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Notes

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NOTES

Constitutional Law—Residence Requirements for Divorce

Changing residence is now a routine practice in the United States. Statistics reveal that almost one in every five Americans changes his or her home each year.[1] Divorce has similarly become a common phenomenon. Estimates based on 1972 statistics reveal that the divorce rate for that year was four per thousand persons.[2] This combination of mobility and high divorce rates prompts a new look at state statutes that require definite periods of in-state residence before a person can petition for divorce.[3]

The need for re-examination of divorce residence requirements is intensified by recent Supreme Court cases that have challenged the constitutionality of other residence requirements. For example, in *Shapiro v. Thompson*[4] the Court declared that several statutes requiring residence of one year before a citizen could receive state welfare aid were unconstitutional because they infringed on the right to travel. While the Court had previously held unconstitutional state laws or actions that directly interfered with travel between states,[5] *Shapiro* was the first Supreme Court decision to declare a state statute unconstitutional because it constituted a denial of the right to travel even though the statute did not directly restrict travel as such. Not only was this feature of *Shapiro* unique, but in holding that the right to travel was a fundamental right, *Shapiro* was also the first Supreme Court decision to assert that a classification scheme based on old and new residents should be examined by the strict equal protection test.[6] This test requires

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1. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES table no. 41 at 34 (92d ed. 1971).

2. THE WORLD ALAMANAC AND BOOK OF FACTS (1974). These figures indicate an 82% increase in rate since 1962.

3. Forty-nine states have residence requirements, ranging from 60 days to 2 years, that must be met before a party can file for divorce. California has no requirement for filing but requires 6 months residence before granting a divorce. *See* AM. JUR. 2D DESK BOOK, Doc. No. 125 (Supp. 1973).

4. 394 U.S. 618 (1969).

5. *E.g.*, United States v. Guest, 383 U.S. 745 (1966); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

6. 394 U.S. at 634. *See* Note, *Shapiro v. Thompson: Travel, Welfare and The Constitution*, 44 N.Y.U.L. REV. 989 (1969).

that a compelling state interest is needed to justify the statutory classification.[7]

While *Shapiro* gave the right to travel new constitutional importance by requiring a compelling state interest to justify its restriction, the Court explicitly made no attempt to extend the holding beyond the specific facts of the case.[8] This fact, combined with the Court's emphasis that the statutory denial of benefits in *Shapiro* was purposely designed to deter movement of indigents into the state,[9] led some courts and commentators to believe that the Court had condemned only those requirements that acutally had deterred travel and, further, that "deterrence" was limited to situations where residence requirements denied essentials of life to recent immigrants into the state.[10]

Dunn v. Blumstein[11] involved a state statute that required one year's residence before voting. In this case the Court concluded that *either* the denial of the right to vote to some citizens *or* the fact that the denial was based on recent interstate travel would require the state to show "substantial" and "compelling" reasons for having imposed residency requirements.[12] Furthermore, even a substantial state interest would not justify the requirement "if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activit[ies]. . . ."[13]

The Court concluded that the voting statute in *Blumstein* did not pass the above mentioned tests. However, it did not limit its holding to this particular statute but instead discussed residency requirements in general in an attempt to clarify some of the confusion that had accompanied its holding in *Shapiro*:

> It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. *Shapiro* did not rest upon a finding that a denial of welfare actually deterred travel

7. The strict equal protection or compelling state interest test must be met when a suspect category (*e.g.*, race, alienage) or a fundamental right (*e.g.*, voting) is involved in a statutory classification. The traditional equal protection test is used in testing other classifications. Under the traditional test, the state's reasons for the classification need not be "compelling" but only "rational." *See* McGowan v. Maryland, 366 U.S. 420 (1961).

8. 394 U.S. at 638 n.21.

9. *Id.* at 629.

10. *See* Note, 44 N.Y.U.L. REV., *supra* note 6. Whitehead v. Whitehead, 492 P.2d 939 (Hawaii 1972), which dealt with residence requirements for divorce, relied on this interpretation of *Shapiro*. *Id.* at 944-45.

11. 405 U.S. 330 (1972).

12. *Id.* at 335.

13. *Id.* at 343.

> . . . . In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel]. . . ."[14]

While this language in *Blumstein* attempted to define the scope of deterrence, it did not solve the basic problem. Rather, the Court's opinion merely served to shift questions concerning what constituted "deterrents" to travel to what constituted "penalties" on travel. Later in the opinion, the Court stated that "durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.' "[15] However, many lower courts and commentators are still unwilling to read *Blumstein* as categorically requiring that all residence laws classifying persons solely on the basis of travel should be judged by a strict compelling state interest test.

Recent cases dealing with durational residency requirements for divorce are examples of this confusion. In *Larsen v. Gallogly*[16] plaintiff, who was denied a hearing for divorce because he failed to qualify as a resident, brought an action challenging the constitutionality of a Rhode Island statute that required one party to reside in the state for two years before Rhode Island courts would hear a petition for divorce.[17] Larsen contended, among other things, that the residence requirement unconstitutionally penalized his right of interstate travel.[18]

While accepting the *Blumstein* statement that all residence statutes must be measured by a strict standard, the district court questioned whether the law "penalized" the exercise of the right to travel:

> A "penalty" in this context means the suffering of "disadvantage, loss or hardship due to some action." As a result of the residency requirement for divorce, new citizens of Rhode Island must endure a hiatus of two years before they become entitled to a judicial adjustment of a "fundamental human relationship." Without doubt this statute "penaliz[es] persons because they have recently migrated. . . ." Therefore, we find that the defendants must demonstrate a compelling state interest in order for us to sustain the statute as constitutional.[19]

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14. *Id.* at 339-340, *quoting* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
15. *Id.* at 342, *quoting* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
16. 361 F. Supp. 305 (D.R.I. 1973).
17. R.I. GEN. LAWS ANN. § 15-5-12 (1969).
18. The court held the law unconstitutional on both equal protection and due process grounds but directed most of its discussion to the equal protection aspects of the case.
19. 361 F. Supp. at 307 (citations omitted).

In advancing justifications to support the classification, the state had argued primarily that the requirement was necessary to ensure that one of the parties was a bona fide domiciliary of the state.[20] Since domicile[21] in the forum state is necessary before a state can grant a divorce that will be recognized in other states,[22] the court conceded that the assurance of domicile was unquestionably an important state interest and that the two-year requirement furthered this interest since it was an objective and efficient standard by which to judge claims of domiciliary intent. However, the court felt that the state's argument failed since "administrative convenience cannot serve as justification for the abridgement of constitutional guarantees where less restrictive means are available."[23] The other justifications made to support the two-year requirement were summarily rejected by the court because they were unrelated to the two-year requirement.[24]

In *Davis v. Davis*[25] the Minnesota Supreme Court upheld a one-year residency requirement for divorce[26] against a challenge similar to the one in *Larsen*. While the *Davis* court considered the possibility

20. *Id.* at 309.

21. Domicile indicates present habitation plus present intention to remain. Residence is merely the current living place. *See* BLACK'S LAW DICTIONARY 572, 1473 (4th rev. ed. 1968).

22. In Williams v. North Carolina, 317 U.S. 287 (1942) the Supreme Court ruled that each state must give full faith and credit to divorce decrees obtained in other states if one of the divorced parties was a bona fide domiciliary of the state granting the decree. In Williams v. North Carolina, 325 U.S. 226 (1945), however, the Court qualified its earlier decision, holding that, if asked to recognize a divorce decree from another forum, a state court may re-examine the evidence originally given on domicile and make an independent finding whether one of the parties was indeed domiciled in the divorcing state. According to *Williams II*, if the re-examining state finds the evidence insufficient, it does not have to recognize the divorce.

Requiring extended residence or other indicia of domicile, however, will not always ensure that bona fide domicile will be found by the inquiring state. *See* cases collected in Annot., 28 A.L.R.2d 1303, 1313-15 (1953); Annot., 1 A.L.R.2d 1385, 1393-94 (1948).

23. 361 F. Supp. at 309. The court went on to point out other ways in which domicile might be assured. It suggested that inquiry into domicile might be made part of the divorce proceeding. Alternatively, existing perjury sanctions might be used or a statute passed punishing abuse of process. *Id.*

The suggestion that a shorter period of residency might be constitutional has been tried in Wisconsin. After the two-year residence requirement for divorce was held unconstitutional in Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971), the state legislature amended the statute to require only a six-month period of residence. *See* WIS. STAT. ANN. § 247.05(3) (Spec. Pamphlet 1973), *formerly*, ch. 90, § 5 [1959] Wis. Sess. Laws.

24. These arguments were that the law served to promote marital stability, to prevent use of courts by outsiders, and to prevent the state from becoming a divorce mill. 361 F. Supp. at 310.

25. 297 Minn. —, 210 N.W.2d 221 (1973).

