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Federal Jurisdiction -- The Status of Public Officials as "Persons" Under 42 U.S.C. Section 1983

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tion over prisoners' section 1983 claims demonstrates that the federal courts will offer the prisoners this sympathetic forum and enable them to take an active role in correcting unconstitutional conditions and procedures in the state prisons.

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Federal Jurisdiction—The Status of Public Officials as "Persons" Under 42 U.S.C. Section 1983

The United States Supreme Court has declared that the right of a tenured public school teacher to continued employment is a protected property interest[1] that cannot be taken away without due process.[2] The employee facing removal is generally entitled to a hearing on the charges brought against him in which he can confront and cross-examine witnesses.[3] Recently, the Fourth Circuit Court of Appeals in *Burt v. Board of Trustees of Edgefield County School District*[4] and *Thomas v. Ward*[5] greatly enhanced the opportunity for the victim of

prisoners experience within the prison grievance system and parole system. James Hoffa, former president of the Teamsters' Union, commented on his observations of the parole board while he was in prison: "I know of an individual who served 27 years in prison and was allowed exactly three minutes to appear in front of the parole board and then they said, Well, we want to study you two more years. What they found out in 29 years that they couldn't find out in 27 I'll never find out." Hoffa, *Criminal Justice from the Inside*, 56 JUDICATURE 422, 425 (1973). Hopefully prisoners' section 1983 suits will be effective in eliminating this type of process.

One lawyer seemed to sum up the situation best: "It is often difficult for attorneys, or courts, whose entire universe revolves around rational decision-making, to fully comprehend the total and arbitrary power which has characterized prison authorities' control over the lives of prisoners. Administrative decisions which drastically affect the lives and liberty of thousands of prisoners have often been made on the flimsiest of information, without review." Brief for the National Council on Crime and Delinquency as Amicus Curiae at 3, Wolff v. McDonnell, 418 U.S. 539 (1974).

1. Board of Regents v. Roth, 408 U.S. 564, 576 (1972) (dictum). In Perry v. Sinderman, 408 U.S. 593 (1972), the Court expanded *Roth* to include not only those teachers who were formally tenured, but also those who had an implied or "de facto" tenure. Such tenure is to be ascertained by an examination of the historical policies and practices of the institution. 408 U.S. at 602-03. For a similar statutory doctrine see N.C. GEN. STAT. § 115-142 (1975) (establishing formal dismissal procedures for teachers with more than three consecutive years of service in one school district).

2. Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972).

3. McNeil v. Butz, 480 F.2d 314, 321 (4th Cir. 1973).

4. 521 F.2d 1201 (4th Cir. 1975).

5. Civil No. 74-1541 (4th Cir., Nov. 24, 1975).

a defective proceeding to secure restitutionary and injunctive relief against school authorities. The court held that individual members of a school board can be sued in their official capacity as "persons" within the meaning of section 1983 of the Civil Rights Act[6] in an original federal district court proceeding.[7] The practical effect of these decisions may be far-reaching, in that they seemingly open the treasuries of local governmental units to equitable reimbursement judgments in section 1983 actions. Furthermore, *Burt* and *Thomas* manifest the Fourth Circuit's continued resistance to Supreme Court decisions narrowing the scope of remedies against public bodies in civil rights actions.[8]

In the spring of 1970, the Board of Trustees of the Edgefield County, South Carolina, School District released teacher Helen Burt on the ground of incompetence. In May, 1972, she brought suit under section 1983 against the school board and each individual member of the Board alleging that her discharge was racially motivated and that she was denied adequate notice and an opportunity for a hearing. She sought 25,000 dollars for damages to her "character and person," plus reinstatement[9] with back pay and retirement benefits. Before trial, she dropped her damage claim, as well as her claim for reinstatement, but retained her demands for back pay and retirement contributions.[10] The district court supported the Board's finding of incompetence but determined that Mrs. Burt had been denied a hearing with due process

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6. 42 U.S.C. § 1983 (1970) provides:

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

7. 28 U.S.C. § 1343 (1970) provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
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> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . . .

