

OWEN v. CITY OF INDEPENDENCE: THE DEMISE OF MUNICIPAL IMMUNITY

Traditionally, courts have granted municipalities absolute immunity for their governmental and discretionary actions.¹ Civil liability in tort attached only for a municipality's proprietary and ministerial acts.² Recently, some lower federal courts have accorded municipali-

1. Common law municipal immunity originated in *Russell v. Men of Devon*, 2 Term. Rptr. 667, 100 Eng. Rep. 359 (1788) (town immune because unincorporated and no funds from which to pay claims). See Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 438 (1941). *Mower v. Leicester*, 9 Mass. 247 (1812), incorporated the immunity doctrine into American common law. The court in *Bailey v. New York*, 3 Hill 531 (N.Y. 1842), first distinguished between governmental and proprietary (or corporate) actions, imposing liability only for the latter. See generally J. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATION, 708-19 (1872); C. ELLIOT, THE PRINCIPLES OF THE LAW OF PUBLIC CORPORATIONS, ch. 16 (1898); 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 53.02b-.59 (3d ed. 1977); C. RHYNE, MUNICIPAL LAW, 730-38 (1957); T. SHEARMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE, ch. 8 (2d ed. 1870); James, *Tort Liability of Governmental Units and their Officers*, 22 U. CHI. L. REV. 610, 622 (1955) [hereinafter cited as James]. Courts also immunized municipalities from liability for exercises of discretion. See generally Jaffe, *Suits Against Governments and Officers—Damage Remedies*, 77 HARV. L. REV. 209, 218-25 (1963) [hereinafter cited as Jaffe]. Thus, for a time, the common law accorded municipalities absolute immunity from tort liability. Later, some courts immunized municipalities from liability for governmental acts. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 720-21 (1978) (Rehnquist, J., dissenting) (“[T]he state courts did not speak with a single voice with regard to the tort immunity of municipal corporations.”); *Sala v. County of Suffolk*, 604 F.2d 207, 211 n.5 (2d Cir. 1979). See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 978-79 (4th ed. 1971) [hereinafter cited as W. PROSSER]; Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 142 (1972) [hereinafter cited as Kates & Kouba]; Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L. F. 795, 801.

2. Municipal liability developed in several areas. See generally K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 25.07 (1956); E. HARPER & F. JAMES, THE LAW OF TORTS, § 29.6 (1956); W. PROSSER, *supra* note 1, at 970-87; Kates & Kouba, *supra* note 1, at 143. Cities were routinely sued in tort in both federal and state courts. See *Monell v. Department of Social Services of New York*, 436 U.S. 658, 687-88 (1978); *cf.* *Cowles v. Mercer Co.*, 74 U.S. (7 Wall.) 118 (1868) (state-created corporation could be sued in federal court). Courts entertained constitutional violation suits against cities, including suits brought under the Contract Clause. *E.g.*, *Benbow v. Iowa City*, 74 U.S. (7 Wall.) 313 (1869); *Weber v. Lee County*, 73 U.S. (6 Wall.) 210

ties a qualified "good faith" immunity³ for civil rights violations⁴ under § 1983, Sec. 1 of the Civil Rights Act of 1871,⁵ as long as the responsible municipal official acted in good faith. In *Owen v. City of Independence*,⁶ the United States Supreme Court eliminated "good faith" municipal immunity under § 1983, holding that a municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.⁷

In *Owen*, by unanimous resolution of the city council, the City of Independence publicly released an allegedly false statement impugning the police chief's honesty and integrity.⁸ The city manager

(1867); Board of Comm'rs v. Aspinwall, 65 U.S. (24 How.) 376 (1860). See generally 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-68, chs. 17-18 (1971). Courts also heard actions against municipalities for federal statutory violations. See, e.g., Levy Court v. Coroner, 2 U.S. (2 Wall.) 501 (1864); Mayor of New York v. Ransom, 67 U.S. (23 How.) 487 (1859).

3. Since *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), discussed in notes 30-33 and accompanying text *infra*, federal courts have tried to delineate the parameters of municipal immunity under § 1983. See notes 34-43 and accompanying text *infra*.

4. Commentators term these violations "constitutional torts" because they violate constitutional rights, common law tort duties, and statutorily protected rights. See Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 Nw. U. L. REV. 277, 323-23 (1965).

5. Enacted by the Forty-Second Congress as Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (Supp. III 1979)), the section today provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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. See notes 20-22 and accompanying text *infra*.

6. 445 U.S. 622 (1980).

7. *Id.* at 638.