26. MINN. STAT. ANN. § 518.07 (1969).

that *Blumstein* could be read as requiring the strict equal protection test every time the right to travel was restricted by a residence statute,[27] the court rejected this interpretation and chose to interpret *Blumstein* in the light of a more recent Supreme Court case, *Vlandis v. Kline*.[28] Although *Kline* itself held a residence requirement[29] unconstitutional on due process grounds, it approved the earlier case of *Starns v. Malkerson*,[30] which upheld against the traditional equal protection standard a statute requiring a one year period of residence in the state before a student could get in-state tuition privileges.[31] Using *Starns* as a guide, the Minnesota court held that

> since a durational-residency requirement for resident tuition can be said to constitute a penalty on interstate travel, and since it is difficult to find any compelling state interest in requiring a 1-year wait for resident tuition, it seems clear that the court is implying that *not every penalty* on interstate travel triggers the compelling-state-interest test. In other words, it appears that we may weigh the harshness of the penalty in determining whether there has been a denial of equal protection.[32]

The court then concluded that the penalty inherent in the residence statute in *Blumstein* was a harsh one, involving "a fundamental political right, . . . preservative of all rights,' "[33] but that the "penalty" involved in the divorce cases caused little hardship because divorce was neither a basic right nor an urgent need.[34] The court did not feel the need to apply the compelling interest test to the statute. Instead, relying on the traditional equal protection test, the court upheld the requirement as rationally related to ensuring the state's interest in having only bona fide domiciliaries before its courts as divorce applicants.[35]

Yet another view of the status of residence requirements for divorce was taken in *Coleman v. Coleman*,[36] which decided a challenge

27. 297 Minn. at —, 210 N.W.2d at 224.
28. 412 U.S. 441 (1973).
29. CONN. GEN. STAT. ANN. § 10-329b (Supp. 1973). This statute established an irrebutable presumption of non-residency for tuition purposes during a student's entire university career. In the case of a single student, the presumption attached if his or her legal address had been outside of Connecticut anytime in the year before application to the university. If the student were married, he or she was considered a non-resident if his or her address was out of state at the time of application.
30. 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971).
31. 412 U.S. at 452-53 & n.9.
32. 297 Minn. at —, 210 N.W.2d at 225 (emphasis added).
33. *Id.*, *quoting* Reynolds v. Sims, 377 U.S. 533, 562 (1964).
34. 297 Minn. at —, 210 N.W.2d at 226.
35. *Id.* at —, 210 N.W.2d at 226-27.
36. 32 Ohio St. 2d 155, 291 N.E.2d 530 (1972).

to the one-year residence requirement of an Ohio statute.[37] The *Coleman* court at first approached the issue in the same manner as the *Davis* court, questioning whether a residence law postponing divorce was a "penalty" on travel. However, even after deciding that it was not a "penalty,"[38] the Ohio court did not apply the traditional equal protection test to the law as the *Davis* court did but proceeded to question whether the residency requirement met the strict test of fulfilling a compelling state interest.[39] As in *Larsen* and *Davis*, the major interest asserted by the state was the need for the year's residence to assure domicile and jurisdiction. While this same argument failed the strict test in *Larsen* because the court felt there were less restrictive means of finding domicile, the *Coleman* court held,

> In view of the numerous possible combinations of objective expressions, and the fact that those who do lead a transitory life might never accumulate that assortment of objective manifestations that would convince an individual judge to exercise jurisdiction, we conclude that the state has used the *least restrictive* manner of insuring that its divorce laws are not utilized by nonresidents of Ohio . . . .[40]

The court held further that the other state justification for the requirement, the need for a time period for newcomers to re-examine their marriage in light of the move, was "reasonable" and therefore acceptable.[41] This result seems to call into question whether the court had really committed itself to applying the compelling state interest test.

While it is true that *Blumstein* does not label specific time periods constitutional or unconstitutional,[42] it is also true that merely because a restriction is found reasonable does not mean that the compelling state interest test is met if a lesser restriction will serve the same purpose.[43] In *Coleman* the court did not consider whether a shorter period would serve the same purpose.[44]

In apparently deviating from the strict equal protection test, *Coleman* may be implicitly applying a theory announced explicitly in *Shiff-*

37. OHIO REV. CODE ANN. § 3105.03 (Page 1971).
38. 32 Ohio St. 2d at 159, 291 N.E.2d at 534.
39. *Id.* at 162-63, 291 N.E.2d at 536.
40. *Id.* at 162, 291 N.E.2d at 535. The court went on to note that there were no effective checks to false testimony regarding intent to remain in the state in divorce litigation. *Id.* at 162 n.10, 291 N.W.2d 535 n.10. Compare this statement with the solutions presented in Larsen v. Gallogly, 361 F. Supp. 305, 309 (D.R.I. 1973).
41. 32 Ohio St. 2d at 161, 291 N.E.2d at 535.
42. 405 U.S. at 348.
43. *Id.* at 343.
44. 32 Ohio St. 2d at 161 n.9, 291 N.E.2d at 535 n.9.

man v. Askew.[45] The *Shiffman* court reasoned that although *Blumstein* required a "compelling" state interest to uphold residency requirements, each travel restriction must be weighed against the right it penalizes.[46] As a result of this balancing process, the more essential the right affected and the greater the restriction on travel, the more compelling the state interest needed to allow restriction. If, as both the *Coleman* and *Shiffman* courts agree, divorce rights are less fundamental than voting rights, the test, although still termed a "compelling state interest test" will be less stringent than that applied in voting cases.

In analyzing the divergent approaches taken by the courts one can make an independent questioning of the Supreme Court's intention in *Blumstein*. The interpretation that *all* residency requirements must be measured by the compelling state interest test is supported by the Court's seemingly categorical language.[47] In addition, the Court did not have to emphasize the right to travel since the same decision could have been made on grounds that the classification of residents abridged the fundamental right to vote. This alone would have triggered the compelling state interest test.[48] By stressing the travel issue as it did, the Court might have been indicating that *all* residency cases should be examined strictly.[49]

Further, as the Court mentions explicitly in the older direct-infringement-on-travel cases the issue was whether there would be any basis for preventing interference on a large scale if a state were allowed to hinder travel in a minor way.[50] Such reasoning can be applied to indirect infringements and used to support the theory that all residence requirements should be required to meet a compelling interest test.

Nevertheless, unless the right qualified by the residency requirement is taken into consideration, a court will have neither a method to judge whether the right to travel has been infringed nor a way of determining how strong a state interest must be in order to support the requirement. The decision whether a state interest is compelling or

45. 359 F. Supp. 1225 (M.D. Fla. 1973). In this case a three judge federal court upheld a Florida law (FLA. STAT. ANN. § 61.021 (Supp. 1973)) that required six months residence before filing for divorce.

46. 359 F. Supp. at 1233.

47. *See* 405 U.S. at 342.

48. *Id.* at 335.

49. *See* Note, *Constitutional Law—Equal Protection—Penalty on the Right to Travel—Durational Residence Requirements*, 1973 WIS. L. REV. 914, 925.

50. 405 U.S. at 340 n.9.

not can hardly be made in a "vacuum."[51]

In affirming *Starns v. Malkerson*,[52] the Court approved a district court decision holding that while certain state justifications might not satisfy the court in some residence requirement cases, the same reasons might be acceptable in other instances where the requirements did not create serious hardship.[53] The decision in *Starns*, although made before *Blumstein*, apparently retains its validity[54] and supports the view that the penalty imposed by the requirement is important in determining by what standard the travel restriction is to be measured.

The interpretation of *Blumstein*, however, is only one aspect of the divorce cases. In each of the cases that rejected the equal protection challenge, the court summarily dismissed the contention that the final resolution of marital relations is a fundamental right equal in importance to voting or welfare assistance.[55] Even *Larsen*, which upheld the challenge, made only passing reference to an "adjustment of a 'fundamental relationship.' "[56] The failure to explore prior judicial determinations of the fundamentality of marriage relations may well be an important oversight. If the rights involved in marriage relationships are constitutionally fundamental, their restriction alone would activate the strict equal protection test[57] and forestall the necessity of having to interpret *Blumstein*. Even if these rights are not ultimately given constitutional sanction, their importance cannot be denied.

Several older landmark cases dealing with marriage and related issues can be cited for the proposition that the Supreme Court has found marriage rights to be fundamental.[58] More recently, in *Boddie*

51. 359 F. Supp. at 1233.

52. 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971).

53. *Id.* at 237-38.

54. The one-year requirement upheld in *Starns* was apparently approved in Vlandis v. Kline, 412 U.S. 441, 452-53 n.9 (1973). However, in a concurring opinion, Mr. Justice Marshall, joined by Mr. Justice Brennan, seriously questioned this approval in the light of *Blumstein*. *Id.* at 455.

55. Shiffman v. Askew, 359 F. Supp. 1225, 1235 (M.D. Fla. 1973); Davis v. Davis, 297 Minn. —, 210 N.W.2d 221, 226 (1973); Coleman v. Coleman, 32 Ohio St. 155, 158-59, 291 N.E.2d 530, 533 (1972).

56. 361 F. Supp. at 307.

57. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127-32 (1969).

58. *See* Loving v. Virginia, 388 U.S. 1 (1967). In this case, the Supreme Court held a Virginia anti-miscegenation law unconstitutional on due process and equal protection grounds. The Court categorized marriage as "one of the 'basic civil rights of man' " and held that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* at 12. *See also* Skinner v. Oklahoma, 316 U.S. 535 (1941). In *Skinner* the Supreme Court held

v. Connecticut,[59] dealing with the access to divorce court, the Court stressed the importance of marriage in our society as one of the bases for its holding that due process was violated when a party was denied a divorce because he lacked funds to pay a filing fee to initiate court proceedings.[60]

This view was further explained in *United States v. Kras*[61] and *Ortwein v. Schwab*.[62] In both *Kras* and *Ortwein* the initial plaintiffs sought to rely on *Boddie* as precedent to find unconstitutional their denial of judicial hearings in bankruptcy and welfare proceedings due to their inability to pay filing fees. In *Kras* the Court upheld the filing fee and distinguished *Boddie*:

> We are also of the opinion that the filing fee requirement does not deny Kras the equal protection of the laws. Bankruptcy is hardly akin to free speech or marriage or to those rights, so many of which are embedded in the First Amendment, that the court has come to regard as *fundamental* and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated.[63]

In *Ortwein* the Court reinforced this statement, "In this case appellants seek increased welfare payments. This interest, like that of *Kras*, has far less constitutional significance than the interest of the *Boddie* appellants."[64] This approach is significant also since it gives marriage relations a higher constitutional status than the need for welfare payments. In the divorce cases the lower courts consistently treated welfare as having a higher status than divorce.[65]

Whether the statements of the earlier cases of *Boddie*, *Kras*, or

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unconstitutional an Oklahoma statute that subjected habitual criminals to sterilization on the basis of types of crimes committed. The Court required the law to be strictly scrutinized since "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541.

While it might be contended that the statements of *Loving* and *Skinner* might not be applicable to divorce cases, it must be stressed that residence requirements that restrict divorce interfere not only with the rights in the existing marriage but also the rights of future marriage.

59. 401 U.S. 371 (1971).

60. *Id.* at 376.

61. 409 U.S. 434 (1973).