The Supreme Court has interpreted section 1343(3) as conferring jurisdiction only when a proper cause of action is stated under section 1983. *See* City of Kenosha v. Bruno, 412 U.S. 507, 511-13 (1973). *See generally* Comment, *The Civil Rights Act and Mr. Monroe*, 49 CALIF. L. REV. 144, 147-51 (1961).

8. *See* Harper v. Kloster, 486 F.2d 1134, 1138 (4th Cir. 1973). *See also* Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966).

9. 521 F.2d at 1203-04 n.1. By the time of trial Mrs. Burt had reached the normal retirement age of 65.

10. *Id.* at 1203.

safeguards. She was awarded back pay but not retirement fund contributions.

On appeal, the Fourth Circuit found it impossible to determine whether the lower court judgment ran against the trustees of the school district as individuals or as representatives of the school board. It vacated the judgment[11] and remanded the case for a clarification of the action as one for damages[12] or equitable reimbursment.[13] The court dismissed the action against the Board as an official body since it did not constitute a "person" under section 1983; however, it ruled that members of the Board acting in their official capacities were proper "persons" under section 1983 and thus subject to claims for equitable relief.[14]

The factual circumstances of *Thomas v. Ward* closely paralleled those of *Burt*. Lyle Thomas was dismissed from his teaching position by the Winston-Salem/Forsyth County, North Carolina, School Board following a hearing in which he was deprived of the opportunity to confront witnesses testifying by affidavit against him.[15] The district court

11. The court found that the judgment on its face ran directly against the board members as individuals, and ordered the named defendants to pay over damages to the plaintiff. 521 F.2d at 1204 n.2. Upon that determination, it further ruled that the trial court committed error in not allowing the defendant's demand for a jury trial. *Id.* at 1206. This result apparently reflects a change in judicial attitude from the Fourth Circuit's decision in Smith v. Hampton Training School for Nurses, 360 F.2d 577, 581 n.8 (4th Cir. 1966), in which the court ruled that an action for back pay did not constitute an action for damages, but rather only an integral part of the equitable remedy of reimbursement, and thus afforded no constitutional right to a jury trial. *See* Comment, *Jury Trial in Employment Discrimination Cases—Constitutionally Mandated?*, 53 TEXAS L. REV. 483 (1975).

12. The judges were in disagreement as to the proper measure of damages if the judgment ran against the board members as individuals. Judge Craven would allow damages only for the value of the broken employment contract, which he found only nominal in the case of an incompetent teacher. 521 F.2d at 1204-05. Judges Winter and Russell would allow full recovery of back pay as damages. *Id.* at 1207-08, 1209.

13. The Fourth Circuit has long regarded suits for back pay as equitable in nature since such awards serve only to restore claimants to their rightful economic status. In Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966), the court ruled that in section 1983 litigation, back pay is simply an integral part of the equitable remedy of reinstatement. *See* Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) (back pay award under Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), ruled simply part of statutory equitable remedy); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). *But see* Horton v. Orange County Bd. of Educ., 464 F.2d 536 (4th Cir. 1972), in which discharged teacher was not entitled to reinstatement but was allowed to recover as "damages" her new pecuniary loss for the period she was disemployed to the date of trial. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.25, at 928-31 (1973).

14. 521 F.2d at 1205.

