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Civil Rights - Municipalities - Municipalities Are Not Immune from Liability for Constitutional Violations and Cannot Raise the Good Faith of Its Officials as a Defense

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CIVIL RIGHTS — MUNICIPALITIES — MUNICIPALITIES ARE NOT IMMUNE FROM LIABILITY FOR CONSTITUTIONAL VIOLATIONS AND CANNOT RAISE THE GOOD FAITH OF ITS OFFICIALS AS A DEFENSE

Plaintiff was discharged from his position as Chief of Police for the City of Independence, Missouri.[1] He was given no reason for the dismissal[2] and received only a written notice from the city manager stating that the dismissal was made pursuant to a provision of the city charter.[3] Plaintiff subsequently brought suit[4] in federal district court under 42 U.S.C. § 1983,[5] alleging that he had been discharged under color of state law without notice of reasons

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1. Owen v. City of Independence, 445 U.S. 622, 629 (1980). Owen and the city manager had a dispute over Owen's administration of the police department property room when a handgun, listed in the property room records as having been destroyed, turned up in the possession of a felon in Kansas City, Missouri. The results of an investigation showed that the records were insufficient to permit an adequate accounting of the property room goods, but that there was no evidence of any criminal acts or of any violation of state or municipal law in the administration of the property room. The city manager then asked Owen to resign as police chief and take another position within the department. Owen refused and was subsequently discharged. The city council voted to release the investigative reports to the news media. The local press gave prominent coverage both to the city council's actions and to Owen's discharge, linking the discharge to the investigation. *Id.* at 625-29.

2. *Id.* at 629. Owen sent a letter to the city manager demanding written notice of the charges against him and a public hearing with a reasonable opportunity to respond to those charges. *Id.* at 626-27.

3. *Id.* at 629. Under section 3.3(1) of the city's charter, the city manager has sole authority to "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads of administrative departments and all other administrative officers and employees of the city." *Id.* at 625 n.2.

4. *Id.* at 630. Owen named the City of Independence, the city manager, and the members of the city council in their official capacities as defendants. *Id.*

5. 42 U.S.C. § 1983 (1976). Section 1983 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.

Id.

and without a hearing, in violation of his constitutional rights to procedural and substantive due process.[6] Plaintiff sought declaratory and injunctive relief, including backpay, a hearing on his discharge, and attorney's fees.[7] The district court entered judgment for defendants,[8] and the United States Court of Appeals for the Eighth Circuit initially reversed.[9] Defendants petitioned for review of the decision of the court of appeals. The United States Supreme Court granted certiorari and remanded for further consideration[10] in light of its decision in *Monell v. Department of Social Services.*[11] On remand, the court of appeals reaffirmed its original decision that the city had violated plaintiff's rights under the fourteenth amendment, but held that all of the defendants, including the city, were entitled to qualified immunity from liability.[12] The United States Supreme Court again granted review, and *held* that a municipality has no immunity from liability for its constitutional violations under the Civil Rights Act and may not assert the good faith of its officers as a defense.[13] *Owen v. City of Independence,* 445 U.S. 622 (1980).

The issue of municipal liability under section 1983 was first addressed by the United States Supreme Court in *Monroe v. Pape*[14] in 1961. In *Monroe,* the Court based its theory of municipal immunity from section 1983 liability upon the legislative history of the Civil Rights Act of 1871.[15] The Court's analysis focused on the

6. 445 U.S. at 630.

7. *Id.*

8. *Id.* The district court held that Owen had no property interest in his employment which would entitle him to procedural and substantive due process rights; that he was not deprived of an interest in liberty in connection with his discharge; that the city had established a good faith defense by proof of the good faith of the individual defendants who had acted as agents and officers of the city; and that section 3.3(1) of the city charter, making administrative department heads dischargeable only "when necessary for the good of the service," did not impliedly provide the police chief with right to notice and a hearing, but rather was persuasive evidence that such rights were not intended to exist. Owen v. City of Independence, 421 F. Supp. 1110, 1120-25 (W.D. Mo. 1976).