62. 410 U.S. 656 (1973) (per curiam).

63. 409 U.S. at 446 (emphasis added). Significantly at this point the Court refers to *Shapiro* and its holding that the right to travel is fundamental, 394 U.S. at 638, perhaps impliedly comparing marriage and travel rights.

64. 410 U.S. at 659.

65. While the question of the constitutional fundamentality of marriage rights is still unanswered, it has been decided that there is no constitutional right to welfare assistance. Hence, the compelling interest test is not automatically applied in welfare cases. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

Ortwein can be relied on to support a holding that divorce rights are constitutionally fundamental is still uncertain. The recent Supreme Court decision in *San Antonio School District v. Rodriguez*[66] indicates that the vital interest of our society in the exercise of any right does not give immediate constitutional protection to it.[67] Instead the Court in *Rodriguez* reasons that to gain constitutional protection the right must be "explicitly or implicitly guaranteed by the Constitution."[68] Only the dicta in *Kras* has thus far implied a direct constitutional guarantee of the right of marriage dissolution.[69]

Although the *Rodriguez* reasoning indicates that there may be no absolute certainty regarding the constitutional protection of the rights involved with marriage, the lower courts have been remiss in not pursuing the question. The lack of citation in the recent divorce cases to any of the older cases dealing with marriage rights[70] and the failure to consider *Boddie* for the proposition that marriage is an essential right[71] indicate that these courts neglected to anlayze the Supreme Court's views on marriage before coming to their independent decisions.

The analysis of *Blumstein* undertaken by the lower courts in the divorce cases is valuable and necessary in exploring the ramifications of the right to travel. However, as more people divorce[72] and bring about judicial involvement in the dissolution of their marriages, there is a definite need for the courts to deal directly with the constitutional status of marriage related rights.

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66. 411 U.S. 1 (1973). *Rodriguez* dealt with a challenge to the Texas scheme of collecting and allocating money for public school use. The challenge claimed the scheme made a classification that hindered some in their pursuit of the fundamental right of education.

67. *Id.* at 29-34.

68. *Id.* at 33-34.

69. *See* text accompanying note 63 *supra.* Mr. Justice Marshall, in his dissent, objected to the majority's "suggestion" that divorce might be fundamental and questioned whether the Court really meant to go this far. 409 U.S. at 462 n.4.

70. The dates of decision of the cases may explain why some courts did not cite *Kras* and *Ortwein.* The latter was decided on Mar. 5, 1973; the former on Jan. 10, 1973. *Larsen v. Gallogly* was decided on July 16, 1973; *Shiffman v. Askew* on June 1, 1973; *Davis v. Davis* on Aug. 24, 1973 and *Coleman v. Coleman* on Dec. 15, 1972.

71. *Larsen,* which held the residence requirement unconstitutional, did cite *Boddie* as authority, but did not deal with it in detail in relation to the issue of marriage rights alone. 361 F. Supp. at 307-08. *Coleman* also cites *Boddie* but does not treat it as applicable in the case before it. 32 Ohio St. at 160 n.7, 291 N.E.2d at 534 n.7. *Davis* speaks of *Boddie* only in connection with the due process argument. 297 Minn. at —, 210 N.W.2d at 227. *Shiffman* refers to *Boddie* only as authority for leaving divorce regulation to the states. 359 F. Supp. at 1229.

72. *See* text accompanying note 2 *supra.*

Federal Jurisdiction—Municipal Immunity Under the Civil Rights Act—Closing the Loopholes

In *Monroe v. Pape*[1] the United States Supreme Court held that 42 U.S.C. section 1983[2] does not contemplate municipal liability for the unconstitutional acts of municipal employees.[3] Since that decision, however, the lower federal courts and several commentators have developed a number of ways to distinguish *Monroe* and thus hold municipalities vicariously liable. The Court, in two recent cases, closed some of these "loopholes" in *Monroe* by reaffirming the controversial interpretation of section 1983 that a municipality is not a "person" within the meaning of that section. In *Moor v. County of Alameda*[4] the Court refused to allow incorporation of municipal liability under the California Tort Claims Act into a section 1983 claim and similarly upheld the district court's refusal to exercise pendent jurisdiction over the state claim against the municipal defendant. In *City of Kenosha v. Bruno*[5] the Court held that equitable relief was unavailable against a municipal corporation for violations of section 1983.

Moor involved injuries to appellants during a civil disturbance in Berkeley, California. The injuries allegedly resulted from the wrongful discharge of a shotgun by a deputy sheriff who was attempting to quell the disturbance. Appellants brought suit in federal district court, alleging a conspiracy to deprive them of their constitutional rights to freedom of speech and assembly and due process. The federal claims arose under section 1983, and jurisdiction was alleged under 28 U.S.C. section 1343.[6] Joined as defendants were the sheriff and several deputies individually and the County of Alameda as their employer. The latter was alleged to be amenable to suit under 42 U.S.C. section

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

2. 42 U.S.C. § 1983 (1970) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13). This section 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.

3. 365 U.S. at 187-92.

4. 411 U.S. 693 (1973).

5. 412 U.S. 507 (1973).

6. 28 U.S.C. § 1343 (1970). This is the general jurisdictional statute, giving original jurisdiction to the federal district courts over civil rights claims.

1988[7] which, the plaintiff contended, incorporated municipal liability under the California Tort Claims Act[8] into section 1983. Both appellants urged the district court to exercise pendent jurisdiction over the state law claims against the county.[9] The district court dismissed all claims against the county, and the Ninth Circuit affirmed.[10]

The Supreme Court affirmed the dismissal of the section 1983 claim on the authority of *Monroe v. Pape*.[11] The Court, in refusing to accept appellants' argument that section 1988 incorporated municipal liability into a federal section 1983 cause of action, pointed out that section 1988 "is intended to complement the various acts which do create federal causes of action for the violations of federal civil rights."[12] The provisions of section 1988 authorizing use of state law are meant to furnish suitable remedial measures when the federal substantive provisions provide insufficient or unsuitable remedies.[13] The cause of action must arise under the federal civil rights act[14] initially in order for section 1988 to be operative. An entire state cause of action cannot be "federalized" through section 1988.[15]

Furthermore, the Court stated that section 1988 provides for the use of state law by federal courts only when "not inconsistent with the Constitution and the laws of the United States."[16] Since the *Monroe*

7. 42 U.S.C. § 1988 (1970) provides:

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

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

9. Rundle v. Madigan, 331 F. Supp. 492 (N.D. Cal. 1971).

10. Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972), *noted in* 4 U. TOLEDO L. REV. 201 (1973). The court of appeals also dismissed Moor's diversity jurisdiction argument, holding that the county was not a citizen for diversity purposes.

11. 365 U.S. 167 (1961).

12. Moor v. County of Alameda, 411 U.S. 693, 702 (1973). The Court reversed the Ninth Circuit on the diversity issue, holding that the county was a citizen of California because, under state law it was a "body corporate and politic" and not the mere arm or alter ego of the State. *Id.* at 717-22.

13. *Id.* at 702-03.

14. For purposes of this Note, the Civil Rights Act refers to those acts which are now codified at 42 U.S.C. §§ 1981-89 (1970).

15. 411 U.S. at 703-04.

16. 42 U.S.C. § 1988 (1970).

decision was part of the laws of the United States, the imposition of vicarious municipal liability would be inconsistent with the *Monroe* interpretation of section 1983.[17] The Court rejected the argument that *Monroe* was distinguishable because the municipality involved in that case had not been deprived of common-law sovereign immunity, whereas in the present case California counties were no longer immune under state law. Since Congress had rejected a municipal liability proposal in passing the Civil Rights Act, it was difficult to infer an intent to include liability for those municipalities not clothed with immunity under state law.[18] The Court, therefore, held that the existence of municipal liability under state law was irrelevant to liability under section 1983.

The Court also affirmed the refusal by the district court to exercise pendent jurisdiction over the state law claim against the County.[19] The question whether the district court had the *power* to exercise such jurisdiction over a party not subject to independent federal jurisdiction was left open by the Court. However, under the doctrine of *United Mine Workers v. Gibbs*[20] the district court had the *discretion* to decline pendent jurisdiction. Since the claim against the county involved defenses not available to the individual defendants and complicated issues of state law, the Supreme Court held that the lower court's dismissal of the pendent state claims did not constitute an abuse of discretion. The *Gibbs* decision specifically recognized the possibilities of jury confusion and the complexity of the state law as factors to be considered in exercising discretion.[21]

In *City of Kenosha v. Bruno*[22] the Court held that a municipal corporation was not liable for the conduct of its employees for purposes of equitable relief under section 1983. Appellants were owners of retail liquor establishments that featured nude dancers. The city councils of Racine and Kenosha, Wisconsin denied renewal of their liquor licenses after holding legislative hearings provided for by state statute. Alleging deprivation of procedural due process, appellants brought suits for declaratory and injunctive relief against the cities under section 1983. The district court declared the state statute unconstitutional and granted the injunctions.[23] On direct appeal the Supreme Court

17. 411 U.S. at 706.
18. *Id.* at 706-10.
19. *Id.* at 710-17.
20. 383 U.S. 715 (1966).
21. *Id.* at 727.
22. 412 U.S. 507 (1973).
23. Misurelli v. City of Racine, 346 F. Supp. 43 (E.D. Wis. 1972).

reversed because of lack of jurisdiction over the municipalities under *Monroe v. Pape*.[24] The Court reasoned that there was no evidence in the legislative history of section 1983 that Congress meant to provide a bifurcated approach to municipal liability, making municipalities "persons" for purposes of equitable relief while excluding them from liability for damages.[25]

MONROE V. PAPE

Monroe involved a section 1983 action for damages against the City of Chicago for alleged brutality at the hands of Chicago police officers. The Court, after an extensive discussion of the legislative history of the Civil Rights Act of 1871,[26] concluded that legislative reaction had been so "antagonistic" to the concept of municipal liability for civil rights violations that Congress could not have meant to include municipalities within the word "person" as used in section 1983. This conclusion was based upon the rejection of a proposed amendment to the Act during congressional debates.[27]

Mr. Justice Douglas, writing for the majority in *Monroe*, noted that a few months prior to legislative consideration of the Civil Rights Act, Congress had passed an act that had provided rules of construction for acts of Congress.[28] One provision of this Act declared that "the word 'person' may extend and be applied to bodies politic and corporate."[29] He found this provision to be "an allowable, not a mandatory, one." Since the Court interpreted the legislative history as con-

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24. 365 U.S. 167 (1961).

