Cases that Shaped the Federal Courts

Monroe v. Pape

1961

Justice William O. Douglas

Federal Judicial Center
2020

Central Question

Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?

Historical Context

Monroe v. Pape dealt with a seemingly dry question of statutory interpretation, but the case had a significant impact on the work of the federal courts. By adopting a broad definition of key language in a statute passed nearly a century earlier, *Monroe* facilitated a large number of civil rights suits. Coming as it did near the height of the civil rights movement, this decision arguably opened up the federal courts to a broader set of constitutional cases than ever before.

The Constitution does not explicitly confer on individuals the ability to sue to enforce their rights. Instead, a federal court can only hear a case in which Congress has granted the court jurisdiction and given the litigants the right to sue. In the aftermath of the Civil War (1861–1865), Congress passed a series of laws designed to broaden parties' ability to sue in federal court if their civil rights had been violated. One of these laws, the Ku Klux Klan Act of 1871 ("the KKK Act"), permitted individuals to sue anyone who had violated their civil rights while operating "under color of state law." Initially, the law was part of an effort to stop the Ku Klux Klan and other racist groups from terrorizing African Americans in the U.S. South. This law was seldom employed during much of the first half of the twentieth century. As the federal courts increasingly adopted broader interpretations of the rights guaranteed by the first eight amendments over the course of the 1950s and 60s, however, the law offered a potential vehicle for individuals to sue to enforce these rights and hold state officials accountable for constitutional violations.

Legal Debates Before *Monroe*

Perhaps the most important legal question involving the application of the KKK Act was the scope of its "color of law" provision. Some claimed that this language permitted a lawsuit only when a state statute specifically authorized the defendant to act in a manner that violated the Constitution. This rationale was based in part on a long line of cases that held that Congress could only regulate state action through its powers to enforce the Fourteenth Amendment and related provisions of the Constitution. Under this logic, Congress could govern actions authorized by a state law, such as a police officer arresting African Americans for attending a segregated public school, but it could not regulate private actions, like a restaurant owner denying African Americans service. More ambiguous,

however, were cases in which state officers acted in their official capacities but violated state law or abused their power. This distinction was important because most cases in which officials violated individuals' rights—police officers assaulting or torturing suspects, for example—did not involve explicit authorization from the state. In many such instances, the police were actually violating state laws.

Nevertheless, two cases preceding *Monroe* suggested that this sort of unauthorized conduct might be covered by the "under color" language. *Screws v. United States* (1945) and *Williams v. United States* (1951) involved criminal prosecutions under a different federal statute that employed similar language to the KKK Act. The statute in those cases prohibited the deprivation of federal constitutional rights "under color of *any* law" (emphasis added). *Screws* involved Georgia police officers who brutally beat an African American suspect to death while he was in custody. In a controversial decision, the Supreme Court overturned the officers' convictions because prosecutors had not shown that the officers had "willfully" violated their victim's constitutional rights. Although that aspect of the case has often been criticized for restricting the ability to hold state officers accountable for constitutional violations, the *Screws* Court interpreted the "color of law" language broadly. The Court's definition included officers who violated state law, so long as they were operating under the authority or office the state had conferred on them. *Williams* involved a private detective who held a special police officer's card issued by the state of Florida. He was charged with beating confessions out of individuals accused of theft. The Court held that the detective's use of the card was sufficient to meet the "color of law" standard set out in *Screws*, even though he was not a police officer or otherwise employed by the state.

Even so, it remained unclear whether the KKK Act could be read to apply to analogous cases. The KKK Act was arguably distinguishable from the statute involved in *Screws* and *Williams*. One could read the KKK Act's requirement that the defendants act under color of "state" law, rather than "any" law, to require a state statute authorizing unconstitutional action before plaintiffs could start a lawsuit. The KKK Act also facilitated civil suits for monetary damages, rather than criminal prosecutions. Many worried that officers operating in good faith might find themselves sued for inadvertently violating federal rights. While federal prosecutors were not likely to bring criminal cases against state officers unless they had a plausible case, the KKK Act could open the door to private individuals bringing frivolous civil suits.