15. Thomas received a hearing in which the only evidence against him was letters of school officials, his personal file, and affidavits of several students who were later

ruled the hearing improper and ordered that Thomas be given another hearing. The second, constitutionally proper hearing confirmed his incompetence. Thomas filed another complaint in federal district court against the Board and each of its members, requesting reinstatement and back pay. The district court dismissed the action, but on appeal the Fourth Circuit ruled that the defective first hearing at least entitled Thomas to back pay until the time of his second hearing.[16] On the basis of *Burt*, the court reiterated that school board members acting in their official capacities are "persons" under section 1983.[17]

MUNICIPAL IMMUNITY UNDER SECTION 1983

The Fourth Circuit's approach in *Burt* and *Thomas* represents another attempt by one of the lower federal courts to confront the confusion surrounding the meaning of "person" in section 1983. Originally enacted in 1871,[18] section 1983 attempted to protect newly emancipated blacks against violence from the Ku Klux Klan with the open acquiescence of state and local authorities.[19] It provided a federal forum for actions against municipal and state officers who failed actively to enforce the law—especially the fourteenth amendment.[20] Like most of the early civil rights legislation, the statute lay practically dormant until the 1950's.[21] Its first modern interpretation came in the landmark case of *Monroe v. Pape*,[22] in which the United States Supreme Court upheld the right of six children and their parents to assert a damage action against Chicago policemen for unlawful invasion of their home. However, after careful scrutiny of the legislative history,[23] the *Monroe* Court concluded that Congress did not intend

shown to be disciplinary problems themselves. No witnesses were sworn and Thomas thus had no opportunity for cross-examination. The trial court found on this record a failure of due process. Civil No. 74-1541 at 4.

16. *Id.* at 9-10.

17. *Id.* at 11.

18. Ku Klux Klan Act of April 20, 1871, 17 Stat. 13.

19. *See* CONG. GLOBE, 42d Cong., 1st Sess. 662 *passim* (1871). *See also* Kates and Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972).

20. For accounts of the attrocities reported to the Congress during the debates on the Act see CONG. GLOBE, 42d Cong., 1st Sess. App. (1871).

21. *See generally* E. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Note, *The Proper Scope of Civil Rights Acts*, 66 HARV. L. REV. 1285 (1953).

22. 365 U.S. 167 (1961).

23. Justice Douglas based his majority opinion on the rejection of the Sherman Amendment that would have made local governments liable for riots or violence occurring within their jurisdiction. *Id.* at 188-92. *See* CONG. GLOBE 42d Cong., 1st Sess. 704-05, 725, 800-01 (1871). *See generally* Kates and Kouba, *supra* note 19, at 131.

municipalities to be subject to the Act and that consequently they were not "persons" as defined in the statute.[24] Since the city could not be sued under section 1983, the Court ruled that it had no jurisdiction under 28 U.S.C. section 1343[25] and dismissed the action against the city. The *Monroe* result, limiting actions against municipalities, has been interpreted to include many local political subdivisions, including school boards.[26] The decision received much criticism,[27] and almost immediately lower federal courts sought methods to circumvent its meaning.

Twelve years later, the Court again confronted the *Monroe* situation. In *Moor v. County of Alameda*[28] petitioners brought damage actions under section 1983 against several law enforcement officers and against the County on the theory that the County was vicariously liable under state law for the officers' unconstitutional acts. Since under their construction of the California Tort Claims Act,[29] the County in effect consented to be sued in state court, petitioners asserted that it had also waived its immunity in the federal forum and thus could be treated as a "person" for section 1983 purposes. Furthermore, they argued that the Court's policy of exclusion of governmental units from section 1983 liability effectively denied plaintiffs an adequate recovery. In complainants' view, personal actions against individual officers did not provide a deterrent against official infringement of federal rights, since often the officers proved judgment proof or were protected by some type of official immunity.[30] In spite of these policy considerations, the

24. 365 U.S. at 191-92.

25. *See* note 7 *supra.*

26. *See* Singleton v. Vance County Bd. of Educ., 501 F.2d 429 (4th Cir. 1974).

27. *See* Kates and Kouba, *supra* note 19, at 132-36; McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections,* 60 VA. L. REV. 1 (1974); Comment, *Developing Governmental Liability Under 42 U.S.C. § 1983,* 55 U. MINN. L. REV. 1201, 1205-07 (1971).

