
Marcia E. Prussel
I. INTRODUCTION

The cause of action formulated in section 1983 of the Civil Rights Act of 1871 affords redress for infringements upon civil rights. While this statute does not specify the damages recoverable for civil rights violations, injunctive and declaratory judgments, as well as compensatory and punitive damages, have been granted. Defendants in these civil rights actions have included both individuals and local governing bodies. Recently, however, the United States Supreme Court in *Newport v. Fact Concerts, Inc.* held that punitive damages were not recoverable from a municipal defendant.
in a section 1983 action.\(^5\)

While the \textit{Fact Concerts} Court stated clearly that punitive damages against municipalities were not available under federal law, it did not discuss the ability of a federal court to assess punitive damages against a municipality when such damages were permitted by state law. The issue of how to reconcile the history and purpose of section 1983, as seen by the Supreme Court, with a state’s contrary interpretation of public policy and the purpose of punitive damages was not addressed by the Court. In fact, the Court stated that “[w]e do not address the propriety of the punitive damages awarded against petitioner [city] under Rhode Island law.”\(^6\) The Court’s refusal to address this issue leaves open the possibility that a plaintiff in a federal court pursuing a section 1983 claim might be able to obtain punitive damages from a municipality, regardless of the seemingly absolute rule against such damages as embodied in \textit{Fact Concerts}.

In \textit{Fact Concerts}, the Court attempted to limit the liability extended to municipalities in recent years for violations of civil rights.\(^7\) The decision does not, however, render it completely impossible for a plaintiff in a section 1983 action to receive punitive damages from a municipal government. Two strategies remain available for the plaintiff in a proper jurisdiction\(^8\) to seek and obtain punitive damages: (1) the use of section 1988 and (2) the doctrine of pendent jurisdiction. These two methods will be addressed in this note to determine the availability of punitive damage awards from a municipal defendant when such awards are provided under the state law, notwithstanding the \textit{Fact Concerts} decision. First, the history and purpose of section 1983 and the general theory behind punitive damages will be examined briefly to better determine the success of these

\(^5\) \textit{Id.} at 271. \textit{Fact Concerts} is one of the recent cases in which the Court has attempted to define the limits of liability under section 1983. In \textit{Monroe v. Pape}, 365 U.S. 167 (1961), the Court originally limited liability to non-municipal defendants. \textit{Monroe} was overruled, however, by \textit{Monell v. New York Dept. of Social Services}, 436 U.S. 658 (1978), when the Court held that municipal and other local governments were subject to suit under section 1983. \textit{Id.} at 663. The availability of official immunity to municipal defendants was left open by \textit{Monell}. \textit{Id.} at 701. The Court circumscribed the availability of this immunity in \textit{Owen v. City of Independence}, 445 U.S. 622 (1980), by disallowing a good faith immunity for municipal defendants in section 1983 actions. \textit{Id.} at 625. \textit{Fact Concerts} further defines the liability of municipal defendants in section 1983 actions by making them immune from punitive damage awards. 453 U.S. at 271.

\(^6\) \textit{Id.} at 253 n.6.

\(^7\) \textit{See supra} note 5.

\(^8\) That is, under a state law which allows punitive damages against a municipality. \textit{E.g.}, \textit{R.I. GEN. LAWS} \textit{§§} 9-31-1 to 9-31-4 (Supp. 1982) and \textit{§§} 45-15-12, 45-15-13 (1980).
devices in bypassing the *Fact Concerts* decision in proper section 1983 actions. The strategies will then be discussed and the potential for successfully attaining punitive damage awards from municipal defendants in light of *Fact Concerts* will be assessed.

II. *Fact Concerts*

A. Procedural Development

The city of Newport, Rhode Island, and certain city officials were named as defendants in a section 1983 action alleging that revocation of a license to hold a concert deprived plaintiffs, Fact Concerts, Inc. (FCI), a promotional corporation, of its constitutional rights to free expression and due process under color of state law. FCI had previously received state approval to produce a series of concerts at a local state park. FCI then obtained an entertainment license from the city of Newport and proceeded to make arrangements for the upcoming event.

Originally, jazz singer Sarah Vaughn was one of the performers scheduled to appear at the concert. When she cancelled her performance in Newport, FCI hired the group Blood, Sweat and Tears as a replacement. The Newport city council, which included the Mayor of Newport, tried to prevent Blood, Sweat and Tears from appearing at the concert. The city council characterized Blood, Sweat and Tears as a rock group and, out of fear of crowd disturbances or a "rowdy and undesirable" audience, attempted to ban the concert entirely unless Blood, Sweat and Tears was removed from the program.

The first of two special city council meetings was held at which the council would not investigate FCI's characterization of the group's music or look any further into the nature of the band's music. Instead, the vote of the city council was to forbid the concert

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9. See infra notes 56-101 and accompanying text.
10. See infra notes 115-199 and accompanying text.
11. The officials included the mayor of Newport and the six other members of the city council. 453 U.S. at 252.
12. Also named as plaintiff was Marvin Lerman, the principal investor in FCI.
13. 453 U.S. at 252.
14. *Id.* at 249-50.
15. *Id.* at 250.
16. *Id.*
17. *Id.*
unless Blood, Sweat and Tears did not play.\textsuperscript{19} The vote was publicized and ticket sales for the concert decreased.\textsuperscript{20}

Later the same week, the mayor and city council informed FCI that Blood, Sweat and Tears would be allowed to perform if no rock music was played.\textsuperscript{21} At the second special city council meeting held the day before the concert was to take place, the council decided to revoke FCI's license altogether for failure to fulfill the conditions of the contract, although the council knew the terms of the contract had been substantially met.\textsuperscript{22}

On the morning the concert was scheduled to begin, FCI obtained a restraining order to enjoin interference with the concert by the city or its officials.\textsuperscript{23} The concert proceeded and included a performance by Blood, Sweat and Tears. Less than half the potential ticket sales were realized, however, and plaintiffs lost approximately $72,910.\textsuperscript{24}

FCI then instituted a suit in the United States District Court for the District of Rhode Island, claiming its constitutional rights of free expression and due process had been violated under section 1983.\textsuperscript{25} Three pendent state tort claims were also brought.\textsuperscript{26} Compensatory and punitive damages were sought with respect to all the claims. The jury in the district court found for FCI and awarded both compensatory and punitive damages.\textsuperscript{27} The defendant city and its offi-
cials moved for a new trial on the grounds that punitive damages may not be awarded against a municipality under section 1983\textsuperscript{28} and in the alternative, the damages awarded were excessive.\textsuperscript{29} The district court found no reason why punitive damages should not be awarded against municipalities as well as individuals in appropriate circumstances.\textsuperscript{30} The motion for a new trial was denied, although the award was found to be excessive.\textsuperscript{31}

The United States Court of Appeals for the First Circuit affirmed the district court decision,\textsuperscript{32} stating that this area of law was in a state of flux.\textsuperscript{33} The appellate court stated that punitive damages were available against municipalities in certain circumstances,\textsuperscript{34} just as they were available against individual defendants.\textsuperscript{35} The United States Supreme Court granted certiorari because of the confusion surrounding this issue,\textsuperscript{36} and held that punitive damages were not available against municipal defendants in section 1983 suits.\textsuperscript{37}