The Case

The allegations James Monroe made against the Chicago police were not frivolous. He claimed that thirteen Chicago police officers, led by Deputy Chief of Detectives Frank Pape, arrived at the Monroe family home late one night without warrants. He alleged that

they broke down one of the doors and entered another without announcing their presence, barged in, and dragged Monroe and his wife into the living room naked. Monroe claimed Pape hurled a series of offensive racial insults at him and beat him repeatedly with a flashlight. He alleged other officers physically assaulted his children and ransacked every room in the house, splitting open mattresses and tossing about the family's belongings in the process. The police took Monroe in for ten hours of interrogation on "open charges," during which time he was unable to contact his family or a lawyer and was never brought before a judge. The police eventually released him without charging him with any offense.

Monroe sued Pape and several other officers under the modern version of the KKK Act (because of its current placement in the U.S. Code, the official compilation of federal statutes, at section 1983 of chapter 42, suits under the KKK Act are often called "1983" actions). Monroe claimed that the officers' behavior violated his constitutional rights and thus entitled him to monetary damages. The officers, however, argued that even if Monroe's allegations were true, he would not be entitled to recover any money from them because they were not operating "under color" of state law. Illinois law, they reasoned, expressly forbade many of the actions Monroe alleged the police had carried out.

The Supreme Court's Ruling

Monroe's attorney relied in large part on the Court's determination in *Screws* and *Williams* that the "under color of law" language included acts that would have violated state law. Counsel for the police argued that *Screws* and *Williams* were wrongly decided and the Court should interpret the "under color" language more narrowly. He also argued that the distinctions between the statute involved in those cases and the KKK Act meant that the Court should adopt a narrower interpretation of "under color of state law," even if it did not overturn the earlier decisions.

Justice William O. Douglas wrote the majority opinion for the Court. Douglas focused on the legislative history of the KKK Act to determine whether the Reconstruction-era Congress that passed the law had intended to permit civil rights suits in cases where officials acted in a manner unauthorized by state law. On the basis of a detailed historical analysis, Douglas reasoned that the national legislature had intended precisely that.

Although the Court ruled the officers could be held individually liable, Douglas's opinion also held that Monroe could not subject the City of Chicago itself to a lawsuit. This part of the Court's decision relied on language in the KKK Act applying its protections to the actions of "persons." Although corporate entities and cities are often classified as persons for legal purposes, Douglas pointed to historical evidence that the justices unanimously agreed showed that Congress did not intend to authorize suits against cities.

Justice Felix Frankfurter dissented from the majority on the issue of the officers' liability. Though he acknowledged the weighty issues implicated by police brutality, Frankfurter argued that the Court had misinterpreted the history of the KKK Act and that Congress had never intended to open police officers and other state officials up to personal liability in federal court. The Court's broad interpretation of the Act, he argued, threatened the delicate balance between state and federal interests that both the Reconstruction Congress and judicial precedents had sought to preserve.

Aftermath and Legacy

Most scholars agree that *Monroe* opened up the federal courts to a wider range of civil rights cases than they had previously entertained. In a complex sequence of cases, the Supreme Court both accelerated and curtailed this trend in various ways. For example, in *Bivens v. Six Unknown Agents of Federal Narcotics Bureau* (1971), the Court decided that the Fourth Amendment authorized suits analogous to Monroe's against federal agents. That case was slightly different, in that the right to sue derived from the Constitution, rather than a federal statute, but some experts have drawn parallels between the two kinds of suits. In *Monell v. New York Department of Social Services* (1978), the Court overturned the part of Monroe that ruled KKK Act plaintiffs could not sue cities. While the *Monell* Court acknowledged that it would normally defer to precedents like *Monroe* in interpreting statutes, the majority of the justices found that there was strong evidence to suggest that the *Monroe* Court had misinterpreted Congress's intent in passing the KKK Act. In particular, leading members of the Reconstruction-era Congress had made statements suggesting an intent to hold cities to account during debates over the KKK Act's passage. In 1981, the Court held that petitioners suing under the KKK Act did not have to show that their rights had been violated intentionally. In 1986, however, the Court reversed that rule, reasoning that the KKK Act was designed to protect against constitutional violations, which generally require some intentional act by the government or one of its officers.