8. At a regularly scheduled city council meeting, city councilman Roberts read copies of confidential city counselor reports of police department property room "discrepancies." *Id.* at 627. Roberts charged that Owen, the Chief of Police, had misappropriated police department property, allowed narcotics and money to disappear, mysteriously allowed impounded firearms to reach the hands of felons, and manipulated traffic tickets. *Id.* at 627 n.5, 628-29. Roberts moved that the council publicly release the reports and give them to the county prosecutor for presentation to the grand jury, and that the city manager take all appropriate action against those involved. *Id.* at 629. The city council passed the resolution. *Id.* at 630. The grand jury, however, returned a no true bill, and the reports were never publicly released. *Id.* at 629.

discharged the chief the next day.⁹ The council's accusations and the chief's discharge garnered extensive press coverage.¹⁰ Although the accusations did not actually cause the discharge, the temporal sequence of events created an inference of causation in the eyes of the public.¹¹ The city twice refused the chief's requests for written speci-

9. After hearing informal reports of "discrepancies" in police department property room administration, city manager Alberg instituted an official investigation through the city counselor's office. The confidential investigative reports stated that no evidence warranted accusations of illegal or immoral activity. *Id.* at 625-26. Alberg then unilaterally decided to discharge Owen. Four days before Owen's discharge, Alberg issued a public statement in which he stated that no evidence supported allegations of illegal activity, and that he had initiated administrative correction. *Id.* at 626. Alberg discharged Owen the day after the council's resolution without providing reasons for his action, except that he acted pursuant to City of Independence Charter § 3.3(1), which gave the city manager authority to hire and fire department heads at his discretion. *Id.* at 629.

10. *Id.* at 629 n.8.

11. The trial and appellate courts disagreed whether the city actually deprived police chief Owen of his constitutionally protected liberty interest. *Owen v. City of Independence*, 421 F. Supp. 1110 (W.D. Mo. 1976), *aff'd in part and rev'd in part*, 560 F.2d 925 (8th Cir. 1977), *vacated*, 438 U.S. 902 (for remand in light of *Monell*), *on remand*, 589 F.2d 335 (8th Cir. 1978), *rev'd*, 445 U.S. 622 (1980). The district court found that the city did not deprive Owen of his liberty interest because the city's allegedly stigmatizing actions did not directly cause Owen's discharge. 421 F. Supp. at 1121-22. The court of appeals disagreed. It found that the city *did* violate Owen's liberty interest because the city's allegedly false accusations blackened Owen's name and reputation. While the stigmatizing charges were not included in the city manager's official discharge notice, official city council action released the charges against Owen contemporaneously which, in the eyes of the public, connected the charges with Owen's dismissal. 560 F.2d at 937. While the court of appeals on remand and the Supreme Court agreed with the district court's recital of the facts, both agreed with the court of appeals' original factual interpretation.

The Supreme Court dissent agreed with the district court's original factual interpretation. On the merits, the dissent emphasized that the city had no knowledge or notice that its actions violated Owen's rights because the Supreme Court did not decide that employees stigmatized in the course of discharge were entitled to a name clearing hearing until two months *after* Owen's dismissal. *Owen v. City of Independence*, 445 U.S. 622, 658-64 (1980). *See Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972) (Powell, J., dissenting). *See generally* Nelson, Harding, Yeutter, Leonard, and Tate, *Discharge from Public Employment and the Right to Procedural Due Process*, 4 CURRENT MUNICIPAL PROB. 432 (1977).

For cases where fact patterns lacked constitutional violations, see, e.g., *Martinez v. California*, 444 U.S. 277 (1980) (no causal relation between injuries and actions of defendants); *Codd v. Velger*, 429 U.S. 642 (1977) (no stigma proved); *Bishop v. Wood*, 426 U.S. 341 (1976) (no hearing required after discharge of employee whose position terminable at will of employer); *Paul v. Davis*, 424 U.S. 693 (1976) (no constitutional violation in course of termination of employment); *Rizzo v. Godde*, 423 U.S. 362 (1976) (no causal link between alleged unconstitutional policy and alleged constitutional violations); *Adickes v. S.H. Kress & Co.* 398 U.S. 144 (1970) (no proof

fication of the charges against him and an opportunity to clear his name.¹² Because the city's actions allegedly blackened the chief's name and reputation, he sued the city for the deprivation of his fourteenth amendment liberty interest without due process of law.¹³ The Supreme Court held that the city was not immune from liability under § 1983. In so holding, the Court advanced four rationales: first, the statute's remedial nature protected those wronged by the abuse of governmental authority;¹⁴ second, § 1983 on its face granted no immunities;¹⁵ third, denial of immunity would deter future civil rights violations;¹⁶ and lastly, public policy dictated that the municipality, and not the victim, should bear the cost of civil rights violations.¹⁷

that defendant acted under custom or usage having force of law); *Stringer v. City of Chicago*, 464 F. Supp. 887 (N.D. Ill. 1979) (complaint stated no connection between city and alleged misconduct). See generally Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974); Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L.R. 304 (1979).