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

29. CAL. GOV'T CODE § 815.2(a) (West 1966).

30. The concept of the immunity of government officials sprang out of the common law's recognition of the necessity of permitting officials to perform their official functions free from personal liability. This was modified in Scheuer v. Rhodes, 416 U.S. 232 (1974), in which the Supreme Court held that government officials are not totally exempt from liability under section 1983. They were granted only a qualified immunity contingent upon such factors as the scope of discretion and responsibility of the officers plus the circumstances as they appeared at the time of the unconstitutional event. 416 U.S. at 247.

The latest standard for immunity in the school board disciplinary context (which closely parallels the teacher suspensions in *Burt* and *Thomas*) appeared in Wood v. Strickland, 420 U.S. 308 (1975): "A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Id.* at 322. *See also* Note, *Consti-*

Court adhered to the rationale of *Monroe* and declared that Alameda County was not a "person" under section 1983.

Soon after *Moor*, the Supreme Court's decision in *City of Kenosha v. Bruno*[31] apparently closed the issue of local government liability under section 1983. In *Kenosha* appellee liquor store operators brought an action under section 1983 claiming deprivation of due process in the City's refusal to renew their one-year liquor license. They sought only declaratory and injunctive relief.[32] Although the jurisdictional issue did not surface at the trial stage, the Supreme Court dismissed the action against the City on the ground that it was not a "person" for section 1983 purposes. Justice Rehnquist's opinion concluded:

> We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, 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.[33]

The mandate of *Kenosha* seems clear. The Court has specifically excluded municipalities and other local governmental units from "person" status under section 1983 whether the suit be couched in legal or equitable terms.

Although the Supreme Court has emphatically denied municipal liability under section 1983, it has not yet discussed the situation presented by *Burt* and *Thomas*, in which the individual members of the public body are sued in their representative capacities. Clearly, *Monroe* sanctions suits against public officials as individuals, but damage actions against such persons are often thwarted by various

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tutional Law—Neither the Eleventh Amendment nor the Doctrine of Executive Immunity Automatically Bar a Suit for Damages Brought against State Officials in their Individual Capacities under 42 U.S.C. § 1983—Scheuer v. Rhodes, 24 CATH. U. L. REV. 164 (1974); Note, *Sovereign Immunity—Scheuer v. Rhodes: Reconciling Section 1983 Damage Actions with Governmental Immunities*, 53 N.C.L. REV. 439 (1974).

31. 412 U.S. 507 (1973).

32. 412 U.S. at 508. The district court declared the statute in question unconstitutional, relying on two Seventh Circuit decisions holding officials to be proper "persons" in an action seeking equitable relief, namely, Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969), and Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961). 412 U.S. at 511. *See generally* Comment, *Suing Public Entities Under the Federal Civil Rights Act: Monroe v. Pape Reconsidered*, 43 U. COLO. L. REV. 105 (1971).

33. 412 U.S. at 513 (citation omitted).

forms of official immunity.[34] Likewise, an injunctive decree against an individual may fall outside the scope of his authority as an individual and thus block effective relief.[35] Suits against board members as officials would not encounter either of these obstacles. It would seem, however, that a judgment requiring municipal officials to pay damages or reinstate an employee is precisely equivalent to requiring the city to do so. Many lower federal courts have adopted this reasoning[36] in the wake of *Monroe* and *Kenosha.* In *Taliaferro v. State Council of Higher Education,*[37] for example, one court reasoned:

> The logic of *Bruno* seems inescapable . . . . Since this Court can perceive no distinction in principle between a state or county and the agencies or institutions into which it divides itself, or the agents in their official capacities through which it acts, the Court can reach no other conclusion than that the State Council of Higher Education, and the named defendants in their official capacities, are not 'persons' for purposes of either monetary or injunctive relief under § 1983.[38]