Discussion Questions

- The KKK Act was enacted nearly a century before *Monroe*. Why do you think the issues the Court addressed had not arisen sooner? What nonlegal factors might have led to the statute becoming more important around the time the Court decided *Monroe*?
- Much of Justice Douglas's opinion in *Monroe* focused on the use of historical sources to determine Congress's intent in passing the KKK Act. What benefits and drawbacks do you see to this method of interpretation? Should a statute's meaning remain fixed by the intent of the lawmakers who passed it, or should judicial interpretation of laws evolve over time?
- In rejecting calls to overturn *Screws* and *Williams*, Justice Douglas pointed out that Congress had not objected to the Court's interpretation of the "under color" language in those cases. How persuasive should congressional silence of this sort be on a court? What weight should later courts give to the fact that Congress did not override *Monroe*'s interpretation of the KKK Act?

Documents

Supreme Court of the United States, Opinion in *Monroe v. Pape*, February 20, 1961

These excerpts from Justice Douglas's majority opinion and Justice Frankfurter's dissent focus on the scope of the KKK Act's "under color of" language and Congress's intent in framing the law in 1871.

Petitioners claim that the invasion of their home and the subsequent search without a warrant and the arrest and detention of Mr. Monroe without a warrant and without arraignment constituted a deprivation of their "rights, privileges, or immunities secured by the Constitution" within the meaning of R. S. § 1979. It has been said that when 18 U. S. C. § 241 made criminal a conspiracy "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution," it embraced only rights that an individual has by reason of his relation to the central government, not to state governments. But the history of the section of the Civil Rights Act presently involved does not permit such a narrow interpretation.

Section 1979 came onto the books as § 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment. Senator Edmunds, Chairman of the Senate Committee on the Judiciary, said concerning this section:

> The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which has since become a part of the Constitution, *viz.*, the Fourteenth Amendment.

Its purpose is plain from the title of the legislation, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of R. S. § 1979. So far petitioners are on solid ground. For the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment.…

It is argued that "under color of" enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage

to do what he did. In this case it is said that these policemen, in breaking into petitioners' apartment, violated the Constitution and laws of Illinois. It is pointed out that under Illinois law a simple remedy is offered for that violation and that, so far as it appears, the courts of Illinois are available to give petitioners that full redress which the common law affords for violence done to a person; and it is earnestly argued that no "statute, ordinance, regulation, custom or usage" of Illinois bars that redress.

The Ku Klux Act grew out of a message sent to Congress by President Grant on March 23, 1871, reading:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.…

The legislation—in particular the section with which we are now concerned—had several purposes. There are threads of many thoughts running through the debates. One who reads them in their entirety sees that the present section had three main aims.

First, it might, of course, override certain kinds of state laws. Mr. Sloss of Alabama, in opposition, spoke of that object and emphasized that it was irrelevant because there were no such laws:

> The first section of this bill prohibits any invidious legislation by States against the rights or privileges of citizens of the United States. The object of this section is not very clear, as it is not pretended by its advocates on this floor that any State has passed any laws endangering the rights or privileges of the colored people.

Second, it provided a remedy where state law was inadequate. That aspect of the legislation was summed up as follows by Senator Sherman of Ohio:

> … it is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.

But the purposes were much broader. The *third* aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. The

opposition to the measure complained that "It overrides the reserved powers of the States," just as they argued that the second section of the bill "absorb[ed] the entire jurisdiction of the States over their local and domestic affairs." …

While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law. Senator Osborn of Florida put the problem in these terms:

> That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States. The question of the constitutional authority for the requisite legislation has been sufficiently discussed.

There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty. Speaking of conditions in Virginia, Mr. Porter of that State said:

> "The outrages committed upon loyal men there are under the forms of law."

Mr. Burchard of Illinois pointed out that the statutes of a State may show no discrimination:

> If the State Legislature pass a law discriminating against any portion of its citizens, of if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws.…

The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.…

Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.…

Since the *Screws* and *Williams* decisions, Congress has had several pieces of civil rights legislation before it. In 1956 one bill reached the floor of the House. This measure had at least one provision in it penalizing actions taken "under color of law or otherwise." A vigorous minority report was filed attacking, *inter alia*, the words "or otherwise." But not a word of criticism of the phrase "under color of" state law as previously construed by the Court is to be found in that report.…

If the results of our construction of "under color of" law were as horrendous as now claimed, if they were as disruptive of our federal scheme as now urged, if they were such an unwarranted invasion of States' rights as pretended, surely the voice of the opposition would have been heard in [congressional committees]. Their silence and the new uses to which "under color of" law have recently been given reinforce our conclusion that our prior decisions were correct on this matter of construction.…

Document Source: *Monroe v. Pape*, 365 U.S. 167, 170–71, 172–74, 175–77, 180, 183, 186, 187 (1961) (citations omitted).