12. Shortly after Alberg informed Owen of his dismissal, Owen requested specification of the reasons and charges warranting his discharge, but Alberg ignored the request. 445 U.S. at 629. The city and Alberg also denied Owen's subsequent request for an appeal of the discharge decision, claiming that the city charter and ordinances provided no appellate procedure for dismissals. *Id.*

13. As part of his action, Owen claimed a potential employer refused to hire him because of the notoriety aroused by the circumstances of his discharge. 421 F. Supp. at 1117.

14. 445 U.S. at 650-51.

15. *Id.* at 635. *Accord*, *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities.").

16. 445 U.S. at 651-52.

17. *Id.* at 654-57. Public policy dictates that the entity which causes the loss should bear the loss. *Kates & Kouba*, *supra* note 1, at 138. See generally Levinson, *Suing Political Subdivisions in Federal Court: From Edelman to Owen*, 11 U. TOL. L. REV. 829 (1980) [hereinafter cited as Levinson]. Because a governmental entity is better able to pay the costs of maladministration than is an injured victim, *Kates & Kouba*, *supra* note 1, at 136-38; Levinson, *supra* at 858, less compelling reasons exist to protect the entity for acts characterized as official policy of that entity. See Note, *Monell v. Department of Social Services: The Emergence of Municipal Liability under 42 U.S.C. § 1983*, 8 CAP. U. L. REV. 103 (1978) [hereinafter cited as *Monell: Emergence*]. Additionally, municipal corporations are better able to prepare for liability by planning and acquiring privately or publicly financed insurance coverage as a cost of doing business. *Kates & Kouba*, *supra* note 1, at 143; Note, *Local Governments Can Be Sued Directly Under 42 U.S.C. § 1983 where Unconstitutional Action is Pursuant to Government Custom or Implements Official Policy*, 10 TEX. TECH. L. REV. 145, 163-64 (1979) [hereinafter cited as *Local Government Suits*]. See note 38 and accompanying text *infra*. See generally, K. DAVIS, *supra* note 2, at § 25.17 (Supp. 1970); W. PROS-

At common law, courts granted municipalities immunity from civil liability for their governmental or discretionary acts.¹⁸ Liability attached only for proprietary or ministerial acts.¹⁹ To establish a federal cause of action for victims of civil rights deprivations, Congress enacted section 1 of the Civil Rights Act of 1871 (§ 1983).²⁰ In passing § 1983, Congress sought to protect those Fourteenth Amendment rights that states were unable to enforce or unwilling to uphold.²¹ While § 1983 does not expressly incorporate immunities, courts have construed it to incorporate traditional common law immunities.²²

Courts recognize four causes of action by which victims of civil rights deprivations may obtain relief from municipalities. Three may be brought under § 1983. First, the victim may sue the municipality for damages.²³ Second, the victim may sue the municipality for equi-

SER, *supra* note 1, at 970-987; Calibresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1967); Jaffe, *supra* note 1, at 213-18; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1218-19 (1977) [hereinafter cited as *Developments—§ 1983 and Federalism*].

18. See note 1 *supra*.

19. See note 2 *supra*.

20. See note 5 *supra*. The Forty-Second Congress passed section one with little debate, leaving no direct legislative history about the scope of liability or immunity under § 1983. Kates & Kouba, *supra* note 1, at 132-33; *Developments—§ 1983 and Federalism*, *supra* note 17, at 1192; Comment, *Municipal Liability and Section 1983 for Civil Rights Violations after Monell*, 64 IOWA L. REV. 1032 (1979) [hereinafter cited as *Liability after Monell*]. See generally, Levin, *The Section 1983 Municipal Liability Doctrine*, 65 GEO. L.J. 1483 (1977) [hereinafter cited as Levin]; Levinson, *supra* note 17, at 855 & n.19; Shapo, *supra* note 4.

21. Congress passed the Civil Rights Act of 1871, popularly called the Ku Klux Klan Act, to protect blacks in the South from violence which violated their civil rights under the newly-enacted Fourteenth Amendment. Two purposes of the Act were to provide compensation to victims of past abuses, and to deter future constitutional deprivations. *Owen v. City of Independence*, 445 U.S. at 651. See Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); *Carey v. Phipps*, 435 U.S. 247, 256-57 (1978).

22. "The Supreme Court has read § 1983 as incorporating common law immunities when it finds that the same considerations of public policy that underlie the common law rule likewise countenance immunity under § 1983." *Bertot v. School Dist. No. 1, Albany County*, 613 F.2d 245, 248 (10th Cir. 1979); accord *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) ("[S]ection 1983 is to be read in harmony with general principles of tort immunities and defenses . . ."). See generally, *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). See also Schnapper, *Civil Rights Litigation after Monell*, 79 COLUM. L. REV. 213, 247 (1979) [hereinafter cited as Schnapper].