B. \textit{The Supreme Court Decision}

In a majority opinion written by Justice Blackmun, the Court re-examined the congressional intent behind enactment of section 1983 and the Civil Rights Act of 1871 to determine the extent of municipal immunity from punitive damages.\textsuperscript{38} The Court found

\begin{itemize}
\item punitive damages. 453 U.S. at 253. The district court ordered, and the plaintiff accepted, a remittitur in the punitive damage award against the city, reducing the award to $75,000 against the city. \textit{Id.} at 254 n.8; Joint Appendix, \textit{supra} note 21, at 68.
\item 28. 453 U.S. at 253.
\item 29. \textit{Id.}
\item 30. \textit{Id.} at 254; see \textit{supra} note 27. The district court considered the challenge to the punitive damages instruction even though it was untimely under \textsc{fed. r. civ. p.} 51 and no objection had been made at trial. \textit{Id.} at 255-56.
\item 31. \textit{Id.} at 254.
\item 32. 626 F.2d 1060 (1st Cir. 1980), \textit{vacated and remanded}, 453 U.S. 247 (1981). The appellate court also noted the failure to object to the punitive damages instructions under \textsc{fed. r. civ. p.} 51. \textit{Id.} at 1067.
\item 33. \textit{Id.}
\item 34. The Court of Appeals stated that “punitive damages are available against section 1983 defendants when there are aggravating circumstances.” \textit{Id.} at 1067.
\item 35. \textit{Id.}
\item 36. 453 U.S. at 255. The Court examined the defendant's failure to enter a timely objection under \textsc{fed. r. civ. p.} 51 and the lack of plain error in the decision below, but felt that the “novelty” and need for determination of this issue required an “unconstricted review” to promote the interests of justice and efficient judicial administration (even though the procedure was improper). \textit{Id.} at 257.
\item 37. \textit{Id.} at 271.
that by 1871 there was a "settled common-law immunity" for municipal corporations against punitive damages and, in the absence of a specific provision abrogating this immunity in the Civil Rights Act, the Court determined that this well-established immunity was intended to be incorporated into the Act.

Further, the lack of extended legislative debate on section 1 of the Civil Rights Act of 1871, the predecessor to section 1983, prompted the Court to examine the legislative history of the Sherman amendment, a proposed addition to the Civil Rights Act which would have held municipalities strictly liable for damage by riots or other violent assembly. The court determined that the rejection of this amendment, which would have explicitly required municipal governments to compensate those injured, implied that the 42d Congress did not intend by its silence to impose liability upon municipalities for punitive damages.

The Court also discussed the concerns voiced by some legislators in the debates over the Sherman amendment and articulated in some early cases establishing this immunity. These concerns stemmed from the beliefs that innocent taxpayers, who should benefit from the example being set, were the people punished; that innocent people were being unfairly punished for the acts of others; and that an undue fiscal burden was being placed on cities. Because these concerns were embodied in cases arising prior to 1871, and were voiced by legislators in the debates surrounding the Civil Rights Act of 1871, the Court found no intention to abolish the municipal immunity from punitive damages in cases brought under sec-

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39. 453 U.S. at 266.
40. Id. at 263 (quoting Pierson v. Ray, 386 U.S. 547 (1967)).
41. Id. at 264. Monell v. New York Dept. of Social Services, 436 U.S. 658 (1978) and Monroe v. Pape, 365 U.S. 167 (1961) are also cases in which the Court turned to examination of the proposed Sherman amendment due to limited legislative debate on § 1 of the Civil Rights Act. The Sherman amendment was not an amendment to section 1, now section 1983; rather, it was an additional section (§7) sought to be amended to the entire act. Monell, 436 U.S. at 666.
42. 453 U.S. at 263-64.
43. Id. at 261 (citing M'Gary v. President and Council of the City of Lafayette, 12 Rob. 668, 677 (La. 1846)).
44. Id. at 261. Early cases also mentioned that corporations cannot be willful or malicious on their own and so should not be held liable for punitive damages for the acts of its officers. Id. at 261-62 (citing Hunt v. City of Boonville, 65 Mo. 620 (1877)).
45. Id. at 263.
tion 1 of the Act.46

The Court also reviewed the general policy behind awards of punitive damages to decide whether such awards against local governments would be beneficial in the context of section 1983.47 The retributive purpose of punitive damages was found by the Court to be hampered by allowing such awards against municipalities.48 Retribution was viewed by the Court to be of lesser importance than the compensatory or deterrent aspects of section 1983,49 but assessments of punitive damage awards against municipal governments were found also to lack the deterrent effect desired.50 The Court, therefore, concluded that the purposes of punitive damage awards were not served by making municipalities available for such damages.51

Other public policy issues were also considered in Fact Con­
certs. The expanded liability under section 1983, enunciated by the Court in recent cases,52 was reviewed. This expansion of the section 1983 remedy, combined with the possibility of punitive damage awards, was seen by the Court as too great a burden for municipal governments to bear.53 In addition, the Court indicated that knowledge by the jury of the unlimited taxing power of municipalities may prejudice their assessment of punitive damages and may result in excessive cost to the cities.54 Thus, the Court concluded from its analysis of these public policy concerns, as well as its analysis of the

46. Id. at 263-64.
47. Id. at 266.
48. Id. at 267. The Court stated that since the victim will be fully compensated and punitive damages are only a windfall to the plaintiff, innocent taxpayers should not have to pay this retribution through increased taxes. Id. Moreover, a municipality can only act through its officials. If one of these officials acts in a willful or malicious manner such that punitive or exemplary damages are justified, the Court theorized, the individual official should be punished, not the government or its citizens. Id.
49. Id. at 268.
50. Id. at 268-70. The Court did not believe that punitive damage awards based on the wealth of a municipality would deter individual officials from misconduct. Id. Officials may also be punished through discharge or through the polls, if elected, without the necessity of awarding punitive damages against the local government. Id. at 269-270. If punitive damages are appropriate, the Court reasoned, they should be assessed against the offending individual based on his financial resources, and not the city's, in order to effectively deter repeated violations. Id. at 270.
51. Id. at 271.
53. 453 U.S. at 270.
54. Id. at 270-71. See also infra notes 95-100 and accompanying text.
policies behind section 1983 liability and punitive damage awards, that it would be contrary to public policy if punitive damages were awarded against municipalities in section 1983 actions.55

III. BACKGROUND

A. Section 1983

Enactment of section 1 of the Civil Rights Act, the predecessor to section 1983,56 was a broad congressional action57 taken to enforce the fourteenth amendment to protect citizens from deprivations of their civil rights.58 It provides a federal remedy for individuals whose civil rights59 have been transgressed by acts of state and local officials.60 While no new rights were created, a federal remedial scheme was deemed necessary to preserve already existing rights.61

A remedy under section 1983 was extended in Monroe v. Pape62 to unconstitutional acts by officials abusing the power conferred by their governmental duties as well as those acting within the scope of their official duties. The Monroe Court examined what was meant by “under color of state law” and whether a municipality was a

55. 453 U.S. at 271.
58. 365 U.S. at 171.
61. Note, supra note 60, at 952. See infra note 66 for the remedial purposes of section 1983.
62. 365 U.S. 167, 184 (1961); see generally Note, supra note 60, at 953.
"person" liable under section 1983. In so doing, the Court reviewed the congressional debates surrounding the passage of the Civil Rights Act in 1871 and the rejection of the proposed Sherman amendment. The *Monroe* Court's interpretation of the debates and history of section 1983 led to its decision that, while section 1983 provides a remedy for civil rights violations caused by the use or misuse of state law, municipalities were not "persons" under section 1983 and could not be held liable for civil rights violations. The Court found the purposes behind section 1983 were to remedy situations in which state law explicitly deprived citizens of rights or effectively did so by the absence or inadequacy of its laws. The intent of the statute, however, was not viewed by the *Monroe* Court as sufficiently broad to allow actions to be brought against municipalities.