The Supreme Court has adopted the same reasoning in the analogous context of state immunity under the eleventh amendment from prosecution in the federal courts. Plaintiffs bringing suits against state officials in their representative capacities often are confronted by jurisdictional barriers by which the officials seek to define the action against them as one running against the state.[39] If the court characterizes the suit as one in essence against the state, it is compelled to dismiss the action for lack of jurisdiction, unless the state waives its immunity. In such suits against state officials, the Supreme Court has generally held that the classification of a suit as one against the state is to be determined by the nature and effect of the relief sought.[40] Thus, when an action involves recovery of money from the state treasury, the state is the real party in interest, and its officials are entitled to invoke the eleventh amendment even though they are

34. *See* note 30 *supra. See also* Kates and Kouba, *supra* note 19, at 131-32; *The Supreme Court, 1972 Term,* 87 HARV. L. REV. 252, 256-63 (1973).

35. Thaxton v. Vaughan, 321 F.2d 474 (4th Cir. 1963).

36. *See* Patton v. Conrad Area School Dist., 388 F. Supp. 410 (D. Del. 1975); Needleman v. Bohlen, 386 F. Supp. 741 (D. Mass. 1974); Hines v. D'Artois, 383 F. Supp. 184 (W.D. La. 1974).

37. 372 F. Supp. 1378 (E.D. Va. 1974).

38. *Id.* at 1381-82. *See also* Bennett v. Gravelle, 323 F. Supp. 203 (D. Md. 1971).

39. *See, e.g.,* Scheuer v. Rhodes, 416 U.S. 232 (1974); Edelman v. Jordan, 415 U.S. 651 (1974).

40. Ford Motor Co. v. Department of Treas., 323 U.S. 459 (1945). *See also* Kennecott Copper Corp. v. Tax Comm'n, 327 U.S. 573 (1946); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

nominal defendants.[41] Applying this rationale, the Court has granted immunity to individual state officials in actions for tax refunds[42] and retroactive welfare benefits.[43]

While interpretations of the eleventh amendment have no binding effect on the definition of a "person" for the purposes of section 1983, the techniques employed to determine whether a suit against state officials is actually a suit against the state appear applicable in deciding whether an action against municipal authorities is in essence an action against the city and thus subject to the *Monroe* and *Kenosha* exemption. In an attempt to avoid this seemingly logical approach, courts allowing suits against officials in their representative capacities have developed two lines of reasoning to justify their decisions. The first argument adopts by analogy the limitations on state immunity defenses in equitable proceedings,[44] while the second approach simply confines *Monroe* and *Kenosha* to their literal holdings without regard to the rationale underlying them. The Fourth Circuit in *Burt* and *Thomas* adopted both of these approaches.

Ex Parte Young and Equitable Relief

In the landmark decision of *Ex Parte Young*[45] the Supreme Court ruled that the eleventh amendment did not bar an action to enjoin the Minnesota Attorney General from enforcing an unconstitutional railroad rate statute. In order to reach its result, the Court resorted to the creation of a legal fiction:

> [I]n every case where an official claims to be acting under the authority of the State . . . the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. . . . [H]e is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.[46]

The *Young* result clearly exalted form over substance, since it disqualified a suit against the Minnesota Attorney General but allowed the

41. Ford Motor Co. v. Department of Treas., 323 U.S. 459 (1945).
42. *Id.*
43. Edelman v. Jordan, 415 U.S. 651 (1974).
44. *See The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 252 (1973).
45. 209 U.S. 123 (1908).
46. *Id.* at 159-60.

same action against the person occupying that office. Obviously, the effect of the injunction on the State of Minnesota in either situation was the same.[47]

In *Ford Motor Company v. Department of Treasury of Indiana*,[48] the Supreme Court rejected the application of the *Young* fiction to suits for monetary remedies. In addition to the Department, the complainants joined the Governor, the Treasurer, and the State Auditor in their official capacities as the Board of the Treasury Department. Despite the joinder of these individuals, the Court determined that the payment of back taxes from the state treasury clearly involved direct action against the State's resources and sustained eleventh amendment immunity.[49] After *Ford Motor*, therefore, it appeared that equitable actions could be brought against state officials but that the eleventh amendment barred damage actions against them. However, the precedents left uncertain the result in a suit seeking an equitable reimbursement remedy accompanied by a claim for injunctive relief.