25. 412 U.S. at 513.

26. 365 U.S. at 187-91. *Monroe* has been severely criticized for its interpretation of congressional intent on the municipal liability issue. See the convincing treatment of the legislative history in Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 132-36 (1972). *See generally* Kates, *Suing Municipalities and Other Public Entities Under the Civil Rights Act*, 4 CLEARINGHOUSE REV. 177 (1970); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); Note, *Federal Jurisdiction—Governmental Immunity and Pendent Jurisdiction*, 4 U. TOLEDO L. REV. 201 (1973).

27. Senator Sherman of Ohio proposed the amendment to provide for municipal liability for any civil rights violation occurring within the boundaries of the municipality whether committed by public officials or private citizens. The Senate passed the bill, but it was rejected by the House. The conference committee failed to agree on the amendment, and it was finally deleted in order to save the act and get it through the House.

The House also raised questions about whether the imposition of liability by Congress on the subdivisions of the states would be constitutional. The Court, however, did not reach these constitutional issues. Monroe v. Pape, 365 U.S. 167, 191 (1961).

28. *Id.*

29. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

clusively precluding municipal liability,[30] the policy considerations favoring municipal liability were not reached.

Monroe was extended beyond its holding by several lower federal courts. It has been applied by analogy to immunize city agencies from liability.[31] It was interpreted, moreover, as prohibiting use of respondeat superior, even when the employer is a non-municipal entity or public official, on the theory that only those who are personally involved in the deprivation of an individual's civil rights are "persons" within section 1983.[32] This expansion was not universal, however, and a number of courts held non-municipal public entities liable under section 1983.[33]

MONROE UNDER FIRE—THE LOOPHOLES DEVELOP

Equitable Relief

The Seventh Circuit was the first lower court to test the boundaries of the *Monroe* holding. In *Adams v. City of Park Ridge*[34] the court distinguished *Monroe* as having involved a claim for damages only. The court concluded that *equitable* relief against the city was permissible under section 1983. The reasons for denying damages against a municipality, in the court's view, were not persuasive when applied to prospective equitable liability that would not substantially impair the public treasury. The distinction would appear valid and reasonable except for a footnote in *Monroe* that seems to preclude equitable relief as well as damages.[35] In this footnote the *Monroe* Court noted:

> 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 . . . . The question

30. *See* text accompanying notes 66-67 *infra.*

31. *E.g.*, Davis v. United States, 439 F.2d 1118 (8th Cir. 1971) (per curiam); Sellers v. Regents of Univ. of Cal., 432 F.2d 493 (9th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971); United States *ex rel.* Gittelmacker v. County of Philadelphia, 413 F.2d 84 (3d Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970); Sams v. Board of Parole, 352 F. Supp. 296 (S.D.N.Y. 1972).

32. *E.g.*, Adams v. Pate, 445 F.2d 105 (7th Cir. 1971); Potts v. Wright, 357 F. Supp. 215 (E.D. Pa. 1973); Barrows v. Faulkner, 327 F. Supp. 1190 (N.D. Okla. 1971).

33. Scher v. Board of Educ., 424 F.2d 741 (3d Cir. 1970) (by implication); Local 858, Teachers v. School Dist. No. 1, 314 F. Supp. 1069 (D. Colo. 1970). This position is supported by cases in which the Supreme Court held non-municipal public entities vicariously liable. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969); Turner v. City of Memphis, 369 U.S. 350 (1962). *See* Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. REV. 548, 677-79 (1972).

34. 293 F.2d 585 (7th Cir. 1961).

35. *See* Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967).

> 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.[36]

The *Adams* court did not discuss this footnote in holding that equitable relief was available although the court cited the cases mentioned in the footnote as authority for its decision.[37] The Fifth Circuit in *Harkless v. Sweeney Independent School District*[38] discussed the footnote and decided that it did not preclude equitable relief against a municipality.[39] The grant of equitable relief, moreover, seems to be bolstered by Supreme Court decisions that allowed such relief under section 1983 without mention of *Monroe*.

In *Turner v. City of Memphis*[40] the Supreme Court ordered issuance of an injunction against a municipality and a restaurant operator under section 1983. The Court did not discuss the implications of the footnote in *Monroe* although the alleged racially discriminatory practices by the restaurant occurred on property leased from the city. If the footnote was intended to preclude equitable relief against a municipality under section 1983, the result in *Turner* is not easily explained.[41]

Incorporation of State Law Through Section 1988

Most of the courts that have considered the question whether a state law providing for municipal liability could be incorporated through

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36. 365 U.S. at 191 n.50. Two cases in which equitable relief was granted against municipalities under section 1983 were mentioned in the footnote. Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam); Douglas v. City of Jeannette, 319 U.S. 157 (1943).

37. 293 F.2d at 587.

38. 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).

39. We think the [Supreme Court in *Monroe*] 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 § 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 purposes of equitable relief, a question not expressly considered in the cited equitable relief cases.

Id. at 322. *See also* Butts v. Dallas Indep. School Dist., 436 F.2d 728 (5th Cir. 1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Wolfe v. O'Neill, 336 F. Supp. 1255 (D. Alas. 1972).

40. 369 U.S. 350 (1962) (per curiam).

41. Mr. Justice Douglas, dissenting in *Moor*, cited Mitchum v. Foster, 407 U.S. 225 (1970) as authority for his argument that equitable relief was not foreclosed by *Monroe*. In *Mitchum* the Court held that section 1983 was a specific exemption to a federal statute barring injunctions against state court proceedings. Section 1983 was, therefore, properly the basis of a suit to restrain unconstitutional state court actions. The decision, however, appears to be less than persuasive as support for municipal liability under section 1983.

section 1988 into a section 1983 cause of action have rejected it.[42] In *Carter v. Carlson*,[43] however, the District of Columbia Court of Appeals held the District liable for violations of section 1983 by District police. The court pointed out that *Monroe* had involved an Illinois municipality that had not waived its common-law immunity. The District of Columbia, on the other hand, had no such immunity and "the scope of immunity under section 1983 should follow the local rule."[44] Since the local rule provided for more effective implementation of the Civil Rights Act than the federal statutes, the court reasoned that section 1988 should be available to incorporate that rule into the section 1983 action.

Several other courts have considered the *Carter* rationale and have rejected it. Some have distinguished it on the basis of congressional control of the District of Columbia and on the ability of Congress to provide for section 1983 liability for the District.[45] The Seventh Circuit seems to have stated the basic objection to *Carter*, however, in *Yumich v. Cotter*.[46] "With all respect, however, we read *Monroe* as a binding statutory construction, not dependent upon state law immunity, and not related to a deficiency in federal remedies, but establishing that section 1983 does not impose liability for damages upon a city."[47]

Section 1988 has been used to borrow remedial measures from state law where the substantive sections of the Civil Rights Act were inadequate to implement its policies. Most notable is *Sullivan v. Little Hunting Park*[48] in which the Supreme Court incorporated the state law of damages into a section 1982 claim. This type of incorporation appears to be the correct application of section 1988, *i.e.* where the cause of action arises under the substantive provisions of the Civil Rights Act and no adequate redress is available within the Act. Since municipal liability cannot arise under section 1983 because of the bar of *Monroe*, a state law that waives municipal immunity cannot cure this jurisdictional defect.[49]

42. *E.g.*, Gonzales v. Doe, 476 F.2d 680 (2d Cir. 1973).

43. 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973). The Supreme Court did not reach the issue of section 1988 incorporation; holding that the District of Columbia was not a "State or Territory" within section 1983.

44. *Id.* at 369.

45. *E.g.*, Ries v. Lynskey, 452 F.2d 172 (7th Cir. 1971).

46. 452 F.2d 59 (7th Cir. 1971).

47. *Id.* at 61.

48. 396 U.S. 229 (1969).

49. While § 1988 may allow use of state *remedies* in redressing deprivations

Pendent Jurisdiction

Where none of the foregoing methods of obtaining jurisdiction over a municipal defendant are available, a federal court might still retain jurisdiction over the state law claim under the doctrine of pendent jurisdiction. Since providing a federal forum to litigants who could get no relief from the state courts, even where state law ostensibly provided such relief, was one of the primary objectives of Congress in enacting the Civil Rights Act,[50] the avenue of pendent jurisdiction, if open under the circumstances, is valuable in fulfilling this objective. There is some dispute, however, over whether a federal court has the power to join a party, not otherwise subject to its jurisdiction, in a federal action against different parties properly before the court.[51]

The Supreme Court established the accepted test for the exercise of pendent jurisdiction in *United Mine Workers v. Gibbs*.[52] The test involves two issues: (1) does the court have the constitutional *power* to hear the state claim, and (2) in the court's *discretion*, will the policies of "judicial economy, convenience and fairness to the litigants"[53] be promoted by hearing both claims in one trial? The court has the power to hear the state claim if:

> [T]he relationship between the [federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have

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> under § 1983, at least where federal remedies are deficient, . . . we are here confronted with the preliminary issue of whether liability exists at all under § 1983, not what remedy would be appropriate if liability should exist. Manifestly the nature of an appropriate remedy, which assumes the existence of liability, is irrelevant to the question of whether liability can attach in the first place.

Gonzalez v. Doe, 476 F.2d 680, 685 (2d Cir. 1973).

50. *See*, Monroe v. Pape, 365 U.S. 167, 180 (1961); Kates & Kouba, *supra* note 26, at 145-46.