9. 445 U.S. at 631. The court of appeals agreed with the district court that, under Missouri law, Owen possessed no property interest in his continued employment as police chief. The court concluded, however, that the city's allegedly false public accusations had blackened Owen's name and reputation, thus depriving him of liberty without due process of the law. The court also ruled that the good faith of the city was not a defense. Owen v. City of Independence, 560 F.2d 925, 940 (8th Cir. 1977).

10. Owen v. City of Independence, 438 U.S. 902 (1978).

11. 436 U.S. 658 (1978).

12. Owen v. City of Independence, 589 F.2d 335 (8th Cir. 1978). The Supreme Court's decisions in Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), crystallized the rule establishing the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge. The Court, however, decided those two cases two months after the discharge in *Owen.* Thus, the court of appeals reasoned that the city officials could not have been aware of the police chief's right to a name-clearing hearing and that the city should not be charged with predicting the future course of constitutional law. Therefore, the court extended the limited immunity which the district court had applied to the individual defendants to cover the city as well, because the officials acted in good faith and without malice. 589 F.2d at 337-38.

13. 445 U.S. at 657.

14. 365 U.S. 167 (1961).

15. Monroe v. Pape, 365 U.S. 167, 187-91 (1961). The Civil Rights Act of 1871 was enacted to

congressional debates on the Sherman Amendment, which would have made municipalities liable for damages to any persons injured by "persons riotously or tumultously assembled together" with the intent to deprive anyone of their constitutional rights.[16] In light of the amendment's defeat,[17] the *Monroe* Court held that "[t]he response of Congress to the proposal to make municipalities liable for certain actions . . . was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."[18] The Court concluded that local governments were not intended to be among the "persons" to whom section 1983 liability applies.[19]

In subsequent cases, the Court rejected attempts to modify *Monroe,* and municipal liability under section 1983 continued to be barred.[20] Precluded from asserting a section 1983 cause of action under *Monroe,* individuals brought suit against municipalities

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enforce the provisions of the fourteenth amendment. Section 1 of the 1871 Act is now codified in 42 U.S.C. § 1983 (1976).

16. 365 U.S. at 188 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871)). As originally proposed, the Sherman Amendment provided:

> That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city or parish. Any execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city or parish, and the said county, city or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

365 U.S. at 188 n.38 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871)). As originally introduced by the Senate, the amendment would have held all inhabitants of a municipality liable for civil rights violations occurring within the municipality. When this version was rejected by the House of Representatives, the Conference Committee substituted a version which would have made the government liable for damages assessed against its own inhabitants if the judgment was not satisfied by the inhabitants who had committed the deprivation of civil rights. 24 VILL. L. REV. 1008, 1011-12 (1979) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 725 (1871)).

17. 24 VILL. L. REV. 1008, 1011-12 (1979). The House rejected the substituted amendment as well. As finally promulgated, the Sherman Amendment contained no reference to municipal liability. *Id.* at 1012.

18. 365 U.S. at 191.

19. *Id.* at 191-92.

20. *See, e.g.,* City of Kenosha v. Bruno, 412 U.S. 507 (1973) (section 1983 cannot support action for injunction against city); Moor v. County of Alameda, 411 U.S. 693 (1973) (section 1983 cannot be used in conjunction with section 1988 to sustain damage action against county that could be held liable under state law).

directly under the Constitution,[21] invoking the theory developed in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.*[22] The *Bivens* Court held that, absent a statutory remedy, courts have inherent power to fashion common-law remedies for constitutional wrongs.[23] Therefore, the Court in *Bivens* based its decision upon the principle that for every violation of a federally guaranteed right there should be an appropriate remedy.[24]