Seventeen years later, in *Monell v. New York Department of Social Services*, the Supreme Court overruled *Monroe* to the extent that it had held municipalities immune from section 1983 suits. The *Monell* Court re-examined the legislative history and congressional debates on the Civil Rights Act and Sherman amendment, but derived a different conclusion than that reached by the *Monroe* Court. The *Monell* Court did not interpret the rejection of the Sherman amendment as demonstrating an intent to immunize municipalities from civil rights suits. Rather, section 1 of the 1871 Act, the predecessor to section 1983, was viewed by the *Monell* Court as in-

63. 365 U.S. at 187, 191.
64. *Id.* at 173-91; see *supra* text accompanying notes 41-42. For a discussion of the impropriety of the Court's use of the legislative history in *Monroe*, see *Note, supra* note 59, at 1205-07 and *Note, supra* note 60, at 134-35.
65. 365 U.S. at 184, 191. *Monroe* also clarified that the remedy in section 1983 was supplementary to any state remedy, *id.* at 184, and that the violation of plaintiff's civil rights did not have to be done with the specific intent to so violate them. *Id.* at 187. *See Note, supra* note 59, at 1203-04.
66. 365 U.S. at 173-74. The specific remedial purposes of section 1983 were seen as overriding state laws that deprived citizens of federal rights, providing a federal remedy where state law was inadequate, and providing a supplementary federal remedy when theoretically adequate state remedies were not applied with an even hand. *Id. See also Note, supra* note 60, at 951 n.21.
67. 365 U.S. at 187. The Court emphasized the rejection of the Sherman amendment, the lack of constitutional power of the Congress to impose obligations on local governments, and the Dictionary Act, ch. 71, 16 Stat. 431 (1871), which does not mandate that municipalities be included in the definition of "person." 365 U.S. at 188-91.
69. *Id.* at 663.
70. *Id.* at 669-683.
tending a broad remedy for violations of federally protected rights. The Monell Court reconsidered the Monroe Court interpretation of the term "person" and concluded that municipal corporations and other local governmental units were to be included within its scope. Thus, the intent of the 42d Congress is now perceived as embracing municipalities in the ambit of section 1983 liability. Now, municipal governments may be sued for "monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." These governmental units, as well as individual defendants, may also be held liable for unconstitutional action stemming from the government's policy or custom, even though such custom may not be formally codified or approved. Local governments, however, may not be held liable for violations of civil rights based on a respondeat superior theory. Currently, section 1983 is seen as

71. Id. at 685.
72. The Court re-interpreted the meaning of some comments made during the 1871 congressional debates and found the Monroe Court misapprehended them. Id. at 699. The Court based its decision on examination of the common law rule as it existed in 1871 that municipal corporations were to be treated as natural persons and were suable in federal court. Id. at 687-88. The definition of "person" in the Dictionary Act was also reconsidered and held to be applicable. Id. at 688-89. The Monroe Court's departure from prior practice by not distinguishing between school boards (which had been held liable) and municipalities, and its "encouragement" of civil rights violations by allowing municipalities to rely on their immunity were also held determinative. Id. at 695-99.
73. Id. at 701. The Monell Court, unlike that in Monroe, seemed satisfied to impose liability on municipal defendants in the absence of a clear statement to the contrary in the Civil Rights Act or any subsequent legislative action. Id.
74. 436 U.S. at 690.
75. Id. at 690-91.
76. Id. at 694. The Court did not discuss any other types of immunity municipalities might hold, other than immunity from liability on a respondeat superior basis, because the constitutional violations in Monell stemmed from official policy. Id. at 694-95. Federal courts allowed a good faith immunity for municipalities until Owen v. City of Independence, 445 U.S. 622 (1980), abrogated this good faith defense for municipalities and their officers. The Owen Court examined the purposes of section 1983 in its determination that this immunity should be abrogated. Id. at 650-656.

providing a remedy for violations of federally protected rights caused by official policy, whether or not written as law, and this statute must be construed broadly in order to be fully effective.\(^{77}\)

B. Punitive Damages

Although section 1983 does not specify remedies for redressing violations of civil rights, it generally is agreed that injuries caused by the deprivation of civil rights are ameliorated through compensatory damage awards.\(^{78}\) In reaching this conclusion, courts have examined the purpose of section 1983.\(^{79}\) The goal of section 1983 is to protect injuries sustained due to violations of federally protected rights.\(^{80}\) Compensation for injuries is the basic principle of damages developed by the common law of torts.\(^{81}\) This common law rule of damages has been examined and found to be compatible with the purpose of section 1983.\(^{82}\) This suggests that, at the very least, the principle of compensation governs injuries caused by deprivation of civil rights. But “[t]his is not to say that exemplary or punitive damages might not be awarded in a proper case under \(\S\) 1983 with the specific purpose of deterring or punishing violations of constitutional rights.”\(^{83}\)

officials acting in discretionary capacity entitled to qualified immunity). For an excellent discussion of the legislative history of section 1983 through Monell as well as the effect of Owen on immunities, see Comment, Owen v. City of Independence: Expanding the Scope of Municipal Liability Under Section 1983, 47 BROOKLYN L. REV. 517 (1981) and K. DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 25.00-3 to 25.00-4, 26.15 to 26.21, 26.22, questions 6, 7, 18 (Supp. 1982).

77. 436 U.S. at 690-91.
80. See supra notes 56-76 and accompanying text.
81. 2 F. HARPER & F. JAMES, LAW OF TORTS § 25.1, at 1299 (1956); see also Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965) (concerning damages under state tort law: “[T]he primary basis for an award of damages is compensation. That is, the objective is to make the injured party whole to the extent that it is possible to measure his injury in terms of money.” (emphasis in original)).
82. E.g., Carey v. Piphus, 435 U.S. 247, 255-59 (1978) (stating that “[t]o the extent that Congress intended that awards under \(\S\) 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.”); Edmonds v. Dillin, 485 F. Supp. 722, 730 (N.D. Ohio 1980) (stating that “[t]he fundamental goal embodied in the civil rights statutes of compensating aggrieved individuals for violations of their constitutional rights is fulfilled by the availability of compensatory damages. . . .”).
83. Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978); accord Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) (punitive damages may be awarded in "aggravating circumstances"); Stolberg v. Members of Bd. of Tr. for State Coll. of Conn., 474 F.2d 485, 489 (2d Cir. 1973) ("appropriate" \(\S\) 1983 cases); Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir. 1968), cert. denied, 393 U.S. 940 (1968) (evil intent standard); Basista v. Weir,
Punitive damages typically are awarded with the specific design of punishing the offending party and deterring others from committing like offenses. When more than compensatory or injunctive relief seems warranted, punitive damages may be awarded against individual wrongdoers in section 1983 cases provided that the policies of punishment and deterrence are furthered.

Most of the cases that have examined the issue agree, however, that, when punitive damages are assessed against a municipality rather than an individual or a private corporation, the rationale sup-

340 F.2d 74, 87 (3d Cir. 1965) (federal law allows punitive damages; no standard mentioned).

84. Prosser, Handbook of the Law of Torts, § 2, at 9 (4th ed. 1971); see also Edmonds v. Dillin, 485 F. Supp. 722, 730 (N.D. Ohio 1980); Fisher v. City of Miami, 172 So.2d 455, 457 (Fla. 1965); Chappell v. City of Springfield, 423 S.W.2d 810, 814 (Mo. 1968); McClellan and Northcross, Remedies and Damages for Violations of Constitutional Rights, 18 Duq. L. Rev. 409 (1980); see also Note, Punitive Damage Liability of Municipal Corporations in Pennsylvania, 84 Dick. L. Rev. 267, 274 (1979) (discussion of three different approaches to insulating municipalities from punitive damages including the "functional approach" of analyzing the purposes behind punitive damages and examining if these purposes are filled).