51. *Compare* Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969), *and* Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir. 1964), *and* Drennan v. City of Lake Forest, 356 F. Supp. 1277 (N.D. Ill. 1972), *with* Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971), *and* Stone v. Stone, 405 F.2d 94 (4th Cir. 1968), *and* Eidschun v. Pierce, 335 F. Supp. 603 (S.D. Iowa 1971); *cf.* Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971).

52. 383 U.S. 715 (1966). This decision changed the earlier test of Hurn v. Oursler, 289 U.S. 238 (1933). The *Hurn* prerequisite for the exercise of pendent jurisdiction was that the federal and state claims be merely different *grounds* for the same *cause of action*. If the federal claim constituted a different cause of action, there could be no pendent jurisdiction; *id.* at 246. *Gibbs* called this approach "unnecessarily grudging", and therefore the Court liberalized the criteria for pendent jurisdiction. 383 U.S. at 725. *See* Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968); Note, 4 U. TOLEDO L. REV., *supra* note 26, at 216-28.

53. 383 U.S. at 726.

> substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[54]

If the court has the power under this test, it must then decide whether to exercise its discretion to grant or deny pendent jurisdiction. "Its justification lies in considerations of judicial economy, convenience and fairness to the litigants; if these are not present a federal court should hesitate to exercise jurisdiction over the state claims. . . ."[55]

The *Gibbs* decision did not consider the troublesome problem of "pendent parties," *i.e.* where pendent jurisdiction is used to bring into federal court a party not independently subject to a federal claim by joining a state claim against him to federal claims against other parties.[56] The lower federal courts have divided on the question of the power to hear such claims under the *Gibbs* test,[57] and some have avoided the issue by declining to grant pendent jurisdiction as a matter of discretion.[58]

The pendent party question in the context of section 1983 and municipal liability was considered by a federal district court in *Tauss v. Rizzo*.[59] Plaintiffs attempted to enter Frank Rizzo's mayoralty campaign headquarters to protest his policies as Police Commissioner of Philadelphia. The plaintiffs were brutally beaten by police officers guarding the headquarters and arrested on numerous charges. Subsequently aquitted of all charges, plaintiffs brought action against Rizzo and the assaulting policemen under section 1983. They joined the City of Philadelphia in an amended complaint. The court held that the city was not a "person" within section 1983. But the court then asserted pendent jurisdiction over the municipality. The court pointed out that

54. *Id.* at 725.

55. *Id.* at 726.

56. *See* Kates & Kouba, *supra* note 26, at 161-67; Note, 4 U. TOLEDO L. REV., *supra* note 26, at 216-28. *See also* Note, 81 HARV. L. REV., *supra* note 52.

57. *Compare, e.g.*, Eidschun v. Pierce, 335 F. Supp. 603 (S.D. Iowa 1971), *with* Barrows v. Faulkner, 327 F. Supp. 1190 (N.D. Okla. 1971).

58. *E.g.*, Gonzalez v. Doe, 476 F.2d 680 (2d Cir. 1973); Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

59. 361 F. Supp. 1196 (E.D. Pa. 1973). This case was decided after the Supreme Court handed down Moor v. County of Alameda, 411 U.S. 693 (1973). *See* Smith v. Spina, 477 F.2d 1140 (3d Cir. 1973); *cf.* Salinas v. Flores, 359 F. Supp. 233 (S.D. Tex. 1973); Gaison v. Scott, 59 F.R.D. 347 (D. Hawaii 1973); Schwab v. First Appalachian Ins. Co., 58 F.R.D. 615 (S.D. Fla. 1973).

"[t]he now permissible claim against the City is based upon the simple application of the principle of respondeat superior which would present no difficulty to a fact finder. The factors of judicial economy and the avoidance of a multiplicity of suits dictate that these claims should be tried in a single lawsuit."[60]

MOOR AND KENOSHA—WHAT WEIGHT TO GIVE MONROE?

The Court in *Monroe* regarded the legislative history of the Civil Rights Act as conclusively establishing the proposition that municipalities were not to be held liable for violations by their employees. Since Congress had not provided for such liability and the Court could not expand the statute without congressional approval, it considered policy factors irrelevant.[61] In the Court's two recent decisions on the issue, *Monroe* was reaffirmed without question, and policy was again dismissed as irrelevant to the inquiry.[62]

The desirability of municipal liability under section 1983 cannot be questioned.[63] The arguments are generally the same as those against common-law sovereign immunity, and a justification for such immunity is difficult to formulate.[64] However, given the *Monroe* decision, these policies, indeed, become irrelevant to a subsequent court proceeding, and the arguments for change must be made to Congress.[65] This does not mean the Court was necessarily justified in *extending* the

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60. 361 F. Supp. at 1199.

61. It is said that doubts should be resolved in favor of municipal liability because private remedies against officers for illegal searches and seizures are conspicuously ineffective, and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level. We do not reach those policy considerations.
Monroe v. Pape, 365 U.S. 167, 191 (1961).

62. City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973).

63. "Governmental liability is important not only to provide financially responsible defendants, but primarily so that the deterrent will be effective where it is needed—at the level where police policy is made." Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514 (1955). *See also* UNITED STATES COMM'N ON CIVIL RIGHTS, 1961 COMM'N ON CIVIL RIGHTS REPORT: JUSTICE, Book V, at 111, 113.

64. The usual justifications are presented in Kates v. Kouba, *supra* note 26, at 142-44. *See generally* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 449 (1961); Sherry, *The Myth That the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 AD. L. REV. 39 (1969).

65. Since the *Monroe* holding has been reaffirmed and extended in *Moor* and *Kenosha*, the Court appears unwilling to change that interpretation of section 1983. Legislative change was suggested soon after *Monroe* in UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 63, at 113.

Monroe holding without considering the purposes behind enactment of the Civil Rights Act.

The Civil Rights Act was enacted pursuant to the enforcement clause of the fourteenth amendment for the purpose of providing a federal forum to persons deprived of their rights under the newly enacted amendment. The federal courts were necessary to enforcement because state courts were suspected of not enforcing the rights of Negroes and of allowing civil rights violators to go unpunished either criminally or civilly.[66] The provisions for federal jurisdiction were not made dependent upon the presence or absence of an adequate state law remedy but were meant to provide a federal forum despite state laws.[67]

In *Moor* the Court assumed the correctness of the *Monroe* holding that Congress had not made municipalities answerable in damages for the acts of employees that violated section 1983. The Court then held that section 1988 could not be used as a means of obtaining federal jurisdiction over a municipality.[68] This holding was the result, however, of the Court's reading of section 1988 and was not based merely upon the force of *Monroe*.[69] The construction given section 1988 seems consistent with its apparent purpose in the civil rights scheme[70] to provide suitable remedies for violations of the substantive provisions of the Act. Of course, the Court's assumption was implicit that municipalities could not violate these substantive provisions under *Monroe*.[71] The purpose of the Act in providing a federal forum should

66. *See* Monroe v. Pape, 365 U.S. 167, 180 (1961).

67. "It is no answer that the State has a law which if enforced would give relief." *Id.* at 183.

68. *See* text accompanying notes 12-15 *supra.*

69. The Court briefly reviewed the legislative history of secton 1983 in rejecting the argument that where state law provided for vicarious municipal liability, section 1983 should not prohibit such liability. 411 U.S. at 707-10.

70. The Court looked to the legislative origins of section 1988 in order to discover its intended scope. The Court concluded that:

> Considered in context, this latter portion of § 3 [of the original 1866 Civil Rights Act], which has become § 1988 and has been made applicable to the Civil Rights Acts generally, was obviously intended to do nothing more than to explain the source of law to be applied in actions brought to enforce the substantive provisions of the Act including § 1 [now § 1982]. To hold otherwise would tear § 1988 loose from its roots in § 3 of the 1866 Civil Rights Act. This we will not do.

Id. at 705-06.

71. The petitioners did not attack *Monroe* but sought to circumvent it by arguing that since a municipality could not be held liable under section 1983 as interpreted in *Monroe*, the federal law was inadequate to redress civil rights violations against judgment proof individual defendants. Therefore, petitioners contended, section 1988 makes state law available to federal courts, and the County should be made liable under section 1983 as supplemented by the state law of vicarious liability for municipalities. *Monroe*

not be implemented at the cost of a tortured interpretation of one of its provisions. Since section 1988 was interpreted reasonably,[72] only by overruling *Monroe* could the Court have allowed federal jurisdiction, and then only through section 1983 and not section 1988.

The decision in *City of Kenosha v. Bruno*,[73] however, rested entirely on *Monroe*. The latter contains strong support for the proposition that "the generic word 'person' in § 1983 was [not] intended to have a bifurcated application to municipal corporations depending on the nature of relief sought against them."[74] However, that conclusion is not compelled by the facts of *Monroe*, and the Court could have distinguished *Kenosha* on that basis and promoted the purposes of the Civil Rights Act without overruling *Monroe*.[75]

Since *Monroe* was based on Congress' rejection of the Sherman Amendment, which provided for *damages* against a municipality, the Court in *Kenosha* could easily have held that a bifurcated approach allowing equitable relief was consistent with *Monroe* and its interpretation of the legislative history. Such a holding would allow federal courts to issue injunctions against municipalities and thereby correct

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governed, therefore, only to the extent of defining the substantive limits of section 1983; the Court in *Moor* conducted an independent investigation of the legislative history of section 1988 and concluded that this section was intended to incorporate state law in order to supply *remedies*. However, since a claim against the County could not arise under section 1983, there could be no substantive liability on which to append a state law remedy, and section 1988 was not intended to create substantive liability through state law incorporation. *But see* Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201 (1971).

72. The Court distinguished cases in which state laws of vicarious liability were incorporated into section 1983 through section 1988 where the person held vicariously liable was an *individual* superior public official, who was subject to the substantive provisions of section 1983, rather than a municipality that could not be substantively liable. 411 U.S. at 704 n.17.

At least one lower court has voiced concern over this distinction.

> The court remains concerned about a possible anomoly in these Civil Rights laws. [*Monroe*] could be evaded by joining the directors of a state agency and not the agency itself if the relevant state law, applicable through § 1988, included vicarious liability for governmental employees . . . . In contrast, a state agency cannot be vicariously liable under the Civil Rights laws regardless of possible state law of respondeat superior. [*Moor*]. Thus individuals and not a state government, may have to bear the financial burden of a civil rights judgment in a case in which they are not charged with having committed any specific acts against the plaintiffs.