23. See notes 30-32 *infra* and accompanying text.

table relief.²⁴ Third, the victim may recover indirectly from the municipality by suing the municipal official or agent, who, acting within an official capacity, was responsible for the civil rights deprivation. If an indemnity contract exists, the municipality may indemnify the official or agent for payment of the judgment.²⁵ Lastly, ignoring

24. See *Diamond v. Pitches*, 411 F.2d 565 (9th Cir. 1969) (action by prison inmate for damages and injunction against state, county, sheriff, and male nurse); *Deane Hill Country Club, Inc. v. Knoxville*, 379 F.2d 321, 323-24 (6th Cir. 1967), *cert. denied*, 389 U.S. 975 (1967) (action to enjoin enforcement of annexation ordinance, and to recover from city amount of taxes exacted on annexed property); *Patton v. Bennett*, 304 F. Supp. 297, 299 (E.D. Tenn. 1969) (action by student against teacher, board of education, and member of board to enjoin violation of civil rights). *But see, e.g.*, *Harkless v. Sweeney Independent School Dist.*, 427 F.2d 319 (5th Cir. 1970) (action to enjoin school district to renew contracts and receive backpay for alleged racial discrimination); *Adams v. City of Park Ridge*, 293 F.2d 585 (7th Cir. 1961) (action to enjoin enforcement of alleged discriminatory regulation of charitable solicitations).

The Supreme Court rejected § 1983 injunctive relief against municipalities by extending the *Monroe* non-person rule, *see* notes 27-29 and accompanying text *infra*, which eliminated municipalities from damage liability under § 1983. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973) (§ 1983 cannot support action for injunction against a city). *Cf. Moor v. County of Alameda*, 411 U.S. 693 (1973) (§ 1983 cannot be the basis of a damage action against a county which could be held liable under state law). *See generally* *Kates & Kouba*, *supra* note 1, at 147; *Levin*, *supra* note 20, at 1494-1504; *Levinson*, *supra* note 17, at 859; Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 925 & n.22 (1976) [hereinafter cited as *Damage Remedies*]; *Developments—§ 1983 and Federalism*, *supra* note 17, at 1193; *Liability After Monell*, *supra* note 20, at 1037.

25. *See, e.g.*, *Thomas v. Ward*, 529 F.2d 916 (4th Cir. 1976); *Burt v. Board of Trustees*, 521 F.2d 1201 (4th Cir. 1954); *Incarcerated Men of Allen County v. Fair*, 507 F.2d 281 (6th Cir. 1974); *D'Iorio v. County of Delaware*, 447 F. Supp. 229 (E.D. Pa. 1978), *rev'd on other grounds*, 592 F.2d 681 (3d Cir. 1978). *Contra*, *Paxman v. Campbell*, 612 F.2d 848 (4th Cir. 1980); *Muzquiz v. City of San Antonio*, 528 F.2d 499 (5th Cir. 1976) (en banc). *See also*, Newman, *Suing the Law Breakers: Proposal to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 462-63 (1978) (suggesting municipal liability for erroneous constitutional decisions by judges).

An official is personally responsible, however, for suits against him/her in an individual capacity. Courts sought to protect officials from such liability by according various immunities. Courts granted absolute immunity to several higher governmental officials sued under § 1983 in their individual capacities. *E.g.*, *Stump v. Sparkman*, 435 U.S. 349 (1978) (judges absolutely immune when acting within jurisdiction); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors absolutely immune in initiating and presenting state's case); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges absolutely immune when acting within their jurisdictions); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislator's statement privileged in legislative proceedings). In some cases the Court accorded officials qualified "good faith" immunity. *See Butz v. Economou*, 438 U.S. 478 (1978) (qualified immunity for federal official even outside scope of authority); *Procunier v. Naverette*, 434 U.S. 555 (1978) (qualified immunity for prison officials for negligent conduct); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (quali-

§ 1983, the victim may sue the municipality in an action for damages brought directly under the Constitution.²⁶

In *Monroe v. Pape*,²⁷ the Supreme Court narrowed the applicability of the § 1983 damage action by excluding municipalities as defendants in such actions. Believing that Congress intended § 1983 to apply only to natural persons,²⁸ the *Monroe* court held that municipalities, as artificial entities, were absolutely immune from § 1983 damage actions.²⁹

In *Monell v. Department of Social Services of New York*, the Supreme Court overruled *Monroe's* absolute municipal immunity holding.³⁰ The *Monell* court broadened the applicability of § 1983 by construing congressional intent to include municipalities as persons for purposes of § 1983. This interpretation exposed municipalities to lawsuits under § 1983.³¹ The *Monell* court eliminated absolute municipal immunity, but refused to determine which specific municipal immunities remained under § 1983.³²

While the *Monell* court broadened the § 1983 cause of action by limiting municipal immunity, it left to the lower federal courts the

fied immunity for state hospital superintendent acting pursuant to state law); *Wood v. Strickland*, 420 U.S. 308 (1975) (qualified immunity for school board officials enforcing school policy in good faith); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state executive has qualified immunity when acting within scope of duties, within discretion of office, with good faith). See generally *Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 Nw. U. L. REV. 526, 528-29, 539 (1977) [hereinafter cited as *Freed*]; *James, supra* note 1; *Levinson, supra* note 17, at 857-63.

