect to damages under section 1983, no court could find a city liable for equitable relief under section 1983.[35] The brief decision by then-Justice Rehnquist was almost immediately met with a chorus of disapproval,[36] but there was continued erosion of civil rights claims under this newly-strengthened *Monroe* doctrine.[37]

The one "loophole" for civil rights advocates following *Kenosha* was the very argument we advanced in *Harkless*: Plaintiffs could bypass *Kenosha* by joining city officials in their "official capacities" as named defendants.[38]

In 1978, Justice Brennan, in turn, "corrected" *Monroe* in *Monell v. Department of Social Services*[39] by conceding that, while the Court had

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of Chicago, 407 F.2d 1084 (7th Cir. 1969). *See Harkless*, 427 F.2d at 323. However, these and other cases which implicitly allowed equitable relief did not directly address the weaknesses in *Monroe*. *See Recent Developments*, 70 Colum. L. Rev. 1467 (1970) ("[W]ith few exceptions, the cases were decided without any discussion of the logical and syntactical problem of how the same word in a single sentence can have two different meanings." (footnote omitted)). *Id.* at 1471.

33. *See* Comment, Carter v. Carlson: *The* Monroe *Doctrine at Bay*, 58 Va. L. Rev. 143, 157 (1972) (*Harkless* cited in footnote 74).

34. 412 U.S. 507 (1973).

35. *See id.* at 513. Relying on the strength of footnote 50 in Monroe v. Pape, 365 U.S. 167, 191 n.50 (1961), the *Kenosha* Court held that "[s]ince, as the Court held in *Monroe*, 'Congress did not undertake to bring municipal corporations within the ambit of' § 1983 they are outside of its ambit for purposes of equitable relief as well as for damages." *Kenosha*, 412 U.S. at 513.

36. *See* Note, *The Supreme Court 1972 Term*, 87 Harv. L. Rev. 1 (1973):

> The Court [in *Kenosha*] thus undertook no independent analysis of the legislative history of section 1983, relying entirely on the *Monroe* Court's examination of that history and on the language of the statute itself.
>
> In resting so heavily on the *Monroe* Court's interpretation of the legislative history of section 1983, the Court failed to answer extensive scholarly criticism of *Monroe*'s use of that history.

Id. at 256.

37. *See* Adkins v. Duval County Sch. Bd., 511 F.2d 690 (5th Cir. 1975) (county school board not person under § 1983); Cason v. City of Jacksonville, 497 F.2d 949 (5th Cir. 1974) (city not a person under the Civil Rights Act).

38. *See* Ronald M. Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 Geo. L.J. 1483, 1498-1501 (1977):

> The lower courts were quick to perceive and exploit the loophole in the holding of *Kenosha*. As the Third Circuit pointed out in *Rochester v. White* [503 F.2d 263 (3d Cir. 1974)], other strong reasons justified holding that *Kenosha* had not foreclosed suits against officers in their official capacity . . . . The Supreme Court's own behavior after *Kenosha* gave additional proof that it had not meant to announce a substantive limitation on section 1983 liability. The Court routinely continued reaching the merits in section 1983 cases in which a municipal officer was sued in his official capacity.

Id. at 1500-01.

39. 436 U.S. 658 (1978).

reaffirmed *Monroe* without further examination on three occasions,[40] "it can scarcely be said that *Monroe* is so consistent with the warp and woof of civil rights law as to be beyond question."[41] In *Monell*, the Supreme Court held that Congress intended that municipalities, local governmental units,[42] and local governmental officials,[43] sued in their official capacities, be directly suable under section 1983 for discrimination or other deprivations of constitutional rights.[44]

Monell followed the Fifth Circuit's analysis in *Harkless*—without citing the latter—by leaving undisturbed *Monroe*'s holding that the "doctrine of *respondeat superior* is not a basis for rendering municipalities liable under section 1983 for the constitutional torts of their employees."[45] *Monell* marked the end of *Monroe*'s protective role for school boards, local governments, or their officials engaged in discrimination in their representative capacity.[46]

Section 1983 cases have proliferated post-*Monell*.[47] There are various schools of thought on what are the outer limits of liability for municipalities under *Monell*.[48] Among the open issues are whether a random "ille-

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40. *See* Aldinger v. Howard, 427 U.S. 1 (1976); City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973).

41. *Monell*, 436 U.S. at 696.

42. The Supreme Court stated that "[l]ocal governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690.

43. The Court stated:

> Since official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent—at least where Eleventh Amendment considerations do not control analysis—our holding today that local governments can be sued under § 1983 necessarily decides that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which, as here, a local government would be suable in its own name.

Id. at 690 n.55.