In 1974, *Edelman v. Jordan*[50] confronted that specific issue. Plaintiff welfare recipients brought an action alleging denial of equal protection in the Illinois method[51] of administering federally supported family assistance. The district court ordered Illinois to comply with federal guidelines for welfare distributions and, in addition, required state welfare officials to release retroactive benefits wrongly withheld from eligible applicants. On appeal, the Seventh Circuit affirmed the trial court's result and concluded that the *Young* rationale properly sanctioned the grant of a monetary award in the nature of equitable restitution.[52]

In reversing the circuit court's decision, the Supreme Court went beyond a simple characterization of the suit as "equitable" or "legal" and emphasized instead the nature of the relief sought. Since the funds would come directly from the state treasury, the Court concluded that the rule in *Ford Motor* applied and that the eleventh amendment effectively barred the action for retroactice payments.[53] *Edelman*

47. *See* McCormack, *supra* note 27, at 36.
48. 323 U.S. 459 (1945).
49. *Id.* at 464.
50. 415 U.S. 651 (1974).
51. Under Illinois procedure, grants were authorized beginning only with the month in which an application was approved. *Id.* at 665. The federal law allowed retroactive payments for all prior eligible months. 45 C.F.R. § 206.10(a)(6) (1972).
52. Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973).
53. 415 U.S. at 665.

therefore limited the *Young* rationale to suits for prospective relief only. Any suit requiring retroactive payment from a state treasury, regardless of the label placed on it, was deemed a suit against the state, irrespective of the naming of officials as nominal parties.

Given the Supreme Court's conclusion that a suit against a welfare official for reimbursement is in essence an action against the state, to insist that an action against a school board official for back pay is not in essence an action against the county defies logic as well as the thrust of the Supreme Court's decisions. Yet many federal courts have adopted this viewpoint[54] by refusing to consider the impact and rationale of *Edelman* in equitable actions against local officials. The Fourth Circuit in *Burt*, for example, cited two pre-*Edelman* circuit court decisions[55] interpreting officials as "persons" for equitable relief. Neither of these cases, however, could have considered the effect of *Edelman* on the *Young* fiction. In addition, the court cited two Supreme Court cases[56] in which plaintiffs were awarded equitable relief against local officials under section 1983. Both of these cases involved prospective relief only and consequently did not confront the issue of equitable reimbursement.

STRICT CONSTRUCTION OF MONROE AND KENOSHA

A second method used by the lower courts to define officials as "persons" under section 1983 involves the limitation of the *Monroe* rationale to its literal holding. Although recognizing the clear *ratio decidendi* of *Monroe* and *Kenosha*, these decisions allow jurisdiction against the officials simply because neither case specifically denied it.[57] The Fourth Circuit took this approach in *Harper v. Kloster*,[58] its first expression on section 1983 jurisdiction after *Kenosha*. In *Harper*, four black employees sued the City of Baltimore, its mayor, and the city

54. *See* Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974); Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974); Canty v. City of Richmond Police Dept., 383 F. Supp. 1396 (E.D. Va. 1974).

55. Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974); Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974). These cases were cited at 521 F.2d at 1205.

56. Griffin v. County School Board, 377 U.S. 218 (1964); Douglas v. City of Jeanette, 319 U.S. 157 (1943). These cases were cited at 521 F.2d at 1205.

57. *See* Harkless v. Sweeny Indep. School Dist., 427 F.2d 319 (5th Cir. 1970). *See also* Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974); Richmond Black Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151 (E.D. Va. 1974).