26. See, e.g., *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975); *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569, 577 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); *Hander v. San Jacinto Junior College*, 522 F.2d 204, 205 (5th Cir. 1975); *Hanna v. Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975).

27. 365 U.S. 167 (1961). "Monroe v. Pape resurrected section 1983 from ninety years of obscurity." *Developments—§ 1983 and Federalism, supra* note 17, at 1169.

28. See generally, *Kates & Kouba, supra* note 1, at 133-35 (discussing *Monroe* court finding that House rejection of Dictionary Act definition of "person" and rejection of Sherman Amendment inferred House hostility to municipal immunity); *Developments—§ 1983 and Federalism, supra* note 17, at 1191.

29. 365 U.S. at 187-92.

30. 436 U.S. 658, 663 (1978). See generally *Note, Liability of State and Local Governments Under 42 U.S.C. § 1983*, 92 HARV. L. REV. 311, 322 & n.63 (1978) (discussing reversal based on common law and policy factors rather than on legislative history of § 1983) [hereinafter cited as *State and Local Liability*].

31. 436 U.S. at 690-91.

32. *Id.* at 695, 701.

task of determining the contours of that immunity.³³ Two views of municipal immunity under § 1983 emerged. Under the first view, courts carried the *Monell* expansion of municipal liability to its natural conclusion by eliminating municipal immunity in § 1983 actions.³⁴ These courts have concluded the following: first, that municipalities may be liable under § 1983 to compensate victims of constitutional deprivations;³⁵ second, that municipal liability would deter officials from violating constitutional rights;³⁶ third, that victims should not bear the burden of constitutional violations;³⁷ and lastly, that municipal liability best spreads the cost of constitutional deprivations to the public at large.³⁸

33. *Id.* at 695 (“[W]e expressly leave further development of this action [sketching the contours of municipal liability/immunity] to another day.”).

34. *See, e.g.*, *Bertot v. School Dist. No. 1, Albany County*, 613 F.2d 245 (10th Cir. 1979) (en banc) (no qualified immunity for school district) (“The spirit of *Monell* is more compatible with an expansion than a contraction of liability.”); *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir. 1975) (local school district has no Eleventh Amendment immunity); *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569 (7th Cir. 1975) (where established policy attacked, municipal good faith immunity inapplicable); *Shuman v. City of Philadelphia*, 470 F. Supp. 449 (E.D. Pa. 1979) (no qualified immunity for ad hoc execution of policy).

35. *See Monroe v. Pape*, 365 U.S. 167, 184 (1961); *United States v. Classic*, 313 U.S. 299, 325-26 (1941); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190 (1970) (Brennan, J., concurring in part and dissenting in part). *See generally* *Kates & Kouba, supra* note 1, at 136-37; *Schnapper, supra* note 22, at 241-44; *Liability after Monell, supra* note 20, at 1056; *Local Government Suits, supra* note 17, at 164.

36. *See Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978); *Carey v. Phipus*, 435 U.S. 247, 256-57 (1978). Courts believing that municipal liability deters constitutional violations usually opine that municipal liability does not cause undue timidity in officials' exercise of discretion. *See, e.g.*, *Bertot v. School Dist. No. 1, Albany County*, 613 F.2d 245, 249 (10th Cir. 1979); *Kostka v. Hogg*, 560 F.2d 37, 41 (1st Cir. 1977) (dictum) (Coffin, C.J.); *Johnson v. State*, 69 Cal. 2d 782, 798, 447 P.2d 352, 363, 73 Cal. Rptr. 240, 251 (1968). *See generally* *Kates & Kouba, supra* note 1, at 140-41; *Levinson, supra* note 17, at 861 & n.190; *Schnapper, supra* note 22, at 244-45; *Smith, Municipal Tort Liability*, 48 MICH. L. REV. 41, 50-51 (1949); Comment, *New Damage Remedies for Violations of Constitutional Rights*, 31 BAYLOR L. REV. 67, 75 (1979); *Liability after Monell, supra* note 20, at 1056. *See also* *Damage Remedies, supra* note 24, at 957.

37. *See Paxman v. Campbell*, 612 F.2d 848, 870-72 (4th Cir. 1980) (Winter, J., concurring in part and dissenting in part) (on balance, the municipality and not the victim should bear the burden); *Kostka v. Hogg*, 560 F.2d 37, 41 (1st Cir. 1977) (public policy dictates that victims of unconstitutional municipal conduct should be compensated). *See generally* *Kates & Kouba, supra* note 1, at 143; *Liability After Monell, supra* note 20, at 1056; *Monell: Emergence, supra* note 17, at 126-27.