44. *See id.* at 690. *Monell* involved pregnant employees of the Department of Social Services and the Board of Education of the City of New York who were compelled "to take unpaid leaves of absence before such leaves were required for medical reasons. The suit sought injunctive relief and backpay for periods of unlawful forced leave." *Id.* at 661 (citation and footnote omitted).

45. *Id.* at 663-64 n.7.

46. *See id.* at 694-95. "First, *Monroe v. Pape*, insofar as it completely immunizes municipalities from suit under § 1983, was a departure from prior practice." *Id.* at 695.

47. *See, e.g.*, Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989); Cannon v. University of Chicago, 441 U.S. 677 (1979).

48. *See* Barbara Kritchevsky, *"Or Causes to be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L. Rev. 1187 (1988). She wrote:

> Some members of the Court have strayed from reliance on the statute's language and the principles it incorporates in an effort to escape the heavy burden they believe § 1983 actions place on the federal courts. *See* Patsy v. Board of Regents, 457 U.S. 496, 533 (1982) (Powell, J., dissenting); Maine v. Thiboutot, 448 U.S. 1, 22-25 (1980) (Powell, J., dissenting). Indeed, this fear of a "torrent" of litigation was urged as a reason for adhering to *Monroe*'s holding that munic-

gal" or "extra-legal" act of a municipal employee or agent is covered,[49] and whether a municipal employee is personally responsible for constitutional violations resulting from employee acts within the bounds of the locality's prescribed policy.[50]

The Supreme Court has recently grafted the Fourteenth Amendment argument in *Ex parte Young*[51] onto a section 1983 decision.[52] In *Will v. Michigan Department of State Police*,[53] the Court held that a state official, in his official capacity, is not protected by the Eleventh Amendment[54] when sued under section 1983 for injunctive relief because, under section 1983, " 'official-capacity actions for prospective relief are not treated as actions against the State.' "[55] Using the *Ex parte Young* "fiction" of separating a state actor from the state when the state actor is violating the Constitution, *Will* continues to prohibit damages actions against state officials under section 1983.[56]

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ipalities were not "persons" within the meaning of § 1983. Monell v. Department of Social Servs., 436 U.S. 658, 724 (1978) (Rehnquist, J., dissenting) . . . .
Id. at 1193 n.23.

49. *Monell* explicitly rejects making a municipality liable under § 1983 in respondeat superior for its employees and/or agents. *See* 436 U.S. at 691 ("[A] municipality cannot be held liable *solely* because it employs a tortfeasor."). *But see* Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65 N.C. L. Rev. 517 (1987). ("Professor Mead argues that the Court's rejection of *respondeat superior* in favor of policy or custom causation requirement has erected a significant barrier to section 1983 municipal liability." (student introduction to Professor Mead's article)).

50. *See* Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. Pa. L. Rev. 755 (1992). They wrote:

> Whenever an individual agent causes a recognized constitutional harm, she is prima facie liable even if the entity approved her conduct and she had a blameless state of mind. Nevertheless, the Court, prompted by concerns about litigation floodgates, federalism, and judicial interference with discretionary government decisions, has crafted an expansive affirmative defense that more than offsets the laxity of the prima facie requirements. Government agents, including those whose positions make them most likely to inflict injury on ordinary citizens, escape liability for damages by grace of qualified immunity unless the right violated was previously recognized by judicial precedent of unmistakable application and clarity.

Id. at 758 (footnotes omitted).

51. 209 U.S. 123 (1908).

52. The link between the Fourteenth Amendment and the power of the federal judiciary under § 1983 to redress constitutional wrongs was anticipated in *Ex parte* Young, *id.* and Home Telephone and Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913). In *Ex parte* Young, a state official was barred from enforcing unconstitutional state laws, 209 U.S. at 137-38; in *Home Telephone*, state officials were barred from abusing their powers, i.e., from acting beyond the powers and scope of state law, 227 U.S. at 287-89. In both cases, the Court looked to the Fourteenth Amendment as a basis for jurisdiction over the state actors. *See Home Telephone*, 227 U.S. at 287; *Young*, 209 U.S. at 150.

53. 491 U.S. 58 (1989).

54. The Eleventh Amendment prohibits suits "commenced or prosecuted" against one of the states. U.S. Const. amend. XI.

55. *Will*, 491 U.S. at 71 n.10 (quoting Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)). *See Ex parte* Young, 209 U.S. 123, 159-160 (1908).

56. *See Will*, 491 U.S. at 71.