Furumoto v. Lyman, 362 F. Supp. 1267, 1275 n.9 (N.D. Cal. 1973).

73. 412 U.S. 507 (1973); *see* text accompanying note 22 *supra*.

74. 412 U.S. at 513.

75. The plaintiffs in *Monroe* sought only damages whereas in *Kenosha* plaintiffs sought declaratory and injunctive relief. Had the Court undertaken an independent investigation of the legislative history of section 1983, the Court could undoubtedly have held that equitable relief would not be inconsistent with congressional disapproval of damages. *See* Kates & Kouba, *supra* note 26, at 147-48.

abuses by applying pressure on local policy making officials to deter their employees from violations of the Civil Rights Act.[76] Moreover, the holding that equitable relief is not available in *Kenosha* is difficult to reconcile with decisions of the Court, subsequent to *Monroe*, that allowed such relief in somewhat analogous circumstances.[77]

If injunctions were issued against municipalities under section 1983, this alone would not completely overcome the general objections to municipal immunity,[78] but such relief would go far in supporting the purposes of the Civil Rights Act.[79] A federal forum would be provided to protect federal civil rights against municipalities acting or condoning action by their servants in disregard of those rights. Such relief seems to be the essence of the Civil Rights Act. Yet *Kenosha* blindly follows *Monroe* and, without discussing these policies, cuts off the possibility of equitable relief.

CONCLUSION

Pendent jurisdiction appears to be the only "loophole" remaining after *Moor* and *Kenosha* that provides a federal forum for actions under section 1983 against municipalities. Although *Moor* upheld a denial of pendent jurisdiction on discretionary grounds, it refused to decide the question of the *power* of the federal courts to hear "pendent party" claims.[80] Until that question is resolved by the Supreme Court, the lower courts are likely to continue reaching divergent results in joining municipal defendants to federal section 1983 claims against individuals.

The logical approach for the Supreme Court to take on the question would be to deny the power to join parties through the judicially developed doctrine of pendent jurisdiction. However desirable this

76. *See* note 63 *supra.*

77. *See* notes 40-41 and accompanying text *supra.*

78. Even if injunctions could secure freedom from deprivation of constitutional rights for the plaintiff, their non-compensatory nature renders them an incomplete remedy. Not only are private attorneys less likely to take the case, but the injured parties, knowing the costs of litigation and the lack of monetary award, will often choose to endure the abuse. This reduces the likelihood of reform and increases the boldness of the offending agency.

Kates & Kouba, *supra* note 26, at 151.

79. Some commentators have suggested that if equitable relief were available in civil rights actions against municipalities, it would be possible to get a damage claim, based on state law, into federal court through pendent jurisdiction. Kates, *supra* note 26, at 201.

80. 411 U.S. at 413-15. The Court noted the analogy of pendent parties to "joinder of new parties under the well established doctrine of ancillary jurisdiction in the context of compulsory counterclaims under Fed. Rules Civ. Proc. 13(a) and 13(b) and in the context of third-party claims under . . . 14(a)." *Id.* at 414-15.

method of joinder, it would be somewhat inconsistent, after the Court has determined that Congress intended to deny a federal claim against a party, then to grant federal jurisdiction by merely joining the party to a closely connected claim against a party properly before the federal court.[81]

Since the Court has refused to limit or overrule *Monroe*, it seems logical to expect that it will not allow that decision to be circumvented through pendent party jurisdiction. However, the Court could allow such joinder of a municipality to a federal section 1983 claim on the theory that such joinder does no violence to the *Monroe* holding since the municipality would not be held liable under section 1983, a possibility foreclosed by *Moor* and *Kenosha*, but only under applicable *state law*. Pendent party jurisdiction would serve merely as a convenient method of trying the state claim together with a federal claim arising out of the same facts in a single proceeding in federal court.

Until the Court finally resolves the question, the availability of pendent party jurisdiction will continue in some federal courts. The doctrine satisfies the purposes of the Civil Rights Act by providing a federal forum to hear claims against municipalities in section 1983 actions. However, pendent jurisdiction is not a panacea, for it depends absolutely on the state law governing sovereign immunity and respondeat superior.[82] Furthermore, the ease with which some courts deny pendent jurisdiction in their discretion and the reluctance to find abuses of that discretion tends to reduce the effectiveness of this method of getting municipalities into federal court for section 1983 violations.

The holding of the Court in *Monroe* was virtually the death blow to section 1983 actions against municipal corporations, and the loopholes that developed were destined to be short-lived in the absence of a reconsideration of that decision.[83] The closing of these loopholes in *Moor* and *Kenosha* forces a difficult decision upon section 1983 litigants; forego the federal forum and join the municipality in a state action, or sue only individuals in federal court and, if pendent jurisdiction is denied, forego the benefits of a municipal defendant.

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81. *See* Bevan v. Columbia Broadcasting Sys., Inc., 293 F. Supp. 1366 (S.D.N.Y. 1968).

82. *See* Salinas v. Flores, 359 F. Supp. 233 (S.D. Tex. 1973).

83. Mr. Justice Douglas, the author of *Monroe*, dissented in both *Moor* and *Kenosha* arguing that the loopholes should remain open. He added to his opinion in *Kenosha* an appendix that developed the legislative history of section 1983 beyond that considered in *Monroe*. 412 U.S. at 517-20.

Labor Law—Bargaining Orders Without Election Interference

In recent years the courts[1] and the National Labor Relations Board[2] have struggled to establish standards for the issuance of bargaining orders[3] in situations in which unions seek recognition on the basis of authorization card[4] majorities. In *Truck Drivers Local 413 v. NLRB*[5] the Court of Appeals for the District of Columbia reviewed this type of recognition demand and granted a bargaining order in response to the employer's refusal to bargain although there had been no interference with the representation-election scheme of the Act.[6] As a result, a union's ability to achieve recognition has been significantly enhanced.

The facts of the two cases consolidated in this opinion are very similar. In *Wilder Mfg. Co.*[7] the union demanded recognition based upon authorization cards from a majority of the employees.[8] The employer, however, refused this demand, contending that the union did not possess a true majority of the authorization cards. The employees who had signed authorization cards then established a picket line and later filed a charge alleging a violation of section 8(a)(5)[9] of the National Labor Relations Act.[10] The trial examiner found that the em-

1. *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); NLRB v. General Stencils, Inc., 438 F.2d 894 (2d Cir. 1971); NLRB v. Wylie Mfg. Co., 417 F.2d 192 (10th Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

2. *See, e.g.*, Schuckman Press, Inc., 181 N.L.R.B. 158 (1970); Davis Wholesale Co., 181 N.L.R.B. 1 (1970); J.P. Stevens & Co., 179 N.L.R.B. 254 (1969). *See also, e.g.*, Doppelt & Ladd, *Gissel Packing Company—The NLRB Applies the Standards*, 49 CHI.-KENT L. REV. 161 (1972); Gordon, *Union Authorization Cards and the Duty to Bargain*, 19 LAB. L.J. 201 (1968); Welles, *The Obligation to Bargain on the Basis of a Card Majority*, 3 GA. L. REV. 349 (1969).

3. A bargaining order is a directive from the National Labor Relations Board ordering an employer to bargain with a union; *see* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). A union can also gain recognition by the employer granting voluntary recognition; *see* Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961); or by a union victory in a Board election; *see* 29 U.S.C. § 159 (1970).

4. *See* Note, *Union Authorization Cards*, 75 YALE L.J. 805, 807-20 (1969) (explanation of the authorization card procedure).

5. 487 F.2d 1099 (D.C. Cir. 1973).

6. *Id.* at 1113.

7. 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039 (1972).

8. Eleven of the eighteen employees in the unit had signed authorization cards. 487 F.2d at 1101.

9. 29 U.S.C. § 158(a)(5) (1970) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

10. *Id.* §§ 151-68.

ployer's conduct violated section 8(a)(5),[11] but the Board, after two previous considerations of the case,[12] held that there could be no violation of section 8(a)(5) absent independent unfair labor practices[13] unless an employer had voluntarily agreed to determine majority status of the union by a method other than Board election.[14]

In the companion case, *Linden Lumber Division*,[15] the union demand based on authorization cards was refused by the employer on the theory that since the union had been organized by supervisors, recognition would result in a violation of section 8(a)(2).[16] The union then withdrew a previously filed representation petition, began a recognition strike, and filed a section 8(a)(5) charge. The trial examiner again found that section 8(a)(5) had been violated,[17] but the Board, rejecting the expanded version of the independent knowledge test,[18] did not find a refusal to bargain on these facts. The Board thus held that section 8(a)(5) applied in this situation only if the employer has voluntarily agreed to determine majority status by a means other than an election.[19]

The unions in both cases appealed, contending that the independent knowledge test was applicable and that the employer has a duty to recognize the union when there is "convincing evidence" of majority status. They argued that the recognition strikes provided the neces-

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11. *See* 487 F.2d at 1101. The trial examiner also dismissed a charge based on 29 U.S.C. § 158(a)(1) (1970), but this issue was not before the court on appeal. 487 F.2d at 1101 n.6.

12. In Wilder Mfg. Co., 173 N.L.R.B. 214 (1968), the Board dismissed the section 8(a)(5) charge since the employer had neither rejected the collective bargaining principle nor interfered with the election process. The court of appeals remanded this decision for reconsideration in light of NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); *see* Textile Workers Union v. NLRB, 420 F.2d 635 (D.C. Cir. 1969) (per curiam). The Board in Wilder Mfg. Co., 185 N.L.R.B. 175 (1970), found a violation of section 8(a)(5) due to the employer's independent knowledge of the majority status of the union and his unwillingness to resolve any doubts by a Board election. Following the Board's decision in Linden Lumber Div., 190 N.L.R.B. 718 (1971), the Board's petition to reconsider the first *Wilder* decision was granted; *see* 487 F.2d at 1103. The Board then issued the decision which was appealed to the court of appeals in *Truck Drivers*.