38. *See, e.g.*, *Turpin v. Maillet*, 579 F.2d 152 (2d Cir. 1978) (municipal liability spreads cost most effectively; city in best position to correct unconstitutional policies). *See* note 17 and accompanying text *supra*. *See generally* *Levinson, supra* note 17, at

In contrast, under the second view, courts retained a limited form of municipal immunity. These courts fashioned a qualified "good faith" municipal immunity, similar to the one accorded government officials when sued under § 1983 in their individual capacities.³⁹ These courts supported qualified municipal immunity on the grounds that courts should defer to municipalities' governmental and discretionary actions.⁴⁰ These courts reasoned that municipal liability should attach only when the municipality violated constitutional rights knowingly or with notice.⁴¹ The underpinnings of this view

862; Van Alstyne, *Government Tort Liability: A Decade of Change*, 1966 U. ILL. L. F. 919, 970-71; *State and Local Liability*, *supra* note 30, at 322-23 Monell; *Emergence*, *supra* note 17, at 127-28.

39. See, e.g., *Paxman v. Campbell*, 612 F.2d 848 (4th Cir. 1980) (en banc); *Sala v. County of Suffolk*, 604 F.2d 207 (2d Cir. 1979); *Koska v. Hogg*, 560 F.2d 37, 41 (1st Cir. 1977); *Devasto v. Faherty*, 479 F. Supp. 1069 (D. Mass. 1979); *Gross v. Pomerleau*, 465 F. Supp. 1167 (D. Md. 1979); *Ohland v. City of Montpelier*, 467 F. Supp. 324 (D. Vt. 1979); *Leite v. City of Providence*, 463 F. Supp. 585 (D. R.I. 1978). See generally W. PROSSER, *supra* note 1, at § 131; F. HARPER & F. JAMES, *supra* note 2, at § 29.1-17.

40. Judicial deference to executive discretionary decisions is rooted in the principle of separation of powers. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Johnson v. State*, 69 Cal.2d 782, 794 n.8, 447 P.2d 352, 361 n.8, 73 Cal. Rptr. 240, 249 n.8 (1968) (en banc) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government."). *Contra*, *Garner v. Giarrusso* 571 F.2d 1330, 1341 (5th Cir. 1978) (no unjust penalty against exercise of discretion). See generally Monell; *Emergence*, *supra* note 17, at 122-25.

41. It is not a tort for government to govern. *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting); *Accord Schurer v. Rhodes*, 416 U.S. 232, 241 (1974) (quoting *Dalehite* with approval); see *Sala v. County of Suffolk*, 604 F.2d 207, 211 (2d Cir. 1979) ("Where prior law does not suggest that a municipal policy is constitutionally infirm, it cannot be said in any meaningful sense that the municipality has been 'at fault' in adopting that policy, and we do not believe that § 1983, enacted by a Congress accustomed to a nearly absolute immunity, should be read to implement a doctrine of liability without fault.") (Footnotes omitted.)

Some courts determined that Congress never intended to make municipalities strictly liable in tort suits. See, e.g., *Gross v. Pomerleau*, 465 F. Supp. 1167 (D. Md. 1979) (*Monell* did not reject municipal good faith immunity); *Ohland v. City of Montpelier*, 467 F. Supp. 324 (D. Vt. 1979) (the reasons for strict government liability are weaker than those for vicarious liability which the court rejected).

Some courts suggested liability applied only prospectively, so that municipalities need not predict the future course of constitutional law. E.g., *Sala v. County of Suffolk*, 604 F.2d 207, 211 (2d Cir. 1979); see *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-07 (1971) (prospective application of new legal principle). See generally *Freed*, *supra* note 25, at 529; *Schnapper*, *supra* note 22, at 248. *Liability after Monell*, *supra* note 20, at 1055. See also *Cox v. Cooke*, 420 U.S. 734, 736 (1975) (per curiam) (prospective application of new legal principle, especially where no one person was responsible for formulating the policy).

are that municipal liability inhibits government action because it inhibits municipal officials and agents from acting forcefully for fear of violating constitutionally protected rights,⁴² and that municipalities cannot afford the financial burden of § 1983 judgements.⁴³

In *Owen*, the Supreme Court⁴⁴ adopted the absolute municipal liability to which it had adverted in *Monell*, and rejected qualified "good faith" immunity. Holding that a municipality may not assert the good faith of its officers or agents as a defense to liability,⁴⁵ the *Owen* court eliminated any municipal immunity in § 1983 actions. The Court found § 1983's language broad in its scope of liability and absolute in its cause of action.⁴⁶ The Court found neither a tradition of common law municipal immunity nor any policy that justified a qualified immunity.⁴⁷