Justice Felix Frankfurter, Dissenting Opinion in *Monroe v. Pape*, February 20, 1961

Mr. Justice Frankfurter, dissenting except insofar as the Court holds that this action cannot be maintained against the City of Chicago.

Abstractly stated, this case concerns a matter of statutory construction. So stated, the problem before the Court is denuded of illuminating concreteness and thereby of its far-reaching significance for our federal system.…

This case presents the question of the sufficiency of petitioners' complaint in a civil action for damages brought under the Civil Rights Act, R. S. § 1979, 42 U. S. C. § 1983. The complaint alleges that on October 29, 1958, at 5:45 a.m., thirteen Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six

Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him. It is also alleged that the actions of the officers throughout were without authority of a search warrant or an arrest warrant; that those actions constituted arbitrary and unreasonable conduct; that the officers were employees of the City of Chicago, which furnished each of them with a badge and an identification card designating him as a member of the Police Department; that the officers were agents of the city, acting in the course of their employment and engaged in the performance of their duties; and that it is the custom of the Department to arrest and confine individuals for prolonged periods on "open" charges for interrogation, with the purpose of inducing incriminating statements, exhibiting its prisoners for identification, holding them incommunicado while police officers investigate their activities, and punishing them by imprisonment without judicial trial.…

The essence of their claim is that the police conduct here alleged offends those requirements of decency and fairness which, because they are "implicit in the concept of ordered liberty," are imposed by the Due Process Clause upon the States. When we apply to their complaint that standard of a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," which has been the touchstone for this Court's enforcement of due process, the merit of this constitutional claim is evident.…

If the question whether due process forbids this kind of police invasion were before us in isolation, the answer would be quick.… But by bringing their action in a Federal District Court petitioners cannot rest on the Fourteenth Amendment *simpliciter*. They invoke the protection of a specific statute by which Congress restricted federal judicial enforcement of its guarantees to particular enumerated circumstances. They must show not only that their constitutional rights have been infringed, but that they have been infringed "under color of [state] statute, ordinance, regulation, custom, or usage," as that phrase is used in the relevant congressional enactment.…

[A]lthough this Court has three times found that conduct of state officials which is forbidden by state law may be "under color" of state law for purposes of the Civil Rights Acts, it is accurate to say that that question has never received here the consideration which its importance merits.…

The general understanding of the legislators unquestionably was that, as amended, the Ku Klux Act did "not undertake to furnish redress for wrongs done by one person upon another in any of the States . . . in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery ...." Even those who—opposing the constitutional objectors—found sufficient congressional power in the Enforcement Clause of the Fourteenth Amendment to give this kind of redress, deemed inexpedient the exercise of any such power: "Convenience and courtesy to the States suggest a sparing use, and never so far as to supplant the State authorities except in cases of extreme necessity, and when the State governments criminally refuse or neglect those duties which are imposed upon them." Extreme Radicals, those who believed that the remedy for the oppressed Unionists in the South was a general expansion of federal judicial jurisdiction so that "loyal men could have the privilege of having their causes, civil and criminal, tried in the Federal courts," were disappointed with the Act as passed....

[A]ll the evidence converges to the conclusion that Congress ... created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some "statute, ordinance, regulation, custom, or usage" sanctioned the grievance complained of. This purpose, manifested even by the so-called "Radical" Reconstruction Congress in 1871, accords with the presuppositions of our federal system. The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism....

The unwisdom of extending federal criminal jurisdiction into areas of conduct conventionally punished by state penal law is perhaps more obvious than that of extending federal civil jurisdiction into the traditional realm of state tort law. But the latter, too, presents its problems of policy appropriately left to Congress. Suppose that a state legislature or the highest court of a State should determine that within its territorial limits no damages should be recovered in tort for pain and suffering, or for mental anguish, or that no punitive damages should be recoverable. Since the federal courts went out of the business of making "general law," such decisions of local policy have admittedly been the exclusive province of state lawmakers. Should the civil liability for police conduct which can claim no authority under local law, which is actionable as common-law assault or trespass in the local courts, comport different rules? Should an unlawful intrusion by a policeman in Chicago entail different consequences than an unlawful intrusion by a hoodlum? These are matters of policy in its strictly legislative sense, not for determination by this Court....