13. Independent unfair labor practices refer to those other than violations of section 8(a)(5) which are found in 29 U.S.C. §§ 158(a)(1)-(4) (1970).

14. 198 N.L.R.B. at —, 81 L.R.R.M. at 1041.

15. 190 N.L.R.B. 718 (1971).

16. 29 U.S.C. § 158(a)(2) (1970).

17. The trial examiner also found a violation of 29 U.S.C. § 158(a)(3) (1970), but the Board determined the violation was not serious enough to require a bargaining order; 190 N.L.R.B. at 719. This finding was not challenged on appeal. 487 F.2d at 1105.

18. *See* text accompanying notes 34-38 *infra*.

19. 190 N.L.R.B. at 721.

sary evidence to satisfy the independent knowledge standard.[20]

To resolve these conflicting views, the court of appeals first looked to section 9(a)[21] which provides that the collective bargaining representative be "designated or selected." Although this provision has been interpreted to permit majority status to be determined by a means other than an election,[22] the court pointed out that elections are preferred by the Supreme Court and the Board.[23] The court then stated that section 9(c)(1)(B)[24] enables management to resolve any doubts about a union's majority status by petitioning for an election, but it does not provide an absolute right to an election.[25] After tracing the development of prior tests[26] for issuing bargaining orders, the court formulated a new standard which requires the employer either to recognize the union or to petition for an election under section 9(c)(1)(B).[27] Since the employers in *Truck Drivers* had not used the section 9(c)(1)(B) procedure, the court remanded with directions that a bargaining order be issued.[28]

To analyze this decision properly, it is first necessary to consider the prior standards used by the courts and the Board. The good faith-

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20. 487 F.2d at 1106-07.

21. 29 U.S.C. § 159(a) (1970) provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

22. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 596 (1969).

23. 487 F.2d at 1107.

24. 29 U.S.C. § 159(c)(1)(B) (1970) provides:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> . . . .
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

25. 487 F.2d at 1110.

26. *See* text accompanying notes 29-39 *infra*.

27. 487 F.2d at 1113.

28. The court of appeals also rejected the union contention; *see* text accompanying note 20 *supra*. The court of appeals quoted from *Gissel*, stating that the employer does have a duty to recognize a union if "convincing evidence" of its majority support is shown. 487 F.2d at 1106. The court examined the evidence which the union contended was "convincing evidence" of majority support such as the recognition strike by a majority of the employees and the statement by the management that ten or eleven employees supported the union. It held that this evidence need not be treated as "convincing evidence" by the Board. *Id.* at 1109.

doubt test, adopted in *Joy Silk Mills, Inc.*,[29] provided that an employer could refuse to recognize a union if he had a good faith doubt about the union's majority status. The Board could issue a bargaining order only if the employer could not prove he had a good faith doubt or if the employer's unfair labor practices could be used as evidence of his bad faith.[30] This rule was modified in *Aaron Brothers Co.*[31] so that the burden was placed upon the General Counsel of the Board to show the employer's bad faith. However, in *NLRB v. Gissel Packing Co.*[32] the Supreme Court stated that the Board had abandoned the good faith-doubt test.[33]

The Board has also applied an independent knowledge test to determine when a bargaining order is appropriate. According to this doctrine, a bargaining order could be issued if the employer had knowledge, independent of the authorization cards, that a majority of the employees supported the union. This test originated in *Snow & Sons*[34] where a bargaining order was entered because an employer dishonored an agreement to recognize a union after the authorization cards had been authenticated by a third party pursuant to an agreement.[35] This standard was expanded in *Pacific Abrasive Supply Co.*[36] where a bargaining order was issued although there had been no authentication agreement. In that case independent knowledge was inferred because the employer had verified the cards, had talked with employees who favored the union and had observed a recognition strike by a majority of the employees.[37] In *Truck Drivers* the Board reinstated the more restricted version of the independent knowledge standard as expressed in *Snow & Sons.*[38]

The Supreme Court in *Gissel* laid down a third standard for the

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29. 85 N.L.R.B. 1263 (1949), *enforced,* 185 F.2d 732 (D.C. Cir. 1950), *cert. denied,* 341 U.S. 914 (1951).

30. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 592-93 (1969). *See also* Pegrebin, *NLRB Bargaining Orders Since Gissel: Wandering From a Landmark,* 46 ST. JOHN'S L. REV. 193, 194-97 (1971).

31. 158 N.L.R.B. 1077 (1966).

32. 395 U.S. 575 (1969).

33. *Id.* at 594. During oral argument in *Gissel,* the Board announced it had abandoned the good faith-doubt test. *Id.*

34. 134 N.L.R.B. 709 (1961), *enforced,* 308 F.2d 687 (9th Cir. 1962).

35. *See* 487 F.2d at 1107-08; Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The "Independent Knowledge" Standard,* 39 U. CHI. L. REV. 314, 319-20 (1972); 1971 U. ILL. L.F. 731, 737.

36. 182 N.L.R.B. 329 (1970).

37. *See* 487 F.2d at 1108; Comment, 39 U. CHI. L. REV., *supra* note 35, at 320-21; 1971 U. ILL. L.F., *supra* note 35, at 741.

38. 487 F.2d at 1108. *See* text accompanying notes 14 & 19 *supra.*

issuance of bargaining orders. The Court held that a bargaining order could be entered if the employer had destroyed the possibility of a fair election by his unfair labor practices.[39] The Court, however, did not specify what action should be taken absent election interference by management,[40] and accordingly *Gissel* did not control the court of appeals' decision in the present case.

The court of appeals could have decided the case on existing precedents. Since there was no conclusive support for the contention that a recognition strike constitutes sufficient evidence to support a bargaining order,[41] the court was not compelled to adopt the union position. The independent knowledge test,[42] on the other hand, was clearly a viable option since it had been applied in similar situations in the past and had been reaffirmed by the Board in *Wilder* and *Linden Lumber*. Nevertheless, the court chose to ignore the Board standard and instead created its own test.

The decision by the court of appeals is not without merit. It provides certainty and ease of application since the only inquiry is whether the employer did or did not petition for an election. As a result employers will be encouraged to use the 9(c)(1)(B) procedure to resolve doubts about the majority status of a union demanding recognition on the basis of authorization cards. Furthermore, the court's standard, which is very similar to the union proposal in *Gissel*,[43] will eliminate tactics which were in the past used by employers to delay recognition. In union petitioned elections the employer has often challenged the election on the basis of the inappropriateness of the suggested unit. This tactic resulted in a hearing conducted by the regional director of the NLRB at which the employer could delay the election.[44] However, if the employer petitioned for the election, he could not request a hear-

39. 395 U.S. at 579. *See* Carson, *The Gissel Doctrine: When a Bargaining Order Will Issue*, 41 FORDHAM L. REV. 85 (1972).

40. 395 U.S. at 595, 614; Christensen & Christensen, *Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions Under the NLRA*, 37 U. CHI. L. REV. 411, 423 (1970); *1972-73 Survey of Labor Relations Law*, 14 B.C. IND. & COM. L. REV. 1173, 1192 (1973); 1971 U. ILL. L.F., *supra* note 35, at 741.

41. *See* note 28 *supra*; text accompanying note 20 *supra*.

42. *See* text accompanying notes 34-38 *supra*.

43. The union in *Gissel* contended that when an employer is faced with a recognition demand based upon cards, he must recognize the union or petition for an election. 395 U.S. at 594-95.

44. Even under the court's standard, the employer could wait a long time before filing his petition or could continuously propose frivolous units, but the Board could issue a bargaining order due to such abuse of the election process or set definite time limits for the petition to be properly submitted. *See generally* Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).

ing since he must propose the appropriate unit.[45] Faced with the employer petition, the union would perhaps waive any objections it might have in order to avoid the delay which a hearing would necessitate since enthusiasm, and perhaps the election, could be lost due to the ensuing postponement.[46] Accordingly, the result is an expedited election process[47] which will separate those employers with real doubts from those merely attempting to deny recognition to the union.[48]

Nevertheless, the court of appeals' interpretation of section 9(c)(1)(B) does not seem to comport with the literal wording of that provision.[49] The language allows the employer to petition for an election, but it does not require that he do so. Furthermore, the Supreme Court in *Gissel* pointed out that section 9(c)(1)(B) was intended "to allow them [the management], after being asked to bargain, to test out their doubts as to a union's majority . . . ."[50] The use of the word "allow" is indicative of a permissive rather than a mandatory interpretation of the section's purpose, and therefore the court of appeals' position appears unwarranted.

Since there is no direct precedent in support of the court's decision, certain matters of policy must be considered in order to understand the reasoning of the court and the Board. First of all, protection of the employee's free choice in deciding upon a bargaining representation is one of the primary purposes of the NRLA.[51] Uncoerced and unrestrained choice is especially important since a recognized union acts as the exclusive representative of all employees in the unit.[52] To achieve this purpose the Board seeks to maintain the "laboratory conditions"[53] of the election process by utilizing the comprehensive set of

45. *See* Comment, 39 U. CHI. L. REV., *supra* note 35, at 325-27. Of course if the employer's unit proposal was outrageous, the regional director could suggest a change without the necessity of a hearing, or the union could simply disclaim any interest in that unit. The union could of course contest the unit and ask for a hearing which would be a short proceeding since the union would limit the number of its objections. *Id.* at 327.

46. *Id.* at 326-27.

47. There is a significant difference in the time required for a consent election and one in which the election is contested. In a contested election an average of forty-three days is required from the time the petition is filed until the regional director's decision is made. In a consent election, the hearing is waived so that only three to five days elapse between the petition filing and the agreement for the election. Thus forty days are saved. *Id.* at 325 n.48.

48. *Id.* at 328.

49. *See* note 24 *supra.*

50. 395 U.S. at 599 (emphasis added).

51. *See* 29 U.S.C. §§ 151, 157 (1970).

52. *See id.* § 159(a).