Relief came to individuals whose constitutional rights had been violated by municipal actions in *Monell v. Department of Social Services,*[25] in which the Supreme Court expressly rejected the *Monroe* holding that "local governments were not among the 'persons' to whom 42 U.S.C. § 1983 applies and were therefore wholly immune from suit under the statute."[26] In *Monell,* the Supreme Court re-evaluated the legislative history surrounding the Sherman Amendment and concluded that the *Monroe* Court had misconstrued the intent of Congress.[27] The Court in *Monell* attributed the defeat of the Sherman Amendment to the reluctance of Congress to "obligate municipal corporations to keep the peace if those corporations were neither so obligated nor so authorized by their state charters."[28] Congress feared that to confer liability on a municipality for damages caused by unauthorized acts of private persons would be beyond the scope of its constitutional power.[29] The Court in *Monell* observed, however, that no one doubted

21. Note, *Monell v. Department of Social Services: One Step Forward and a Half Step Back for Municipal Liability Under Section 1983,* 7 HOFSTRA L. REV. 893, 899 (1979).

22. 403 U.S. 388 (1971). Federal jurisdiction in a *Bivens*-type action was provided in 28 U.S.C. § 1331, which required a federal question and at least $10,000 in controversy. 403 U.S. at 398 (Harlan, J., concurring). The $10,000 in controversy requirement was dropped in 1980. Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 stat. 2369 (codified at 28 U.S.C.A. § 1331 (West Supp. 1980)).

23. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 390-97 (1971). The facts of *Bivens* precluded application of section 1983. The plaintiff had claimed injuries resulting from his arrest without probable cause and with the use of unreasonable force by agents of the Federal Bureau of Narcotics. Even if the agents' conduct had been found to violate the fourth amendment, no statutory relief was available. Section 1983 did not provide relief for wrongful actions of a federal agency, because by its terms it applies only to unconstitutional actions committed under color of state law. The Court in *Bivens* rejected the defendants' argument that in the absence of a federal statutory remedy only state remedies should apply by stating that a federal cause of action could be based directly upon the fourth amendment. The Court concluded that a cause of action for damages is a "remedial action normally available in the federal courts." *Id.*

24. *Id.* at 397.

25. 436 U.S. 658 (1978). The plaintiffs, female employees of New York City's Department of Social Services and Board of Education, were required by official policy to take an unpaid leave of absence beginning in their fifth month of pregnancy. Plaintiffs, in a class action suit under section 1983, alleged that the forced maternity leave policy violated their constitutional rights. *Id.* at 660-62.

26. 445 U.S. at 624.

27. Monell v. Department of Social Servs., 436 U.S. 658, 700 (1978). The Court stated: "A fresh analysis of debate on the Civil Rights Act of 1871, and particularly of the case law which each side mustered in its support, shows, however, that *Monroe* incorrectly equated the 'obligation' [contained in the Sherman Amendment] . . . with 'civil liability' [under section 1983]." *Id.* at 665.

28. *Id.* at 668.

29. *Id.* The Court considered the constitutional arguments of both the supporters and opponents of the Sherman Amendment, and pointed out that the debates on the amendment focused on whether Congress had the power to create an obligation that municipalities keep the peace. *Id.* at

Congress's ability under the fourteenth amendment to impose liability upon municipalities when the municipality itself infringed federal rights.[30] Thus, the Court found that the Congressional debate over the Sherman Amendment could not support the inference that municipalities were intended to be immune from liability under section 1983.[31]

The *Monell* Court also considered whether the general language describing those liable under section 1983 — "any person" — could be read to encompass municipalities. *Monell* overruled the determination in *Monroe* that the "word 'person' in the Civil Rights Act did not include municipalities."[32] The Court found that the legislative discussion of section 1983 unequivocally supported the position that section 1983 was intended to cover legal persons — including municipal corporations — as well as natural persons.[33] Therefore, because municipalities were "persons," they were subject to suit directly under section 1983.[34]

By permitting actions against municipalities under section 1983, the *Monell* Court was forced to decide whether the doctrine of *respondeat superior* was applicable.[35] The Court held that "a municipality cannot be held liable *solely* because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under section 1983 on a *respondeat superior* theory."[36] Thus, a municipality, through an ordinance, regulation, custom, or policy, must directly cause its employee to violate a constitutional right before the municipality may be held liable for that employee's conduct.[37]

669-73.

30. *Id.* at 669. The debate on the Sherman Amendment "shows conclusively that the constitutional objections raised . . . would not have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights." *Id.*

31. *Id.* at 683.