85. Hild v. Bruner, 496 F. Supp. 93, 99-100 (D.N.J. 1980). Varying standards are applied when determining when punitive damages are necessitated. In general, malice or reckless disregard of plaintiff's rights must be shown. Id. at 100 ("The test is whether defendant acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so.").

86. Ranells v. City of Cleveland, 41 Ohio St. 2d 1, 321 N.E.2d 885, 887 (1975); accord Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 121 (1st Cir. 1977).
porting punitive damages dissolves. Many suggest that in the absence of a statute specifically providing for punitive damages against a municipality, such damages should not be permitted. These cases are in general agreement that punitive damages against municipalities do not punish or deter the offender and may result in excessive damage awards. The retributive purpose of punitive damages is not considered to be effectuated when assessed against municipalities because the taxpayers, and not the offender, bear the brunt of the punishment. It is the taxpayers who actually pay the damage award and would be punished as wrongdoers even though they are supposed to benefit from the public example made of the wrongdoer.

Deterrence is also not achieved by assessing punitive damages

87. Ranells v. City of Cleveland, 41 Ohio St. 2d 1, 10, 321 N.E.2d 885, 889 (1975); Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965); Chappell v. City of Springfield, 423 S.W.2d 810, 814 (Mo. 1968); Edmonds v. Dillon, 485 F. Supp. 722, 730 (N.D. Ohio 1980). See also Note, supra note 84, at 274, in which the author states: "Cases that follow the functional approach hold that an award of punitive damages against a municipality would violate the basic punitive purpose behind the award." Id., and cases cited therein. But see Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (stating that a city is considered a "person" for purposes of the federal antitrust laws, id. at 394-97, which subjects them to liability for threefold damages if such laws are violated, id. at 396 n.13, although the Court did not decide the question of remedy in that case. Id. at 402); Young v. City of Des Moines, 262 N.W.2d 612 (Iowa 1978) (allowing punitive damages against municipality); Ray v. City of Detroit, 67 Mich. App. 702, 242 N.W.2d 494 (1976) (exemplary damages permitted against municipality but not for punitive purposes); Note, supra note 84, at 281-85 (discussion of the view permitting punitive damages against a municipality).

88. E.g., Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965); Chappell v. City of Springfield, 423 S.W.2d 810, 814 (Mo. 1968); see Edmonds v. Dillon, 485 F. Supp. 722, 730 & n.8 (N.D. Ohio 1980). But see Ranells v. City of Cleveland, 41 Ohio 2d 1, 8, 321 N.E.2d 885, 890 (N.D. Ohio 1975) (dissenting opinion) (punitive damages should be awarded against municipality unless statute specifically forbids); Note, supra note 84, at 285 n.101, 296 (citing courts and commentators which advocate awards of punitive damages against municipalities, but concluding that in the absence of a clear statutory provision, courts should continue to prohibit these awards based on case law).

89. Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965); Chappell v. City of Springfield, 423 S.W.2d 810, 814 (Mo. 1968). This idea is well stated in Note, supra note 84, at 274:

A municipal corporation is composed of innocent, tax-paying citizens. This group of tax-paying citizens is the same group that is supposed to benefit from the public example set by the punishment of the wrongdoer. Imposition of punitive damages on a municipal corporation places the burden of paying those damages upon the very group that the law seeks to protect through the addition of the extra measure of punishment intended by the award of punitive damages. . . . Since it would be 'absurd and illogical' to hold that punishment should be imposed upon the public, courts have declared such a position contrary to public policy, and have denied recovery of punitive damages from a municipal corporation.

Id. at 274-75 (footnotes omitted).
against municipal defendants. An award against the municipality may have little or no effect on the wrongdoing employee, through whom the municipality acts. This is true because the employee would not be able to pay such a large award if it were assessed against the employee individually or even if indemnification were sought by the city. These employees will not be deterred because they know their employer will pay the costs of their wrongdoing.

Appropriate alternatives are available, however, to discipline wrongdoing employees without recourse to punitive damage awards against a municipal employer. For example, some municipal employees might be accountable to the electorate and therefore could be punished through the electoral process. It has been suggested that if punitive damages are to be awarded, they should be based on the employee's financial resources and not the city's, to be a true mechanism of deterrence.

Another reason given for the blanket prohibition against punitive damage awards against municipalities is the prejudicial effect the unlimited taxing power of a municipality will have on the jury. Since evidence of the wealth of a tortfeasor generally is admissible to help determine the amount of punitive damages to be awarded, and a city's wealth virtually is unlimited when its taxing power is considered, juries may be more likely to award huge amounts of punitive damages. If the wealth of the defendant were not admitted as evidence, the jury could not determine an amount adequate to punish the city and the retributive element of these types of awards would be removed. In addition, while there is a general rule that punitive damages must bear a reasonable relation to the amount of

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90. Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965); Note, supra note 84, at 275.
91. Note, supra note 84, at 275. The deterrent effect of these punitive damage awards against one municipality also will not necessarily have a deterrent impact on other municipal corporations. Id. at 276.
92. Fisher v. City of Miami, 172 So.2d 455, 457 (Fla. 1965); Chappell v. City of Springfield, 423 S.W.2d 810, 814 (Mo. 1968); Note, supra note 84, at 276.
93. Chappell v. City of Springfield, 423 S.W.2d 810, 814 (Mo. 1968).
94. Note, supra note 84, at 276 n.46. The cost of compensation, if assessed against the individual at trial or by indemnification, may be sufficient to deter as well.
95. See, e.g., Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965); Chappell v. City of Springfield, 423 S.W.2d 810, 814 (Mo. 1968); Ranells v. City of Cleveland, 41 Ohio 2d 1, 8, 321 N.E.2d 885, 889 (1975).
96. See, e.g., Ranells v. City of Cleveland, 41 Ohio 2d 1, 8, 321 N.E.2d 885, 889 (1975); Note, supra note 84, at 277.
98. Fisher v. City of Miami, 172 So.2d 455, 457 (Fla. 1965). The punishment element would not be served because only a small award is necessary to punish a poor man
the compensatory damages awarded, this has never effectively pre­
vented excessive punitive damage awards.99 The effect of the jury's
knowledge of a municipality's unlimited taxing power continues to
have an impact on the decision that such awards are contrary to pub­
lic policy.100

To summarize, the theory supporting punitive damage awards
in section 1983 actions suggests that such damages may be assessed
against municipalities, over and above compensatory damages, if
such need is demonstrated and if the purposes of punishment and
deterrence are served. Such damages, however, have not tradition­
ally been permitted against municipalities because, in practice, they
neither deter nor punish, and are often excessive. This traditional
majority rule prohibiting punitive damages from municipalities
prompted the Fact Concerts decision,101 thereby creating a definitive
immunity from punitive damages for municipal defendants in sec­
tion 1983 suits brought in federal courts.

IV. ANALYSIS

A. The Effect of Fact Concerts

Potentially, there are section 1983 cases that warrant punitive
damages against municipal defendants, but the inability to promote
the policy behind punitive damages militates against the award of
such damages.102 Fact Concerts renders it impossible for the plaintiff
in a section 1983 case to receive punitive damage awards when the
defendant is a local governmental unit, even if the state law frees
municipalities from the traditional prohibition against punitive
damages.103

but more is necessary to punish a rich man. State v. Sanchez, 119 Ariz. 64, 67, 579 P.2d
568, 571 (1976).