58. 486 F.2d 1134 (4th Cir. 1973).

council as officials under section 1983 for racial discrimination in hiring and promotion. The district court granted substantial relief in the form of injunctions to prevent further discriminatory practices.[59] On appeal, the Fourth Circuit dismissed the action against the City of Baltimore on the basis of *Kenosha* but affirmed jurisdiction over the officials. The court specifically failed to give *Kenosha* "any wider application," although acknowledging that the dismissal of the City as a party would have absolutely no effect on the district court's relief.[60]

Harper's narrow reading of *Kenosha* may be justifiable, even in the post-*Edelman* context, since the remedy sought in *Harper* was prospective injunctive relief. In *Burt* and *Thomas*, however, the circuit court extended its application of the restrictive *Harper* approach[61] to cases involving equitable reimbursement. Although the *Burt* trial court[62] and other district judges within the circuit[63] have afforded *Kenosha* considerable weight, the Fourth Circuit seems willing to entertain suits against municipal officials in their representative capacities until the Supreme Court specifically rules otherwise. Thus, it appears that the Fourth Circuit will continue to ignore the well reasoned approach of *Edelman* and the clear import of *Kenosha*.

POLICY CONSIDERATIONS

Although in neither *Burt* nor *Thomas* did the Fourth Circuit discuss the policies lying behind its construction of "person" under section 1983, that court and other lower courts seem cognizant of the results of extending the *Monroe* and *Kenosha* rationale to its logical conclusion.[64] The elimination of municipal officials as proper defendants would practically deny plaintiffs effective redress under section 1983 against unconstitutional actions by municipal bodies,[65] since actions against the individual board members almost inevitably will face

59. Harper v. Mayor and City Council, 359 F. Supp. 1187 (D. Md. 1973).

60. "The decree of the district court will be just as effective if it applies only to the defendants, excluding Baltimore City, a municipal corporation, as if Baltimore City were also a defendant." 486 F.2d at 1138.

61. 521 F.2d at 1205.

62. *Id.* at 1204-05.

63. *See* Moye v. City of Raleigh, 503 F.2d 631, 635 n.11 (4th Cir. 1974); Richmond Black Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151 (E.D. Va. 1974); Taliaferro v. State Council of Higher Educ., 372 F. Supp. 1378 (E.D. Va. 1974).

64. *See, e.g.*, Keckeisen v. Independent School Dist. 612, 509 F.2d 1062 (8th Cir. 1975).

65. *See* authorities cited notes 27 & 34 *supra*. *See also* Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966).

assertions of official immunity.[66] Nevertheless, the *Monroe/Kenosha* rationale is plainly designed to limit actions against local governments. In *Monroe*,[67] *Moor v. Alameda County*,[68] and *Kenosha*,[69] the Supreme Court at least implicitly rejected these policy arguments by relying on distant legislative history to support its statutory construction.[70] Through its narrow reading of that history, the Supreme Court has determined that section 1983 will not be used as a statute to adjudicate any injured party's constitutional claims against municipal authorities.

Closing the loophole created by cases such as *Burt* and *Thomas* does not guarantee that plaintiffs will have no recourse, since several jurisdictional alternatives exist. Many plaintiffs will be able to meet the 10,000 dollar federal question requirement under 28 U.S.C. section 1331.[71] Claims against municipalities under state law may also be heard by federal courts under the doctrine of pendent jurisdiction.[72] Finally, some commentators have asserted that federal courts should allow claims under 28 U.S.C. section 1343(3)[73] regardless of whether they state a proper cause of action under section 1983.

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66. *See* note 30 *supra.*

67. 365 U.S. at 191.

68. 411 U.S. at 700-01.

69. 412 U.S. at 516-20 (Douglas, J., dissenting).