32. *Id.* at 700. The Court reached this conclusion after examining the debates on section 1 of the Civil Rights Act of 1871. Section 1 was later codified as section 1983, and was distinct from the Sherman Amendment. Note, *Municipal Immunity Withdrawn — Qualified Immunity Left As a Possibility*, 1979 WIS. L. REV. 943, 946.

33. 436 U.S. at 683. The Court's finding was apparently based on the following considerations:

> (1) the broad remedial goals of section 1983; (2) statements made by members of Congress that actions by cities were redressable under section 1983; (3) the state of the law concerning municipal corporations in 1871; and (4) the definition of the word "person" in the Dictionary Act of 1871, which provided that unless the context indicated to the contrary, the word "person" may be applied to "bodies politic and corporate."

24 VILL. L. REV. 1008, 1022 (1979); *see* 436 U.S. at 685-88.

34. 436 U.S. at 690.

35. *See* W. PROSSER, THE LAW OF TORTS § 70, at 464 (4th ed. 1971). The doctrine of *respondeat superior*, or "vicarious liability," holds an employer liable for negligent and intentional torts committed by his employees within the scope of their employment. *Id.*

36. 436 U.S. at 691.

37. *Id.* at 694.

The Court in *Monell* did not decide whether some form of qualified immunity should be afforded municipalities,[38] and expressly refused to address "what the full contours of municipal liability under section 1983 may be."[39] Instead, it reserved judgment on whether local governments, although not entitled to absolute immunity, should be afforded some form of official immunity in section 1983 suits. Therefore, the Court held that local governments were no longer immune from liability under section 1983 when the execution or implementation of one of its policies, rules, or regulations violates a person's constitutional right, but local governments remained partially immune under the doctrine of *respondeat superior.*[40] The Court refused, however, to address the degree of immunity to be afforded a local governmental entity.[41]

The scope of a municipality's immunity from liability under section 1983 was finally addressed in *Owen v. City of Independence.*[42] In *Owen,* the city argued that, because its officials had acted in good faith when the plaintiff was discharged from his position as police chief, it was therefore immune from liability under section 1983. The United States Supreme Cout rejected the city's assertion, holding that municipalities are not entitled to rely on the good faith of their officers as a defense in a 1983 action.[43] The Court began its analysis with the language of the statute itself, since the scope of a municipality's immunity from liability under section 1983 is essentially a question of statutory construction.[44] By its terms, section 1983 "creates a species of tort liability that on its face admits no immunities."[45] The statute's language is absolute and unqualified, with no mention of any privileges, immunities, or defenses that may be asserted.[46] The *Owen* Court noted that the statute imposes liability on "every person," and, as previously held, these words were intended to encompass municipal

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38. *Id.* at 701. The Court stated:

> Since the question whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided . . . , we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity.

Id.

39. *Id.* at 695.
40. *Id.* at 690-91.
41. *Id.* at 701.
42. 445 U.S. 622 (1980).
43. *Id.* at 638.
44. *Id.* at 635. *See* Andrus v. Allard, 444 U.S. 51, 56 (1979); Wood v. Strickland, 420 U.S. 308, 314 (1975).
45. 445 U.S. at 635 (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).
46. 445 U.S. at 635.

corporations as well as natural persons.[47] The Court also examined the legislative history surrounding the passage of section 1 of the Civil Rights Act of 1871,[48] and concurred with the conclusion in *Monell* that the expansive sweep of the language in section 1983 should be read as a broad remedy for violations of federally protected rights.[49]

The *Owen* Court noted that there have been several recent decisions in which the scope of immunity under section 1983 for state and local officials has been determined.[50] In each of these cases, the finding of section 1983 immunity was predicated upon "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."[51] When the immunity claimed was well established at common law at the time section 1983 was enacted, and when its rationale was compatible with the Civil Rights Act, the Court noted that it has construed the statute to incorporate such immunity.[52] The Court found, however, that there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of section 1983 that would accord qualified immunity to a city.[53]

The *Owen* Court recognized that two doctrines exist which do afford municipal corporations some measure of protection from tort liability.[54] The first doctrine creates a distinction between a

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47. *Id. See* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

48. 445 U.S. at 635-36. Section 1 of the Civil Rights Act of 1871 was the forerunner of section 1983. *Id.* at 635.