Relevant also are the effects upon the institution of federal constitutional adjudication of sustaining under [KKK Act] damage actions for relief against conduct allegedly violative of federal constitutional rights, but plainly violative of state law. Permitting such actions necessitates the immediate decision of federal constitutional issues despite the admitted availability of state-law remedies which would avoid those issues. This would make inroads, throughout a large area, upon the principle of federal judicial self-limitation which has become a significant instrument in the efficient functioning of the national judiciary. Self-limitation is not a matter of technical nicety, nor judicial timidity. It reflects the recognition that to no small degree the effectiveness of the legal order depends upon the infrequency with which it solves its problems by resorting to determinations of ultimate power.…

Of an enactment like the Civil Rights Act, dealing with the safeguarding and promotion of individual freedom, it is especially relevant to be mindful that, since it is projected into the future, it is ambulatory in its scope, the statute properly absorbing the expanding reach of its purpose to the extent that the words with which that purpose is conveyed fairly bear such expansion. But this admissible expansion of meaning through the judicial process does not entirely unbind the courts and license their exercise of what is qualitatively a different thing, namely, the formulation of policy through legislation.

Document Source: *Monroe v. Pape*, 365 U.S. 167, 202–04, 208, 211, 220, 233–34, 237, 239, 240–41, 244 (1961) (citations omitted).

Marshall S. Shapo, *Northwestern University Law Review*, 1965

This 1965 article by a law professor from the University of Texas notes that Monroe *had already had a significant effect on the number and variety of cases filed against state officers in federal court, a development with "explosive potential" for the relationship between the state and federal governments. The author advocates several ways to restrict the use of KKK Act suits to better respect judicial restraint and federalism.*

The explosive potential of *Monroe* adds to a growing catalogue of issues concerning the role of the states in the federal system. The basic question in this case is whether absent specific legislation, the federal government should be projected into what basically is local tort law, under a statutory vehicle passed in response to torts which generated a widespread national concern. Not even the admission by the author of the dissent in Monroe that police violations of civil rights are widespread will wash away that issue. It is obvious that the statute as originally conceived is still usable in situations which rival for general lawlessness and outrageous conduct those which gave rise to its enactment. Recent events

in Alabama and Mississippi make clear that the melancholy story of 1871 is repeated every day in 1965. But even here, the practical usefulness of the statute is limited because, as the ex-head of the Civil Rights Division of the Justice Department has said with reference to a proposal for more federal action on the criminal side, "The truth of this matter is that there is no acceptable Federal solution to this law enforcement problem." Yet the real problem arises when the courts extend the statute to situations not involving a virtual breakdown of law. These cases, dealing with factual situations ranging from gambling to inflammatory town meetings, underline the idea that the federal judiciary should tread warily in utilizing a civil damage remedy against local law enforcement officers, where much that is vital to the case grows uniquely from the local situation.

Just how explosive the expanded interpretation of the statute is may be seen from the fact that the yearly number of private actions under civil rights statutes increased by more than half in the two years after *Monroe*-and fourteen-fold in the eighteen years following *Screws*. The pressure will undoubtedly increase. Plaintiffs' attorneys will utilize not only the recent holdings, but will no doubt seek to extend the frontiers of the statute, as they look to recent dicta and reserved questions as well as to pre-*Monroe* rejections. Perhaps, for example, there is room under the new view of the statute for a section 1983 damage action for deprivation of counsel in certain situations, or for the destruction of a garage business by regulatory ordinances—or for many other complaints previously rejected.…

The ideal judicial solution must be one with enough substance to supply a standard of flexibility to cover a broad range of interests. It should call upon decided case law—preferably case law which has wrestled directly with the problem. Ideally, the standard should bear an umbilical relation to the statute. These requirements are best met by the simple demand that the defendant's conduct be outrageous. Harking to the legislative history, this standard would call for a brutality or arbitrariness which goes beyond the garden variety state tort action. In many of the post-*Monroe* decisions under section 1983, this standard finds support in declarations that actionable conduct should be "reprehensible," or "callous and shocking," that "trivial" violations will not suffice, and even that in some cases "'bad' motive may ... become critical." Although this test heavily blends questions of fact into questions of law, it should prove, in the long run, to be a most workable one.