99. Note, supra note 84, at 277-78.

100. It has also been suggested that the potential for large punitive damage awards
contradicts public policy because it would be another "financial burden[] added] to the

101. 453 U.S. at 263-64.

102. These may be cases in which the only damages truly available to the injured
party are punitive, and compensation for the deprivation of the rights involved amounts
to very little in monetary terms. E.g., Carlson v. Green, 446 U.S. 14 (1980). It remains
important in these cases for the defendant to be punished and deterred for depriving the
plaintiff of these rights.

103. The plaintiff cannot now receive the damages he or she might have received
prior to Fact Concerts because courts applying the majority rule prohibiting punitive
damages against municipalities often made exceptions to that rule and allowed punitive
damages against municipal governments in extraordinary circumstances or where the
Although *Fact Concerts* made a distinction between individual defendants and municipal defendants in section 1983 claims, it is unclear if such a distinction is effective. For example, the deterrent purpose of such damage awards may not be served if individual defendants are indemnified against such judgments, just as municipalities are not deterred because the damage award may be paid merely by raising taxes. Thus, neither individuals nor municipal defendants may be deterred or punished and the general purposes of punitive damages are therefore not effectuated.

In addition, the Court has overlooked the fact that individual defendants may be judgment-proof, and if the case is such that punitive damages are the bulk of the award, the plaintiff may again be victimized. The purpose of a section 1983 cause of action to redress those deprived of their civil rights, is not fulfilled by such a result. The distinction between individual and municipal defendants, therefore, also is not efficacious in serving any of the goals enunciated by the Court.

Subsequent to *Fact Concerts*, courts have disallowed or reversed the punitive damages assessed against municipal defendants for violations of civil rights in suits brought under section 1981, section 1982, and section 1983. Thus, plaintiffs in situations in which citizens or superior officers of the municipality ratified or authorized the violative conduct. See Note, supra note 84, at 281-83. This inability for a plaintiff to recover at all may even seem to some municipal employees as a sign of condonation to deprive people of those rights for which little compensation may be had.

104. Some municipalities indemnify their employees in cases where the actions complained of arose within the scope of the employee’s duties. See, e.g., CONN. GEN. STAT. ANN. § 7-465 (West Supp. 1982); MASS. GEN. LAWS ANN. ch. 258, § 9 (West Supp. 1982). Because the acts complained of in section 1983 actions must arise “under color of state law,” it is likely that many individual defendants in such cases will be seen as acting within the scope of their duties and so will be indemnified if the local statute so provides.

105. See supra notes 56-61 and accompanying text.

106. Heritage Homes v. Seekonk Water District, 670 F.2d 1 (1st Cir. 1982) (used *Fact Concerts*’ rationale for § 1981 claim stating this was not one of those situations where taxpayers themselves were malicious and should be punished, although facts of case suggest it was such a case, and court below suggested that there was “open participation” by taxpayers, 648 F.2d 761, 763 (1st Cir. 1981)); Tyler v. Board of Education of New Castle County, 519 F. Supp. 834, 837 (D. Del. 1981) (reasoning in *Fact Concerts* applies to school districts); Ferguson v. Joliet Mass Transit District, 526 F. Supp. 222 (N.D. Ill. 1981) (reasoning in *Fact Concerts* used for § 1981 case). But see Boyd v. Shawnee Mission Public Schools, 522 F. Supp. 1115 (D. Kan. 1981) (reasoning of *Fact Concerts* not applicable to school district in § 1981 claim).


punitive damages against a municipality seem warranted or necessary, must either bypass Fact Concerts,109 or urge that it be distinguished.110 Given the broad rule laid down in Fact Concerts, however, which effectively bestowed immunity upon municipalities against punitive damages in many types of civil rights cases,111 it is improbable that the case will be distinguished easily.112 Nonetheless, punitive damage awards forbidden by Fact Concerts may be attainable through use of 42 U.S.C. § 1988113 and pendent jurisdiction.114

B. Section 1988

A state law that abrogates municipal immunity from punitive damages may be beneficial to a plaintiff bringing a section 1983 claim against a municipality or other local governmental unit in a federal court because section 1988115 may permit use of state remedial measures where remedies under the federal statute are insufficient.

Section 1988 recognizes that the federal laws governing violations of civil rights may not be "adapted to" or may be "deficient in the provisions necessary to furnish suitable remedies and punish offenses. . . ."116 It directs the courts to use "the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such . . . cause is held" as

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109. See infra notes 115-199 and accompanying text.
110. For example, the court in Black v. Stephens, 662 F.2d 181 (3d Cir. 1981) distinguished Fact Concerts and awarded punitive damages against a municipality based solely on a procedural difference. Id. at 184 n.1. Black seems to represent the Third Circuit's manifestation of its disagreement with the Fact Concerts' outcome because the procedural difference upon which it was distinguished was extremely slight. Also, it appears that Black was a vehicle for disagreement with the Supreme Court because, as pointed out in the dissent in Black, the punitive damages issue was not even briefed in the court below and need not have been discussed on appeal. Id. at 205 (Garth, J., dissenting). It is not likely, however, that other courts will follow Black or so quickly distinguish the Supreme Court decision in Fact Concerts on such limited procedural differences.
111. 453 U.S. at 271.
114. 453 U.S. at 253 n.6. See infra notes 157-199 and accompanying text.
116. Id.
long as these state laws are "not inconsistent" with federal laws and the Constitution. The key elements to demonstrating that section 1988 should be used are a deficiency in the federal law, consistency between the state law to be applied and the underlying policies of the federal civil rights statute, and uniformity with the remedial scheme presented by the federal statute.

1. Deficiency of the Federal Statute

It is difficult to determine what is meant by "deficiency" of the remedial provisions of the federal statutes, although that is what section 1988 was designed to alleviate. Clearly, a federal law is not deficient solely because a state law is more favorable to the plaintiff; this is a federal policy and should not be nullified by use of the state law by the plaintiff.

Silence of the federal law as to an important issue, however, has been interpreted as a deficiency. If the governing statute is silent

117. Id. Section 1988 provides in pertinent part:
The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," 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 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.


121. Note, supra note 120, at 1218.

on an issue a party wishes to pursue, at first glance it might appear that the state law may be used.\textsuperscript{123} The simple and oft-cited test of \textit{Brazier v. Cherry}\textsuperscript{124} illustrates the idea that state law may be utilized easily whenever the federal statute is found inadequate in some way:

What is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is automatically available. . . .\textsuperscript{125}

Because section 1983 is silent on the issue of damages, it may seem under the \textit{Brazier} test, that a state law allowing punitive damages against municipalities may be applied. Section 1983, however, may not be viewed as being silent on the issue of punitive damages because \textit{Fact Concerts} added a gloss to the statute in that it forbids these damages against municipal defendants. In addition, an element of inconsistency, not mentioned in the \textit{Brazier} test, is extremely important.\textsuperscript{126} Even if silence is considered a deficiency, and the federal law is "found wanting,"\textsuperscript{127} the state law is not necessarily available.

2. Consistency of State Law with Policies Behind the Federal Statute

Even if the federal statute is deemed deficient, the relevant state law may not be available because, as stated in \textit{Robertson v. Wegmann},\textsuperscript{128} the state statute is "the principal reference point" but is "subject to the important proviso that state law may not be applied
when it is 'inconsistent..." with federal law. The policies of the federal law must therefore be examined to determine whether the state law is inconsistent with these federal policies.