49. *Id.* at 636. The Court focused on the remarks of Representative Shellabarger, the author of the bill in the House, explaining the breadth of construction the Act was to receive:

> I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Id. (quoting CONG. GLOBE, 42d Cong., 1st Sess., App. 68 (1871)).

50. 445 U.S. at 637. *See* Procunier v. Navarette, 434 U.S. 555 (1978) (qualified immunity for prison officials and officers); Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute immunity for prosecutors in initiating and presenting the State's cases); O'Connor v. Donaldson, 422 U.S. 563 (1975) (qualified immunity for superintendent of state hospital); Wood v. Strickland, 420 U.S. 308 (1975) (qualified immunity for local school board members); Scheuer v. Rhodes, 416 U.S. 232 (1974) (qualified good faith immunity for governor and other state executive officers for discretionary acts performed in the course of official conduct).

51. 445 U.S. at 638 (quoting Imbler v. Pachtman, 424 U.S. 409, 421 (1976)).

52. 445 U.S. at 638.

53. *Id.*

54. *Id.* at 644.

municipality's governmental and proprietary functions,[55] and provides that the municipality's common-law immunity for governmental functions is derived from the principle of sovereign immunity.[56] The Court reasoned that, because sovereign immunity insulates municipalities from unconsented suits altogether, the presence or absence of good faith is irrelevant and therefore cannot serve as a basis for qualified immunity.[57]

The second doctrine recognized in *Owen* which protects municipalities from tort liability creates a distinction between the discretionary and ministerial activities of a municipality.[58] This doctrine was not based upon the principle of sovereign immunity, but upon a concern for separation of powers.[59] At common law, this doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality.[60] The *Owen* Court stated, however, that a municipality has no "discretion to violate the Federal Constitution: its dictates are imperative and absolute."[61] The Court concluded that this doctrine therefore could not serve as the foundation for a municipality's claimed good faith immunity under section 1983.[62] Thus, through statutory construction and consideration of the two traditional doctrines of tort liability for municipalities, the Court discerned no well-grounded tradition or reason to extend qualified immunity to municipalities based upon the good faith of their officers.[63]

The *Owen* Court also took into account public policy

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55. *See* 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 53.23-.24 (3d rev. ed. 1977) [hereinafter cited as MCQUILLIN]. A municipality is liable for negligence to the same extent as a private corporation or individual in the exercise of its proprietary functions. A municipality is not, however, liable for injuries resulting from the wrongful acts of its officers in the exercise of strictly governmental functions. *Id.*

56. 445 U.S. at 647.

57. *Id.* The immunity granted at common law for governmental functions is thus more comparable to an absolute immunity from liability for conduct of a certain character, which defeats a suit at the outset, than to a qualified immunity, which "depends upon the circumstances and motivations of [the official's] actions, as established by the evidence at trial." Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976).

58. 445 U.S. at 644. *See* 18 MCQUILLIN, *supra* note 55, at §§ 53.22(a)-(g). When the duty is ministerial, the municipal corporation is liable for damages arising due to a failure to perform the duty, or for negligence in its execution. When the duty is discretionary, there is no liability for failure to exercise it or for errors of judgment in the exercise thereof. *Id.*

59. 445 U.S. at 648.

60. *Id.* at 649.