70. *See* authorities cited note 27 *supra.*

71. 28 U.S.C. section 1331(a) provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Although this provision grants federal jurisdiction, the real issue in the section 1331 context is the ability to state a cause of action for which relief might be granted. Some courts attempt to expand the decision in Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which granted a direct cause of action against federal officers directly from the Constitution. Attempts to formulate a federal cause of action against municipal officials have met with mixed success. *See* Smetanka v. Borough of Ambridge, 378 F. Supp. 1366, 1377-78 (W.D. Pa. 1974) (rejection of first amendment claim); Payne v. Mertens, 343 F. Supp. 1355, 1358 (N.D. Cal. 1972) (rejecting fourth amendment claim). *But see* City of Kenosha v. Bruno, 412 U.S. at 516 (Brennan, J., concurring); Maybanks v. Ingraham, 378 F. Supp. 913, 914-16 (E.D. Pa. 1974) (claim under thirteenth and fourteenth amendments allowed). *See generally* Bodensteiner, *Federal Court Jurisdiction of Suits Against "Non-Persons" for the Deprivation of Constitutional Rights*, 8 VAL. L. REV. 213 (1974); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1558-59 (1972); Note, *Municipal Liability in Damages for Violations of Constitutional Rights—Fashioning a Cause of Action Directly from the Constitution—Brault v. Town of Milton*, 7 CONN. L. REV. 552 (1975).

72. *See* Note, *A Federal Cause of Action Against a Municipality for Fourth Amendment Violations by Its Agents*, 42 GEO. WASH. L. REV. 850, 863 (1974). *But see* Moor v. County of Alameda, 411 U.S. 693 (1973).

73. *See* Paul v. Dade County, 419 F.2d 10, 12 (5th Cir. 1969); Bodensteiner, *supra* note 71, at 229-34. *But see* Comment, *The Civil Rights Acts and Mr. Monroe*, 49 CALIF. L. REV. 145, 148 (1961).

If existing jurisdictional procedures prove inadequate, Congress may change the statutes in any of three ways: (1) it could amend section 1983 to include specifically local governments as "persons";[74] (2) it could amend 28 U.S.C. section 1343 to confer original federal jurisdiction in any claim involving a deprivation of civil rights; and (3) it could simply add a new statute to allow jurisdiction over local governmental units to redress civil rights. These alternatives seem superior to the current lower court policy of ignoring the logical *Edelman* approach.

CONCLUSION

The Supreme Court on three occasions has unequivocably declared that Congress did not intend local governmental units to be subject to liability as "persons" under section 1983.[75] Despite this mandate, the Fourth Circuit in *Burt v. Board of Trustees* and *Thomas v. Ward* allowed plaintiffs to recover equitable back pay judgments against defendant school boards simply by naming the members as nominal defendants. In light of recent Supreme Court pronouncements in the analogous state sovereignty context, the reasoning in these cases seems strained and illogical. The division of authority on the issue indicates the need for further Supreme Court definition of "person" in the section 1983 context. The ultimate solution, however, would be a congressional overhaul of the federal civil rights statutes to provide an effective method of redressing constitutional wrongs in a federal forum.

JERRY ALAN REESE

Judicial Discipline—The North Carolina Commission System

"Courts, be they high or low, should and must be like Caesar's wife, above suspicion. Any other standard is one which undermines the trust and confidence of the average citizen in his government."[1] Recently, North Carolina took steps to ensure that its judiciary exhibit this

74. *See* U.S. COMM'N ON CIVIL RIGHTS, LAW ENFORCEMENT, A REPORT ON EQUAL PROTECTION IN THE SOUTH 179-80 (1965). *See generally* U.S. COMM'N ON CIVIL RIGHTS, 1961 REPORT, BK. 5: JUSTICE, at 73-75 (1961).

75. *See* Moor v. County of Alameda, 411 U.S. at 710 n.27.

1. *In re* Diener, 268 Md. 659, 698, 304 A.2d 587, 607 (1973).