The Court in Robertson found that the policies underlying section 1983 were "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." A federal court, accepting the underlying policies of section 1983 as articulated in Robertson, might find that an award of punitive damages against a municipal government was inconsistent with the policy behind section 1983 based on the Court's decision in Fact Concerts to prohibit such damages in a section 1983 cause of action. This is likely since the Fact Concerts Court analyzed the policies of section 1983 before deciding that punitive damages against municipalities would be inconsistent with that federal law. A court applying this analysis is likely to conclude that an inconsistency remains even though a state has decided its local governmental


130. Id. at 590. See also Brown v. Morgan County, 518 F. Supp. 661, 663 (N.D. Ala. 1981); accord Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act, 45 S. Cal. L. Rev. 131, 157 (1972); see generally Eisenberg, supra note 118, at 518-521.

131. Robertson, 436 U.S. at 591. See also supra notes 56-76 and accompanying text. The Robertson Court determined that the state survival statutes at issue were not inconsistent with these policies. Robertson, 436 U.S. at 592. See Brown v. Morgan County, 518 F. Supp. 661, 663-64 (N.D. Ala. 1981).

132. Cf. Wilcher v. Gain, 311 F. Supp. 754 (N.D. Cal. 1970). This case was decided prior to Monell and rejected municipal liability on the basis of Monroe, although the state law allowed it. The state law was considered inconsistent with the federal policy delineated in Monroe. 311 F. Supp. at 755. This situation is similar to Fact Concerts. Courts may reject the idea of punitive damage assessments against municipalities even if state law allowed them because of the inconsistency with the federal rule laid out in Fact Concerts prohibiting such damages. But see Kates & Kouba, supra note 130, at 160-61. The authors of that 1972 article suggest that Wilcher was decided wrongly and was "slavish adherence to precedent." Id. at 161. They urge that the policy of section 1983 must be reinterpreted when examined together with section 1988. They state that, when taken together, the policies of section 1983 and section 1988 may permit use of the state law, especially when application of a state law which allows what the federal cases prohibit has not been discussed. Id. at 157, 160.

Federal courts could be urged to consider the policies of section 1988 together with section 1983 under applicable state laws allowing punitive damages against municipalities since section 1988 was not mentioned in Fact Concerts. If successful, a court may decide that the federal law must take the municipalities as it finds them; if punitive damages may be awarded against them under state law, then this state law should be recognized, through section 1988, in a section 1983 cause of action in a federal court.

133. See supra notes 79-99 and accompanying text.
units may be penalized.\textsuperscript{134}

In \textit{Miller v. Apartments and Homes of New Jersey, Inc.},\textsuperscript{135} the Third Circuit applied an even farther reaching analysis to determine whether state or federal law should be used. Initially, the court described the "interstitial character" of federal law as asserted by Professor Hart.\textsuperscript{136} The court then described the process which determines whether to fill an interstice with federal common law or state law as an analysis involving: the congressional purpose and the underlying goals of a statute; the extent to which the application of federal law would further those goals or the application of state law would impede them; and the traditional allocation of functions between state and federal law.\textsuperscript{137}

Although the \textit{Robertson} analysis\textsuperscript{138} seems to inhere in the \textit{Miller} test, a plaintiff might prefer the more extensive test enunciated in \textit{Miller}. Under this test, as under the traditional \textit{Robertson} test, a plaintiff may urge that the congressional intent was not to disallow punitive damages to be assessed against municipalities but that the meaning of the silence on this issue is, from section 1988, that state law should prevail. The statute's silence may also be interpreted as meaning that any remedy necessary to vindicate plaintiff's rights, if allowed by state law, is permitted.\textsuperscript{139} The goals behind section 1983 have previously been determined to be to compensate and deter civil rights violations.\textsuperscript{140} It is improbable that federal courts would accept much variance in the statement of these goals if offered by a plaintiff. These courts may not view the goal of compensation as being served by the award of punitive damages against municipalities, even if the state allowed it.\textsuperscript{141} Compensatory damages are not impeded and punitive damages are paid above and beyond the costs of compensation. The goal of deterrence may be fulfilled, however, if the state's goal in permitting punitive damages in these cases is also to deter.

\begin{footnotes}
\item[134] The state courts or legislatures are unlikely to have specifically addressed the federal statutes governing violations of civil rights in their decisions to allow assessments of punitive damages against municipalities.
\item[135] 646 F.2d 101 (3d Cir. 1981).
\item[137] 646 F.2d at 107.
\item[138] See supra text accompanying notes 128-130.
\end{footnotes}
Finally, under the *Miller* analysis, a plaintiff must show that remedial statutes are not traditionally more a federal concern than a state concern. This may be demonstrated by the fact that section 1983 is a federal statute, silent as to remedies, and section 1988, which refers to section 1983, directs courts to use state law.142 Moreover, it has been stated that remedies are more suited to "statutory rather than judicial solution"143 and a plaintiff may argue that the applicable codified state law should be applied rather than the federal common law.144

Under the *Miller* analysis, therefore, a plaintiff is able to better demonstrate that a state law permitting punitive damage awards against municipal defendants is not fundamentally inconsistent with section 1983 and the other civil rights statutes. The extensive interpretations already given by the Court regarding municipal liability145 and punitive damages,146 however, make the chances appear slight that federal courts will accept state laws that impinge on these interpretations. Such laws are likely to be considered inconsistent with section 1983 whether viewed under the traditional *Robertson* or the enhanced *Miller* test.

3. Uniformity

Uniformity of the federal remedial scheme is another obstacle that must be overcome when petitioning for use of state law by the provisions of section 1988. Many cases point out that Congress could not have intended for remedies to vary from state to state because the purposes of the statute would not be fully effective.147 Some courts seem to interpret section 1988 as directing the use of federal common law, but then label the state law or the rule that

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142. *See supra* notes 115-117 and accompanying text; *cf.* Middlesex County Sewerage Auth. v. National Sea Clammers Assoc., 453 U.S. 1 (1981) (Stevens, J., dissenting in part) (no express remedy or comprehensive remedial scheme plus intent of section 1988 shows a clear congressional mandate to preserve all existing remedies).

143. 646 F.2d at 107.

144. Statutes of limitations and other state statutory matters have been applied. *E.g.*, Johnson v. Rogers, 621 F.2d 300 (8th Cir. 1980) (applying Minnesota law of contribution); Brown v. Morgan County, 518 F. Supp. 661 (N.D. Ala. 1981) (Georgia survival statute used).


court wishes to apply the federal common law. On the other hand, section 1988 has also been said to mean that "both federal and state rules or damages may be utilized, whichever better serves the policies expressed in the federal statutes." This suggests that variance between states may have been intended by enacting section 1988. The majority of courts, however, emphasize a uniform remedial scheme or a federal common law of remedies for civil rights violations, rather than allowing different state laws to be applied. Therefore, a plaintiff seeking to apply state law authorizing punitive damages against municipalities may not be successful because the application of such a law would not result in a uniform remedial scheme.