61. *Id.* The Court also stated that when any court passes judgment on a municipality's conduct in a section 1983 action it does not attempt to second guess the reasonableness of the city's decision or attempt to interfere with the government's resolution of competing policy considerations. Rather, it considers only whether the municipality has conformed to the requirements of the federal constitution and statutes. *Id.*

62. *Id.*

63. *Id.* at 650. The Court was unwilling to suppose that injuries which resulted from a municipality's unconstitutional conduct were not meant to be fully redressable through the sweep of section 1983. *Id.*

considerations and the legislative purposes for enacting the statute.[64] The Court found that the main purpose of the Civil Rights Act was to provide protection to those persons wronged by the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[65] The Court determined that it would be "uniquely amiss" if the government itself—" 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' — were permitted to disavow liability for the injury it has begotten."[66] Since many individual officials already enjoy qualified immunity from liability, many victims of municipal malfeasance would be left without a remedy if the city were allowed to assert the good faith of its officials as a defense.[67]

The *Owen* Court reasoned that section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations as well.[68] A damage award against a municipality would act as a deterrent, and would thereby encourage stricter policies and closer supervision of "officials who may doubt the lawfulness of their intended actions."[69] Because of potential liability, officials presumably will now be more protective of citizens' constitutional rights.[70]

Finally, the Court reasoned that the public policy considerations which demand that municipal officials be given a measure of protection from personal liability are less compelling, and may be inapplicable, when the liability of a municipal entity is at issue.[71] The Court cited *Scheuer v. Rhodes,*[72] in which the Court identified two mutually dependent rationales upon which the doctrine of official immunity rested. The rationales noted in *Scheuer*

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64. *Id.*

65. *Id.* (quoting Monroe v. Pape, 365 U.S. 167, 184 (1961)). By creating an express federal remedy, Congress sought to enforce provisions of the fourteenth amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it. 365 U.S. at 171-72.

66. 445 U.S. at 651 (quoting Adickes v. Kress & Co., 398 U.S. 144, 190 (1970) (state-enforced custom requiring racial segregation in restaurants established section 1983 claim)).

67. 445 U.S. at 651.

68. *Id. See* Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978) (Louisiana survivorship law does not adversely affect section 1983's role in preventing official illegality); Carey v. Piphus, 435 U.S. 247, 256-57 (1978) (students suspended from school without procedural due process entitled to recover only nominal damages).

69. 445 U.S. at 652.

70. *Id.* The threat that damages might be levied against the city may encourage those in policymaking positions to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. *Id.*

71. *Id.* at 653.

72. 416 U.S. 232 (1974).

were the injustice of subjecting an officer who is required by law to exercise discretion to liability, particularly in the absence of bad faith, and "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and judgment required by the public good."[73] The *Owen* Court reasoned that the first consideration is inapplicable when the damage award does not come from the official's pocket, but rather comes from the public treasury.[74] It is hardly unjust, noted the Court, to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered.[75] In fact, the Court stated, Congress enacted section 1983 precisely to provide a remedy for such abuses of official power.[76]

The Court then determined that the second rationale in *Scheuer* also loses its force when a municipality's liability, rather than an official's liability, is at issue.[77] The *Owen* Court noted that the inhibiting effect on an official's decisiveness during the decisionmaking process is significantly reduced when the threat of personal liability is removed.[78] It is also questionable whether potential municipal loss will deter a public officer from the conscientious exercise of his duties.[79] The Court reasoned that a decisionmaker would in fact be derelict in his duties if at some point he did not consider whether his decisions were in agreement with the Constitution and weigh the risk that a constitutional violation might result in a damage award from the public treasury.[80] Therefore, based upon statutory construction, common law, legislative intent, and public policy, the *Owen* Court concluded that a municipality has no immunity from liability for its constitutional

73. 445 U.S. at 654 (quoting Scheuer v. Rhodes, 416 U.S. 232, 240 (1974)). *See also* Wood v. Strickland, 420 U.S. 308, 320 (1978). In *Wood,* the Court mentioned a third justification for extending qualified immunity to public officials: the fear that the threat of personal liability might deter citizens from holding public office. *Id.*

74. 445 U.S. at 654.

75. *Id.* The Court noted the common argument that revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers, especially when the municipality has at all times acted in good faith. The Court dismissed this argument, reasoning that it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. *Id.* at 654-55.

76. *Id.* at 654. *See* Monroe v. Pape, 365 U.S. 167, 171-72 (1961).

77. 445 U.S. at 655.

78. *Id.* at 656.