The effects of this kind of standard should be substantial. As to the police area, the statute should operate only in cases involving extraordinarily offensive conduct—which surely was the case in *Monroe*.…

In brief, the tests which we describe would preserve the pith of the statute, the thrust of *Monroe* and the dignity of a "constitutional tort" justifying the exercise of federal judicial power.

Document Source: Marshall S. Shapo, "Constitutional Tort: *Monroe v. Pape*, and the Frontiers Beyond," *Northwestern University Law Review* 60, no. 3 (1965): 324–26, 327–28, 329 (footnotes omitted).

Supreme Court of the United States, Opinion in *Monell v. New York City Department of Social Services*, June 6, 1978

Monell *overturned* Monroe*'s holding that cities could not be sued under the KKK Act. This excerpt from Justice William Brennan's majority opinion in* Monell *reassesses that aspect of* Monroe.

In *Monroe v. Pape*, we held that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]." The sole basis for this conclusion was an inference drawn from Congress' rejection of the "Sherman amendment" to the bill which became the Civil Rights Act of 1871, 17 Stat. 13, the precursor of § 1983. The amendment would have held a municipal corporation liable for damage done to the person or property of its inhabitants by *private* persons "riotously and tumultuously assembled." Although the Sherman amendment did not seek to amend § 1 of the Act, which is now § 1983, and although the nature of the obligation created by that amendment was vastly different from that created by § 1, the Court nonetheless concluded in *Monroe* that Congress must have meant to exclude municipal corporations from the coverage of § 1 because "'the House [in voting against the Sherman amendment] had solemnly decided that in their judgment Congress had no constitutional power to impose any *obligation* upon county and town organizations, the mere instrumentality for the administration of state law.'" This statement, we thought, showed that Congress doubted its "constitutional power … to impose *civil liability* on municipalities," (emphasis added), and that such doubt would have extended to any type of civil liability.

A fresh analysis of the debate on the Civil Rights Act of 1871, and particularly of the case law which each side mustered in its support, shows, however, that *Monroe* incorrectly equated the "obligation" of which Representative Poland spoke with "civil liability." …

Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local 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. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan, writing for the Court,

said in *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 167-168 (1970): "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials .... Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a `custom or usage' with the force of law."

On the other hand, the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

Document Source: *Monell v. N.Y.C. Dept. of Social Servs.*, 436 U.S. 658, 664–65, 690–91 (1978) (citations omitted).

Alan K. Chen, *University of Missouri Kansas City Law Review*, 2010

This extract from a law review article by University of Denver law professor Alan Chen details some of the challenges plaintiffs suing under the KKK Act have experienced since Monroe*, including changes in the law that Chen claims have made it more difficult to sue state officers in federal court.*

In the nearly fifty years that have passed since *Monroe*, the Supreme Court has issued a series of decisions that have gradually diminished § 1983 in ways that make damages recovery both costly and difficult....

First, the Court and lower federal courts have created and enforced a federal common law defense of absolute immunity and a doctrine of qualified immunity that now rapidly approaches the status of absolute immunity. In a series of policy-driven decisions, the Court has created a categorical immunity for government officials who commit constitutional violations while they are performing judicial, prosecutorial, or legislative functions. Absolute immunity is a response to the Court's concern that public officials carrying out these functions are highly likely to be subjected to nuisance suits by parties adversely affected by their official decisions.

The doctrine of qualified immunity provides immunity from § 1983 damages suits for the vast number of public officials not covered by absolute immunity. Like absolute immunity, qualified immunity is entirely policy-driven. The Court's decisions focus on the negative consequences of public officials' exposure to damages liability, including the

unfairness associated with imposing liability on officials who are trying to carry out their duties and may not understand the nuances of constitutional doctrine, the possibility that officials will be over-deterred, or chilled, in performing their duties because they fear the consequences if they make a constitutional error, and both the out-of-pocket and other resource costs associated with defending protracted civil rights litigation. The Court therefore provides protection for officials and directs trial courts to dismiss § 1983 damages claims where the defendant's "conduct does not violate clearly established … constitutional rights of which a reasonable person would have known." As I have argued, the manner in which the Court has structured the procedures for resolving qualified immunity claims has shifted the decision making emphasis to judges in a manner that is "unqualifying" immunity and making it closely resemble absolute immunity in both substance and form.