As the foregoing analysis indicates, it is unlikely that the application of section 1988 will realistically aid a plaintiff who is pursuing punitive damages from a municipality for violation of civil rights, even when state law provides for such damages. To successfully use section 1988, the requirements of its three-part test must be fulfilled. Failure to obtain punitive damages from the defending government may not be deemed a deficiency. Though section 1983 is silent as to available remedies, compensatory damages remain available. Additionally, Fact Concerts has filled the silence of section 1983 on the issue of punitive damage and has prohibited them against municipal defendants. Awards of punitive damages may be considered inconsistent with the federal statutory plan as implied by the Fact Concerts rule prohibiting damages of this type. Moreover, awards of

150. See, e.g., cases cited supra note 147.
151. See infra notes 120-127 and accompanying text.
152. See infra notes 132-134 and accompanying text. This unsuccessful result seems likely even though section 1988 has been described as "responsive . . . whenever a federal right is impaired," Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969), and "sweeping . . . [,] reflect[ing] . . . that the redress available will effectuate the broad policies of the civil rights statutes," Brazier v. Cherry, 293 F.2d 401, 408 (5th Cir. 1961); cf. Eisenberg, supra note 118, at 499-500 (The lack of success of such an attempt is due to a misunderstanding of § 1988's true purpose and inconsistent interpretations of § 1988 by the Supreme Court.).

punitive damages based on state law would cause lack of uniform remedies for violation of civil rights governed by section 1983.\textsuperscript{153} Although section 1988 suggests that state law may be used, a plaintiff seeking such damages is likely to fare better in state court\textsuperscript{154} or by bringing the state claims in federal court with the federal section 1983 claim.\textsuperscript{155}

C. **Pendent Jurisdiction**

It may not be necessary for a plaintiff in a section 1983 claim to separate claims between state and federal courts or to bring suit only in state court to obtain punitive damages against a municipal defendant. The \textit{Fact Concerts} Court did not address the issue of pendent jurisdiction but left it open.\textsuperscript{156} Therefore, if a plaintiff chooses to bring the civil rights action in a federal court, the prohibition against punitive damage awards from municipalities may be overcome by joining the state claim that allows punitive damages against a municipality with the federal section 1983 claim under the doctrine of pendent jurisdiction.

The doctrine of pendent jurisdiction is a judicial creation, allowing federal courts to assert jurisdiction over certain claims or parties which are outside the congressional mandate of power given federal courts.\textsuperscript{157} The tests to be applied to determine if pendent jurisdiction may be invoked have evolved slowly and this evolution has created an intricate and complex structure which is often misconstrued. It is therefore necessary to examine the basic structure of pendent jurisdiction before discussing its application to section 1983 litigation.\textsuperscript{158}


153. State legislatures which have determined on their own that punitive damages may be assessed against municipalities in their state will not be given credence in a federal court, although it appears that no financial burden is placed on unprepared or disabled municipalities if the state has so provided. Note, \textit{supra} note 120, at 1221-22.


155. \textit{See infra} notes 157-199 and accompanying text.

156. 453 U.S. at 254 n.6.


158. This discussion utilizes the structure of pendent jurisdiction as set out, simply and notably, in \textit{A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of
1. The Structure of Pendent Jurisdiction

The early rule, defining the scope of pendent jurisdiction, was enunciated prior to the institution of the Federal Rules of Civil Procedure and stated that state and federal claims could be brought together in federal court if they stemmed from the same cause of action. 159 Because this test was eventually found to be repugnant to the policy of liberal joinder of claims and parties as propounded by the Federal Rules of Civil Procedure 160 and was difficult to apply, it was replaced by a two-part test created in United Mine Workers v. Gibbs. 161

The first aspect of the Gibbs test is based on the constitutional power given to federal courts. 162 A state claim may be appended to a federal claim if the federal claim is substantial and both claims arise from a "common nucleus of operative fact" and should be tried in one proceeding such that they are considered to comprise one constitutional case. 163 The Gibbs Court, however, sharply curtailed the ability to add claims through this constitutional power by holding that federal courts always have discretion to dismiss any state claims a plaintiff seeks to add. 164 If judicial economy, convenience or fairness are not served, or if jury confusion is prevented, the state claim may be dismissed, even though the court has "power" over the case. 165

The other factors considered in determining whether to assert pendent jurisdiction deal generally with examination of the relevant jurisdictional statute. 166 The factors in this examination include congressional intent, the posture of the parties, and the difference be-

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162. Id. at 725.
163. Id. The term "one Case" refers to article III of the United States Constitution.
164. Id. at 726.
165. Id. The courts are also directed to examine whether the case involves a substantial federal question or whether the state claims predominate.
between joining a claim or a party. 167

In Aldinger v. Howard, 168 a plaintiff, in a pre-Monell 169 section 1983 action, sought to impose liability upon a county. 170 Counties and other local governments were not, by the then-current interpretation, intended to be held liable under section 1983 nor under the statute governing jurisdiction over civil rights cases. 171 The Aldinger Court stated that permitting the state claim to be used would violate congressional intent behind the jurisdictional statute. 172 Generally, the state claim may not be added if it causes the jurisdiction of the relevant statute to be asserted over claims or parties not intended to be covered by that statute. 173

The Court, however, in Owen Equipment and Erection Co. v. Kroger 174 stated that, in addition to examining the congressional intent of a jurisdictional statute, the posture of the parties must be taken into account. 175 The Kroger Court would not defeat the congressional intent of the statute conferring diversity jurisdiction, which had been interpreted as requiring complete diversity, 176 when the party who chose the federal forum sought to assert pendent jurisdiction over a claim. 177 The Court suggested, however, that a party in federal court involuntarily might be permitted to add a state claim, even if it seemed contrary to the language of the jurisdictional statute. 178 The question of which party chose the federal forum and whether that party was in an offensive or defensive position is therefore important to the pendent jurisdiction analysis.

The issue of whether a party or a claim is sought to be joined

167. Incidental Jurisdiction, supra note 158, at 1941.
170. 427 U.S. at 4-5.
172. 427 U.S. at 18-19.
175. Id. at 373; see generally Incidental Jurisdiction, supra note 158, at 1940, 1943-45.
176. 437 U.S. at 372 (citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)).
177. Id. at 374 (the plaintiff may not complain and must accept the limitations of the federal court if plaintiff chose to bring suit there).
178. Id. at 375-76. For example, a defendant or impleaded party or a plaintiff in an action removed from state court would all be in federal court involuntarily.
through pendent jurisdiction was also considered in *Aldinger*.\(^{179}\) The *Aldinger* Court implied that adding a party may violate the power given the federal courts more than adding a claim.\(^{180}\) It was suggested that it would be unfair, as well as being beyond the courts' statutory authority, to assert jurisdiction over a party over whom no independent basis of jurisdiction existed.\(^{181}\) The Court noted that it was not as unseemly to allow parties already facing each other in a federal dispute to litigate one more claim.\(^{182}\)

2. Application of the Pendent Jurisdiction Doctrine to Section 1983 Litigation

The matter of whether a state claim or party is sought to be added, the posture of the parties, and the congressional intent of the jurisdictional statute must be considered by a federal court in the decision of whether to assert jurisdiction, as well as whether the court has power over the claim or party. The final decision of asserting pendent jurisdiction over a state claim remains, of course, within the discretion of the federal court. Therefore, a plaintiff in a section 1983 action who seeks pendent jurisdiction of a state claim which allows punitive damages against a municipality must take all of these factors into account.