79. *Id.* In fact, stated the Court, city officials routinely make decisions which either require a large expenditure of municipal funds or involve a substantial risk of depleting municipal funds. *Id.*

80. *Id.* As one commentator has aptly noted:

> Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'etre.*

Note, *Developments in the Law: Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1224 (1977).

violations under section 1983 and may not rely upon the good faith of its officers as a defense.[81]

The implication of the *Owen* decision is that governmental bodies will increasingly be required to respond to the substance of charges that they have acted in an unconstitutional manner. After *Owen,* victims of unconstitutional acts will have a greater likelihood of recovery because they will now have a cause of action against the municipal entity, and not only against the local officials, who are entitled to immunity if they have acted in good faith.[82] The decision also establishes that good faith will not be a defense for municipalities, even if the action taken was valid under then-current law but is later determined to be unconstitutional.[83] This expanded liability may result in a financial strain on some local governments. A ruinous judgment under section 1983 could imperil a municipality's financial stability, and thereby severely limit its ability to serve the public.[84] The need for municipalities to insulate their treasuries through insurance or liability limitations will be imperative.

The holding in *Owen* conflicts with the current law in forty-four states. Each of these jurisdictions provides municipal immunity analogous to the good faith defense against liability for constitutional torts.[85] North Dakota law creates municipal tort immunity, but bars recovery for injuries caused by discretionary acts or by the good faith execution of a validly enacted, although unconstitutional, regulation.[86] This is the form of qualified

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81. 445 U.S. at 657.

82. Scheuer v. Rhodes, 416 U.S. 232, 247-49 (1974).

83. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972). In *Roth* and *Perry,* the Supreme Court crystallized the rule establishing the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge. The Court decided these two cases two months after Owen had been discharged as chief of police. The city council of Independence could not have been expected to predict the *Perry* and *Roth* decisions. While that might excuse officials from liability, the Court held that it offered no excuse for the City. 445 U.S. at 655.

84. 445 U.S. at 670 (Powell, J., dissenting).

85. *Id.* at 680-83. Twelve states have laws creating municipal tort liability but which bar damages for injuries caused by discretionary decisions or by the good faith execution of validly enacted, although unconstitutional, regulations. Five states have retained the governmental/proprietary distinction, while two states grant even broader protection for municipal corporations. Statutes in four states protect local governments from tort liability except for particular injuries, such as those due to motor vehicle accidents or negligent maintenance of public facilities. In one state, local governments are not liable for injuries caused by the execution with due care of any officially enacted statute or regulation. Sixteen states follow the traditional rule disallowing recovery for damages resulting from discretionary decisions which are made within authority granted to particular officers or organs of government. In four states, local governments enjoy complete immunity from tort actions unless they are covered by liability insurance. Only five states impose the blanket liability construed by the *Owen* court. *Id.*

86. N.D. CENT. CODE § 32-12.1-03(3) (a) (Supp. 1979). Subsection (3) (a) provides:

> 3. A political subdivision shall not be liable for any claim based upon an act or omission of an employee of a political subdivision, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid,

immunity which has been granted to executive officials under section 1983,[87] but which now cannot be extended to municipalities under *Owen*.[88] Therefore, it appears that the North Dakota statute may be invalid under the *Owen* standards.

The *Owen* decision chips away at the already eroded historical concept of sovereign immunity. The holding, however, is in keeping with current notions of governmental responsibility: the innocent individual who has been harmed by an abuse of governmental authority should be, and now may be, compensated for his injury.

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or based upon the exercise or performance, exercising due care, or the failure to exercise or perform a discretionary function or duty on the part of a political subdivision or its employees, whether or not the discretion involved be abused. Specifically, a political subdivision or an employee thereof shall not be liable for any claim which results from:

a. The decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, charter, ordinance, order, regulation, resolution, or resolve.

Id.

87. *See, e.g.*, Procunier v. Navarette, 434 U.S. 555 (1978) (qualified immunity for prison officials and officers); Wood v. Strickland, 420 U.S. 308 (1975) (qualified immunity for local school board members).

88. 445 U.S. at 638.