53. The Board seeks to provide conditions similar to those in a laboratory in order

laws contained in the NLRA.[54] Free choice by employees in deciding whether they wish union representation should be an informed choice after having heard the views of both the union and the employer. Ordinarily, however, an employee signs an authorization card without being exposed to the employer's position, and yet he is fully aware of the union viewpoint as a result of organizational meetings, hand bill distributions, and other organizational activities.[55] Thus the employee's choice is made on the basis of information from the union side only. In addition to this one-sided exposure is the possibility of coercion, forgery, and misrepresentation by the union.[56] Therefore to enable the employee to decide freely whether the union is desired, an election should be held rather than the issuance of a bargaining order on the basis of an authorization card majority.[57]

The preference for a Board election, rather than a card-based bargaining order, when there has been no election interference was pointed out by the Supreme Court in *Gissel*.[58] The Supreme Court also stated that elections help bring about industrial stability[59] because a valid election, regardless of the outcome, prevents for a twelve month period election petitions by rival unions or decertification by vote of the employees.[60] Congress has also demonstrated that the election process is favored by amending the National Labor Relations Act in 1959 to make it an unfair labor practice if an uncertified union engages in recognition picketing unless an election petition is filed within a reasonable period.[61] Furthermore, the election process, even if initiated by a union petition and contested by the employer, is a fairly quick process and would certainly be more rapid than the legal proceedings necessary to obtain a bargaining order.[62]

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to determine the true desires of the employees. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948); *see* Note, 75 YALE L.J., *supra* note 4, at 823.

54. *See* 29 U.S.C. §§157-59 (1970).

55. *See* L. JACKSON & R. LEWIS, WINNING NLRB ELECTIONS 37 (1972); Lewis, *Gissel Packing: Was the Supreme Court Right?*, 56 A.B.A.J. 877 (1970).

56. *See* Comment, 39 U. CHI. L. REV., *supra* note 35, at 318.

57. Of course, an election can also be tainted by coercion. Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851, 866-67 (1967).

58. 395 U.S. at 601 n.18.

59. *Id.* at 599 n.14.

60. 29 U.S.C. § 159(c)(3) (1970).

61. *Id.* § 158(b)(7)(C). This provision has been held to be applicable to a majority union. International Hod Carriers Local 480, 135 N.L.R.B. 1153 (1962).

62. The *Wilder* case illustrates the inordinate length of time which may be required when a bargaining order is sought. In *Wilder* the underlying facts and the complaint charging the employer with a section 8(a)(5) violation took place in 1965-1966; 487 F.2d 1100-01. The dispute is not yet finally resolved. An election could have been held in a much shorter period; *see* note 47 *supra*.

Although the court purported to place emphasis on the preferred election process, the result in *Truck Drivers* was a bargaining order based on the unregulated solicitation of authorization cards.[63] The Board approach, on the other hand, actually favors the election process because a bargaining order would not be as easily granted as under the court standard. In fact, in situations similar to that of *Truck Drivers*, the union would be free to petition for an election even if the employer's actions rise to the level of a refusal to bargain. If the union wins the election, it will be certified as the exclusive bargaining representative.[64] If the union loses the election and the employer committed unfair labor practices which interfere with that election, the union will be entitled to a bargaining order.[65] If the union loses the election without unlawful interference by the employer, the union has been given a fair chance to demonstrate its majority support by the more reliable election process.

If it does become necessary to issue a bargaining order, the test for its issuance should be designed to insure that the union actually represents a majority of the employees. Under the Board approach there would be such evidence since according to the agreement between the employer and the union, a third party would verify the card majority.[66] Therefore, the Board could be confident that the union, which would receive the benefit of the bargaining order upon breach of the agreement by the employer, did enjoy the majority support of the employees. Even if the standard used to grant a bargaining order was a showing of "convincing evidence"[67] such as a recognition strike by a majority of the employees, there would be some evidence of the union's majority status. However, under the court's approach a bargaining order could be issued merely upon a union demand for recognition based upon authorization cards if the employer did not recognize the union or petition for an election. Thus there would be no assurance, other than the union's alleged possession of authorization cards, that the majority of the employees really wanted the union as their representative. Even if majority status were required to be shown, it must be further decided when to measure the purported union majority—at the time of the union demand or at the time of the section 8(a)(5) proceeding—since the

63. *See* Note, 75 YALE L.J., *supra* note 4, at 823-28.
64. 29 U.S.C. § 159(a) (1970).
65. *See* 395 U.S. at 579, 599-600.
66. 487 F.2d at 1107-08.
67. *See* note 28 *supra*; text accompanying note 20 *supra*.

degree of employee support may well vary.[68]

The previous discussion has emphasized the protection of employee interests, but one must also consider the employer's interests since the purpose of the NLRA is to protect management as well as labor.[69] It is at least arguable that the right of the employer to present his views to his employees is protected by the first amendment[70] and by section 8(c)[71] of the NLRA. However, the standard of the court of appeals, which expands the instances in which a bargaining order is permissible, inhibits the exercise of the employer's rights. Whenever the employer is faced with authorization cards, he has difficulty in presenting his own views to the employees because he often finds out about the card campaign after it is well underway.[72] Furthermore, a card campaign is more difficult to counter than an election since the effort must be directed at individuals rather than groups of employees, the union proposals are not clearly made known to the employer and the campaign has no fixed time limit.[73]

The court's test could also lead to increased harassment of employers by unions seeking recognition and a corresponding increase in defensive employer petitions for elections in order to protect themselves from bargaining orders. Conversely, the employer will be under pressure to recognize a union on the basis of a card demand because the alternatives are not particularly attractive. The employer could petition for an election, but he would not have the usual advantages of a union petitioned election. Specifically, he could not obtain a pre-election hearing at which to contest the proposed election, and the election would take place more quickly.[74] Alternatively, the employer could refuse to bargain with the union, but that would bring about a section 8(a)(5) proceeding and possibly an eventual bargaining or-

68. Employees may sign cards before they understand the employer's point of view, and then change their minds after the employer's campaign is begun. Of course it is possible for employees who have earlier refused to sign cards to decide later to support the union.

69. The NLRA states that the employers, employees and unions should recognize "one another's legitimate rights." 29 U.S.C. § 151 (1970).

70. U.S. CONST. amend. I. *See* 2 J. JENKINS, LABOR LAW § 5.3, at 12 (1969).

71. 29 U.S.C. § 158(c) (1970). *See, e.g.*, NLRB v. Herman Wilson Lumber Co., 355 F.2d 426 (8th Cir. 1966); Union Carbide Corp. v. NLRB, 310 F.2d 844 (6th Cir. 1962); Note, 75 YALE L.J., *supra* note 4, at 831. However the employer's right to free speech is not without limit. *See, e.g.*, NLRB v. Central Power & Light Co., 425 F.2d 1318 (5th Cir. 1970); Martin Sprocket & Gear Co. v. NLRB, 329 F.2d 417 (5th Cir. 1964); General Shoe Corp., 77 N.L.R.B. 124 (1948).

72. *See* Note, 75 YALE L.J., *supra* note 4, at 831.

73. *Id.* at 832-34.

74. *See* note 46 *supra*; text accompanying note 45 *supra*.

der. Faced with these options, the employer may well choose to recognize the union voluntarily, but even so he must take reasonable precautions to insure that the union has majority support to avoid violation of sections 8(a)(1) and 8(a)(2).[75]

Nevertheless, one could argue that the court's test actually increases the employer's rights because it gives him an opportunity to petition for an election even if he has independent knowledge of the union's majority support.[76] Although the court of appeals declined to rule on this issue,[77] undoubtedly it will have to be decided in the future if the court's standard prevails. If the courts determine that the employer can use section 9(c)(1)(B) even if he has independent knowledge of the majority status, the union will not be entitled to a bargaining order even if the employer breaches an agreement to recognize the union on the basis of authenticated authorization cards. If it is held otherwise, the Board and courts will once again be required to make an inquiry into the employer's state of mind, a task which has proven to be extremely difficult in the past.[78] Of course, this issue would never have to be faced if the Board test were applied.

The Board test establishes three possible avenues leading to union recognition: (1) a union petitioned election; (2) recognition pursuant to an agreement between the parties providing for outside verification of authorization cards; and (3) a bargaining order as a remedy for breach of the agreement or for election interference. This plan seems clearly preferable to the court's approach which, in spite of its positive features,[79] has many inherent defects. Apparently, none of the parties[80] were pleased with the court's plan since all parties petitioned for certiorari.[81] Since the Supreme Court has granted certiorari,[82] it

75. *See* International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961). *See also* Shea Chemical Corp., 121 N.L.R.B. 1027 (1958).

76. *See* Comment, 39 U. CHI. L. REV., *supra* note 35, at 328.

77. 487 F.2d at 1111.

78. *See* Pogrebin, *supra* note 30, at 194.

79. *See* text accompanying notes 43-48 *supra*. The court assumes it aids the employees by protecting them, but this is no longer the case. In the early years of union organization and growth in the United States, the unions did need the court's help in preserving the rights of employees when dealing with the more powerful employers. However, today the union movement is strong and the courts also should be concerned about protecting the employees from the unions. *See* Rains, *Authorization Cards as an Indefensible Basis for Board Directed Union Representation Status: Fact and Fancy*, 18 LAB. L.J. 226, 235 (1967).

80. It may seem strange that the union is not satisfied with this decision. However, it should be remembered that in its decision, the court did not adopt the union view. *See* note 28 *supra*; text accompanying note 20 *supra*.

81. 42 U.S.L.W. 3471 (U.S. Feb. 19, 1974).

82. *Id.* at 3594 (U.S. April 23, 1974).

should reverse the holding of the court of appeals and order a determination consistent with the present Board view which more effectively carries out the intent of the statute and more fairly protects the rights of employees and employers.[83]

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83. The court of appeals decision is very important since section 10(f) of the NLRA, 29 U.S.C. § 160(f) (1970), grants this court jurisdiction over a dispute in which any party is aggrieved by a final order of the Board. Therefore any union involved in such a dispute could appeal the case to this court and receive a bargaining order on similar facts.