In addition to the expansive official immunity doctrines, the federal courts have explicitly and implicitly imposed heightened pleading and evidentiary standards on § 1983 plaintiffs, making it difficult for plaintiffs to survive the onslaught of defendants' motions to dismiss or for summary judgment.…

[L]ower courts sometimes find ways to impose some types of burdens on plaintiffs that make it more difficult for their intent-based constitutional claims to survive dispositive pre-trial motions. Although as a formal matter, the Court has claimed that the pleading standards are not heightened in civil rights matters, the way in which the Court has applied some of its doctrines has effectively increased the burden for plaintiffs who seek to overcome defendants' motions to dismiss or for summary judgment in § 1983 damages claims.…

The driving force behind these decisions is the Court's insistence that § 1983 not be converted into a "font of tort law." In other words, the Court wants to ensure that plaintiffs injured by official misconduct do not make a federal case out of every type of adverse interaction with the state. Ironically, however, all of these cases contradict the very premise of *Monroe*, which is that § 1983 ought to provide a supplemental federal option for seeking damages against state and local officials who abuse their authority. In other words, the function of § 1983 damages actions is precisely to make a federal case out of these disputes because the misuse of official authority is qualitatively more serious and more troublesome than an ordinary tort.

Finally, both because of the nature of § 1983 damages claims and because the Court has modified some of the law regarding structural litigation incentives, it is becoming more difficult for plaintiffs to secure legal counsel to pursue § 1983 claims against individual officials. Although some constitutional damages claims might yield hefty awards, as in the case of suits against officials for unconstitutional conduct that caused death or serious injury to a person, many such claims involve monetary damages claims that are relatively

small or, in some cases, intangible. In such cases, the plaintiffs' incentives to bring a claim might be comparatively small.…

Document Source: Alan K. Chen, "Rosy Pictures and Renegade Officials: The Slow Death of *Monroe v. Pape*," *University of Missouri Kansas City Law Review* 78 (2010): 910–11, 914 (footnotes omitted).

Stephan Benzkofer, *Chicago Tribune*, January 1, 2012

This newspaper profile of Captain Frank Pape, the lead defendant in Monroe*, describes the facts of the case, Captain Pape's aggressive approach to police work, and the aftermath of the case from Pape's perspective.*

Frank Pape leapt into the city's conscience with a gun in his hand—a gun he wasn't afraid to use during his storied career as a Chicago cop.

Before he retired in 1972, he would be called the "city's toughest cop," "the cop all hudlums fear," and a "hero cop." He was a tireless investigator, once staking out a street corner for ten days waiting for a young man with a big nose driving a big sedan. The man finally appeared, and Pape and his partner broke up a burglary ring. He would rise to the rank of captain, serve as chief of detectives and be floated twice as a candidate for the top job.

His name would also be on a Supreme Court case that would add credence to accusations of brutality and mistreatment of suspects.…

Capt. Pape and 12 officers stormed into a homicide suspect's home at 4:45a.m. Oct. 29, 1958. They rousted an African-American family out of bed at gunpoint. James Monroe and his wife, who had both been sleeping naked, were forced to stand in the middle of the living room. The couple's six children were allegedly pushed and hit. One officer allegedly kicked a 4-year-old boy. The officers cursed and used racial slurs. They hit Monroe in the stomach several times with a flashlight, the lawsuit said. The house was ransacked. Monroe was held at police headquarters for 10 hours, but no charges were filed. Pape didn't have a search warrant.

The Monroes sued the city and the officers, saying their civil rights were violated. The case, Monroe v. Pape, went to the Supreme Court, which ruled in 1961 in the Monroes' favor. The decision for the first time gave citizens the right to sue police officers and other city employees under federal civil rights laws.

Shortly after the ruling, Pape took a leave of absence from the Police Department to work as chief of security for Arlington, Washington and Balmoral racetracks. He rejoined the force in 1965 but was assigned to the traffic division.

"They made it easy for me to leave," Pape said near his retirement. "I was never a traffic man. I was a major crime man."

Times were changing, as were law enforcement procedures, but Pape stayed true to his view of the streets—and a police officer's place there. "With me, it's dog eat dog," he said in 1972. "Today, the philosophy of police seems to be that you have to give them the first two shots. I wouldn't be here today if I had done that."

Document Source: Stephan Benzkofer, "'The City's Toughest Cop,'" *Chicago Tribune*, Jan. 1, 2012, 1.19.

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?