The constitutional prerequisites enunciated in the *Gibbs* power test are likely to be fulfilled since the section 1983 claim will be considered a substantial federal question, provided that the claim is not fabricated, and the facts of the state claim are likely to stem from the same operative facts causing violation of the plaintiff's rights.\(^{183}\) The claims should, therefore, be tried in one lawsuit and are one case. While a court always has the discretion to dismiss a pendent state claim, it also seems that the interests of convenience, judicial economy and fairness are served if the state claim is allowed to be de-

\(^{179}\) 427 U.S. at 14-15.
\(^{180}\) Id. at 15, 18. See *Incidental Jurisdiction*, supra note 158, at 1946. The article states that more practical difficulties and procedural burdens arise when a party is added than when a claim is added. Adding a claim involves just another dispute between the parties already involved; judicial economy and convenience, tools of discretion, are not compromised as they are by the addition of a party. Id. It is for this reason that it may be argued, alternatively, that this factor of adding a claim or party is really a part of the *Gibbs* discretion test.
\(^{181}\) *Aldinger*, 427 U.S. at 14.
\(^{182}\) Id.
cided with the federal section 1983 claim. 184

Examination of the congressional intent behind the jurisdictional statute governing civil rights, 185 however, may indicate that Congress did not intend this type of state claim to be appended. Because Fact Concerts determined that the 42d Congress did not intend for punitive damages to be assessed against a municipality in civil rights actions, 186 a court may determine that the congressional intent behind the jurisdictional statute governing civil rights actions was to disallow claims seeking this type of damages to be added by pendent jurisdiction. 187

The statute governing general federal question jurisdiction, 188 however, is also applicable to section 1983 cases. The congressional intent behind this statute, especially since the amount in controversy has been eliminated, 189 is to encourage federal question cases to be heard in federal courts. 190 Rather than forcing the plaintiff to bring the section 1983 action, a federal question, to the state court for the state claim to be adjudicated, federal courts may allow the claim to be added to determine the federal question fully, as Congress seems to have intended. 191

184. Juries would not be confused by the addition of a punitive damages claim and the federal question (§1983) would still predominate. Any existing confusion on the part of the jury may be detected through use of special verdicts. See Fed. R. Civ. P. 49.


186. 453 U.S. at 271.

187. Cf. Aldinger, 427 U.S. at 16-17. An analogous situation was involved in Teamsters Union v. Morton, 377 U.S. 252 (1964). In Morton, the Court determined that the congressional intent of the federal statute governing secondary boycotts, section 303 of the Taft-Hartley Act of 1947, 29 U.S.C. § 187 (1976), which provides for actions to recover “damages . . . sustained,” id., was to displace state law which might provide for other than actual, compensatory damages. Morton, 377 U.S. at 260-61. The Court’s interpretation of the congressional intent of this statute effectively forbade the exercise of pendent jurisdiction over state claims seeking punitive damages based on state law. Id. at 257.


190. North Dakota v. Merchants Bank & Trust Co., 634 F.2d 368, 373-74 (1980) (elimination of the amount in controversy for federal question cases demonstrates that Congress considered these suits important and pendent parties and claims intertwined with these cases should not be excluded); Irwin v. Calhoun, 522 F. Supp. 576 (D. Mass. 1981) (pendent jurisdiction exercised in section 1983 cases grounded on expansive scope of section 1331 as amended); Kedra v. City of Philadelphia, 454 F. Supp. 652 (E.D. Pa. 1978)(court has power to hear pendent claims in section 1983 case based on section 1331 but court, in its discretion, declined to exercise this power).

The fact that the addition of a claim is being sought, and not the addition of a party, demonstrates that there is no great burden being placed on the defendant or on the courts. Because few impediments are being added, the state claim should be permitted to be litigated with the federal one. The offensive party, the plaintiff, is attempting to append the claim, however. If the plaintiff initially brought the suit in federal court, the court may require the claim to be brought separately in state court since that forum is available and federal jurisdiction is not exclusive. This result, though, might undermine the congressional intent of vindicating federal claims in federal court and the state claim should be permitted in federal court. If the case were removed, plaintiff is not in federal court voluntarily, and the state claim should be heard.

The above analysis suggests that plaintiffs may utilize the doctrine of pendent jurisdiction when seeking to recover punitive damages against a municipality under applicable state law in a section 1983 claim. Other section 1983 cases seeking to assert pendent jurisdiction over other types of claims have been successful. A section 1983 case seeking to add a state claim permitting punitive damages against a municipal defendant should attain the same result.

194. See supra note 154. The Supreme Court has observed that concern for judicial economy is not as great where “the efficiency plaintiff seeks so avidly is available without question in the state courts.” Aldinger, 427 U.S. at 15 (quoting Kenrose Mfg. Co. v. Fred Whittaker Co., 512 F.2d 890, 894 (4th Cir. 1972)); see also Kroger, 437 U.S. at 376.
196. Courts’ discretionary power may also be pursued. Courts may recognize that even though the plaintiff is in an offensive posture, it is only fair to try all the claims together.
197. Again, the discretionary power of the court may play a part. The court may find it unfair to force a plaintiff who originally brought suit in state court to bear the burden, financial and otherwise, of bringing this claim in state court while litigating the original claim in the federal court.
199. Pre-Monell cases attempting to hold municipalities liable through state laws were unsuccessful. E.g., Wilcher v. Gain, 311 F. Supp. 754 (N.D. Cal. 1970). Arguably, these cases were decided wrongly and should not be dispositive. See Kates & Kouba, supra note 130, at 160-61.
V. Conclusion

In *Newport v. Fact Concerts, Inc.*\(^2\) the United States Supreme Court held that punitive damages may not be assessed against municipalities in suits brought under section 1983 of the Civil Rights Act of 1871.\(^1\) The *Fact Concerts* Court studied its prior decision of *Monell v. New York Department of Social Services*,\(^2\) which reversed *Monroe v. Pape*,\(^3\) and held that cities may be liable for violations of civil rights under section 1983. As in those cases, the *Fact Concerts* Court was concerned with carrying out the policies of section 1983. These policies were to compensate for and deter further violations of civil rights. The *Fact Concerts* Court also examined the policies behind punitive damages and found that neither the retributive or deterrent purposes of punitive damages nor the purposes behind section 1983 were served by such awards against municipal governments.

*Fact Concerts*, however, does not mean that a plaintiff is foreclosed from obtaining punitive damages from a municipal defendant. Some state laws allow such damages to be awarded. Contrary to *Fact Concerts*' blanket prohibition against it, two strategies are available when seeking to attain this type of remedy in those states which allow it: section 1988 and pendent jurisdiction.

The use of section 1988 is the strategy with less potential for success in urging that punitive damages be awarded against municipalities. The requirements of the three-part test for applying state remedies through section 1988 cannot be easily met. The court may not view the denial of punitive damages as a deficiency in the federal remedial scheme embodied in section 1988 and may find that permitting such damages destroys any uniformity that this scheme may possess. Additionally, although section 1983 is silent as to damages, the rule laid down in *Fact Concerts* may be seen as an accurate interpretation of the federal rule intended by Congress. Thus the application of a state law that permits punitive damages against a municipality may be viewed as being inconsistent with the federal rule. Punitive damages against a municipality, therefore, do not seem to be forthcoming through use of section 1988.

Use of the doctrine of pendent jurisdiction, however, may be successful as the state claim may be appended to the federal section

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1983 claim. Federal courts have power over a state claim when it arises from a common nucleus of operative fact with a substantial federal claim such that the two claims, when brought together, comprise one constitutional case unless the relevant jurisdictional statutes preclude the appending of such a state claim. Once the power of the federal court has been ascertained, however, the court still retains discretion over whether to assert pendent jurisdiction. Using this discretionary power, federal courts may determine that the state and federal claims should be heard together in a federal court. A plaintiff, therefore, might be able to collect punitive damages from a municipal defendant in this manner. Although the holding of *Fact Concerts* would seem to forbid such a result, the use of pendent jurisdiction to obtain punitive damages from municipal defendants in section 1983 actions diminishes the impact of *Fact Concerts*. Although the Court did not address the use of this judicially-created doctrine, the rights of victims of civil rights violations for whom punitive damages seem warranted or essential may be fully vindicated through its use.

Marcia E. Prussel