The Court further refined a municipality's liability under section 1983 in *Canton v. Harris*.[57] In *Canton*, the Court held that if policymakers acted with "deliberate indifference," and thus failed to provide adequate training for officers, a city might be responsible if that lack of training caused injury.[58] In the recent case of *Collins v. Harker Heights*,[59] however, the Court limited this approach, finding that the standard of deliberate indifference may be used only for "identifying . . . the threshold for holding a city responsible for the *constitutional* torts committed by its inadequately trained agents."[60] The Court held that section 1983 cannot be used to invoke municipal liability without a showing of a constitutional violation.[61] The Court found no constitutional due process protection and analogized petitioner's claim to a fairly typical state-law tort claim.[62]

The vicissitudes of section 1983 illustrate a powerful truth in our jurisprudence. To root out discrimination against racial and other protected groups we resort to broad remedies like the Fourteenth Amendment and its statutory creature, section 1983. Tension sets in when these protections are invoked by others whose claims are literally within the legislative words but whose facts do not supply the classic racial or protected group predicate for relief. So, in *Monroe*, the search and seizure claim had no racial or protected group component. The non-classic context provides an opportunity to rethink the historical and intellectual foundations for the remedy and may lead, as in *Monroe*, to its curtailment. The special moment of truth arrives—as in *Harkless* with plaintiff Black teachers, and in *Monell* with plaintiff pregnant employees—when the husk of doctrine elaborated outside of a racial or protected group case is shown to be dead weight in adjudicating a constitutional claim of discrimination intended for statutory cure. Once the classic race or protected group claim is understood as well-anchored, other conceptually similar constitutional claims are rendered, in principle, indistinguishable.

Justice Marshall recognized this distinction. He delivered the opinion of the Court in *Moor v. County of Alameda*,[63] which refused to expand vicarious liability to a county following an accidental discharge of a shotgun by a county sheriff.[64] Justice Marshall also concurred in *City of Kenosha v. Bruno*,[65] which involved a county's refusal to provide a liquor

57. 489 U.S. 378 (1989).

58. *See id.* at 388.

59. 112 S. Ct. 1061 (1992).

60. *Id.* at 1068 (emphasis added).

61. *See id.* at 1069. Petitioner had claimed as the basis of her "constitutional" claim that the city deprived her husband of life and liberty by failing to provide a reasonably safe work environment. *See id.*

62. *See id.* at 1070; *see also* Daniels v. Williams, 474 U.S. 327, 332 (1986) (the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.").

63. 411 U.S. 693 (1973).

64. *See id.* at 721.

65. 412 U.S. 507 (1973).

license.[66] Discrimination was not the basis of either of these suits. Justice Marshall participated in Justice Brennan's vigorous dissent in the next section 1983 case which the Supreme Court dismissed, *Aldinger v. Howard*,[67] in which a woman employee alleged that a county had discriminated against her and fired her because she was living with her boyfriend.[68] Justice Brennan reasoned that:

> "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation" .... "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional acts under color of state law, 'whether that action be executive, legislative or judicial.' "[69]

The collision of *Harkless* with *Monroe* illustrates the Inc. Fund tradition: Never be discouraged by settled adverse doctrine. Official segregation would not have been overthrown, nor *Monroe* overruled in *Monell*, if stare decisis had been left unchallenged.

With the demise of *Monroe* and the rise of *Monell*, a statutory underpinning of Thurgood Marshall's greatest victory was restored. For the plaintiffs in *Brown* relied on the 1871 Civil Rights Act,[70] now codified as 42 U.S.C. § 1983.

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66. *See id.* at 516.
67. 427 U.S. 1 (1976).
68. *See id.* at 3.
69. *Id.* at 33-34 (Brennan, J., dissenting) (quoting Mitchum v. Foster, 407 U.S. 225, 238-39, 242 (1972), quoting *Ex Parte* Virginia, 100 U.S. 339, 346 (1879)).
70. The three federal cases that formed the basis of the Supreme Court's decision in *Brown* were premised on the Civil Rights Acts of 1871, 42d Cong. 1st Sess. (1871), and 8 U.S.C. § 43, the predecessor statute to 42 U.S.C. § 1983. As the petitioner's amended complaint stated:

> This action is authorized by the Act of April 20, 1871, Chapter 22, section 1, 17 Stat. 13 (Title 8, United States Code, section 43), to be commenced by any citizen of the United States or other persons within the jurisdiction thereof to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, or rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States, section 1, and by the Act of May 31, 1870, Chapter 114, section 16, 16 Stat. 144 (Title 8, United States Code, Section 41), providing for the equal rights of citizens and of all other persons within the jurisdiction of the United States, as hereinafter more fully appears.

Amended Complaint at 2, Brown v. Board of Educ. of Topeka, 98 F. Supp. 797 (D. Kan. 1951) (No. T-316 Civil). *See* Complaint at 6, Davis v. County Sch. Bd., 164 F. Supp. 786 (E.D. Va. 1951) (Civil Action No. 1333); Complaint at 2-3, Briggs v. Elliot, Civil Action No. 2657 (E.D.S.C. Dec. 22, 1950). All of the above documents are found in the Record at Vol. 79-83, Brown v. Board of Educ., 347 U.S. 483 (1954).