The *Owen* court imposed liability in spite of immunities tradition-

42. See, e.g., *Devasto v. Faherty*, 479 F. Supp. 1069 (D. Mass. 1979) (accorded municipal good faith immunity because threat of liability would deter officials' execution of duties). Some judges suggested a municipal immunity stricter than the one for officials in their individual capacities because broad municipal liability might deter energetic and decisive decision-making. E.g., *Paxman v. Campbell*, 612 F.2d 848, 863 (4th Cir. 1980) (Haynesworth, J., concurring in part and dissenting in part) (officials in their official capacities should have immunity if they acted in good faith and reasonably in the performance of their tasks); *id.* at 878-79 (Phillips, J., concurring in part and dissenting in part) (grant municipal good faith immunity if individual defendants acted with reasonable care, because the Forty-Second Congress believed in absolute municipal immunity, and never would have adopted absolute municipal liability). See generally *Freed*, *supra* note 25, at 529; *Kates & Kouba*, *supra* note 1, at 143; *Liability after Monell*, *supra* note 20, at 1055; *Local Government Suits*, *supra* note 17, at 164. See also *Kostka v. Hogg*, 560 F.2d 37, 41 (1st Cir. 1977) (government bodies should have a narrower immunity than individual officials because social policy warrants the compensation of victims of unconstitutional conduct); *Leite v. City of Providence*, 463 F. Supp. 585 (D. R.I. 1978) (good faith municipal immunity accorded if conduct is non-malicious and in absence of a clearly established right which the government had no reason to know was being infringed.").

43. *City of Kenosha v. Bruno*, 412 U.S. 507, 517-18 (1973) (Douglas, J., dissenting); *Paxman v. Campbell*, 612 F.2d 848, 860 (4th Cir. 1980); *Devasto v. Faherty*, 479 F. Supp. 1069 (D. Mass. 1979); *Ohland v. City of Montpelier*, 467 F. Supp. 324, 345 (D. Vt. 1979) (taxpayers are not investors in government units; such units cannot choose to avoid areas of decision-making susceptible to the risks of constitutional violations). See generally *Liability after Monell*, *supra* note 20, at 1056.

44. The Court split 5-4. Justice Brennan, joined by Justices Blackmun, Marshall, Stevens, and White, wrote for the majority, as he had in *Monell*. Justice Powell wrote for the dissent, joined by Chief Justice Burger and Justices Stewart and Rehnquist.

45. 445 U.S. at 638.

46. *Id.* at 635-37.

47. *Id.* at 638.

ally accorded municipal governmental and discretionary actions.⁴⁸ The Court rejected governmental action immunity, reasoning that a sovereign may by statute consent to be sued for its governmental improprieties; the Court viewed § 1983 as such a statute.⁴⁹ The Court discarded discretionary immunity on the grounds that a municipality has no discretion to violate the Constitution.⁵⁰

The *Owen* court distinguished the effects of an official's individual liability from the effects of municipal liability.⁵¹ Fearing that the threat of personal liability would deter authoritative decision-making,⁵² the Court determined that municipal officials should be personally immune for civil rights violations.⁵³ The Court asserted that the common law individual immunity accorded government officials acting within the scope of their duties removed this threat.⁵⁴ In contrast, the Court believed that municipal liability would not deter forceful official action.⁵⁵ To the contrary, the Court stressed that imposition of municipal liability would promote protection of civil rights. The court concluded that decision-making officials whose actions might infringe upon civil rights would act to protect such rights in order to save their municipalities' fisci from potential § 1983 judgments.⁵⁶

The *Owen* court posited three policies to support its holding that municipalities could not assert any immunity defense in § 1983 actions. First, since Congress intended § 1983 to remedy civil rights deprivations, courts should not permit a public entity to deny liability for injury it caused.⁵⁷ Next, the Court suggested that compensatory judgments against municipalities would deter future constitutional deprivations because officials would circumscribe their actions within

48. *Id.* at 644-50. For a discussion of how the Court shifted its reading of § 1983 from interpretation of the statute to reliance on policy, see generally *Liability after Monell*, *supra* note 20, at 1036; *Damage Remedies*, *supra* note 24, at 939.

49. 445 U.S. at 644-48. See generally *James*, *supra* note 1, at 615.

50. 445 U.S. at 648-50.

51. *Id.* at 652-56. *Accord*, *Monell v. Department of Social Services of New York*, 436 U.S. 658, 681 (1978). See also, *Bertot v. School Dist. No. 1, Albany County*, 613 F.2d 245, 248 (10th Cir. 1979).

52. 445 U.S. at 656 & n.40.

53. *Id.* at 637-38.

54. *Id.* at 656. *Accord*, *Kates & Kouba*, *supra* note 1, at 139.

55. *Id.* at 656.

56. *Id.* & n.41.

57. *Id.* at 651.

constitutional limits to protect citizens' rights.⁵⁸ Finally, the Court argued that municipal liability, combined with developments in tort law, would spread the cost of constitutional violations to the public at large.⁵⁹

The *Owen* dissent, written by Justice Powell, argued for qualified "good faith" municipal immunity.⁶⁰ Although the majority and dissent agreed that some governmental officials should retain an absolute or qualified immunity in § 1983 actions, they disagreed whether municipalities should be accorded qualified immunity in § 1983 actions.

Powell, indicating weaknesses in the Court's reasoning, contended that the Court erroneously construed congressional silence as abolishing municipal immunity under § 1983.⁶¹ Powell asserted that the language of § 1983 did not repeal common law traditions of immunity.⁶² He claimed that the majority found support for congressional acceptance of liability in general congressional statements supporting § 1983's remedial thrust.⁶³ Powell declared that the majority ignored several congressmen's *specific* statements that municipal liability should attach only when a municipality acted in bad faith, or when its officers had knowledge or notice that its actions violated constitutional rights.⁶⁴

The dissent posited four reasons why municipalities should retain qualified "good faith" immunity. First, courts must defer to executive discretionary decisions.⁶⁵ Second, imposition of retroactive liability on a municipality whose officers were unaware that their conduct caused civil rights deprivations would punish the municipality and its officers for not anticipating the future course of constitutional law.⁶⁶ Third, municipal liability would paralyze government

58. *Id.* at 656.

59. *Id.* at 657-58. *See* note 17 and accompanying text *supra*.

60. *Id.* at 658. (Powell, J., dissenting).

61. *Id.* at 667, 675-76.

62. *Id.* at 665-67. *See* *Imbler v. Pachtmen*, 423 U.S. 409, 421-24 (1976); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

63. 445 U.S. at 675. (Powell, J., dissenting).

64. *Id.* at 671-75.

65. *Id.* at 667-68. *See* note 40 and accompanying text *supra*.

66. *Id.* at 665. ("[S]trict municipal liability unreasonably subject local governments to damages judgments for actions that were reasonable when performed. It converts municipal governance into a hazardous slalom through constitutional obsta-

action.⁶⁷ Finally, municipal liability would impose financial hardship on the governmental units least able to bear the costs of adverse judgments.⁶⁸

Although the *Owen* majority and dissent posit various reasons for municipal liability and immunity, their analyses fail to accord proper weight to the arguments. Both majority and dissent rely, for example, on § 1983's legislative history.⁶⁹ Section 1983's language is silent about possible immunities.⁷⁰ Congress passed § 1983 with little debate, and said nothing about municipal immunity for constitutional violations under § 1983.⁷¹ Because congressional intent regarding § 1983 immunity is inconclusive, analysis of the municipal immunity issue should accord little weight to § 1983's legislative history.

The appropriate consideration properly addressed by both the majority and dissent is whether the traditions or policies in favor of municipal immunity are justified in light of the burden that civil rights violations impose on victims.⁷² The proper analytical question is: Which party, the plaintiff/victim or the defendant/municipality, though blameless, shall bear the burden of civil rights violations in § 1983 actions? In light of tort liability principles, which spread the cost of liability to the public at large through centralized liability and insurance,⁷³ the majority's abolition of municipal immunity appears justified.

"Systemic"⁷⁴ governmental civil rights violations, in which the governmental entity injures people through no "fault" of the governmental unit, warrant a reexamination of who should bear the burden

cles that often are unknown and unknowable.") See note 41 and accompanying text *supra*.

67. 445 U.S. at 668-69. (Powell, J., dissenting.) *Accord*, *Wood v. Strickland*, 420 U.S. 308, 319-20 (1975); *Sheurer v. Rhodes*, 416 U.S. 232, 242 (1974). See note 42 and accompanying text *supra*.

68. 445 U.S. at 670 (Powell, J., dissenting). See note 43 and accompanying text *supra*.

69. 445 U.S. at 635 *passim*; *Id.* at 644 *passim* (Powell, J., dissenting).

70. See note 5 *supra*.

71. See *State and Local Liability*, *supra* note 30, at 322 & n.63 (no interpretive guidance in legislative history of § 1983 regarding municipal immunity).

72. 445 U.S. at 635 *passim*; *id.* at 665 *passim* (Powell, J., dissenting).

73. See note 17 *supra*.

74. "Systemic" injuries result from the combined actions of several governmental units or officials, each of which may be acting in good faith. See 445 U.S. at 652. See generally *Developments—§ 1983 and Federalism*, *supra* note 17, at 1218-19.

and cost of constitutional deprivations. Common law justifications for municipal immunity, created to protect municipalities from oppressive judgments when municipalities possessed few means of raising funds, no longer apply in the milieu of broadly-funded governmental entities.⁷⁵ Fairness dictates that pervasive governmental units, which increasingly impose themselves into the lives of citizens, should bear and help spread the cost of individuals' civil rights deprivations.⁷⁶

After *Owen's* invocation of strict municipal liability in § 1983 actions, municipalities may attempt to prevent such actions by strictly enforcing tightened municipal operating procedures.⁷⁷ For those § 1983 suits which certainly will occur, municipalities may acquire appropriate liability insurance.⁷⁸

If the *Owen* court's supposition that municipal liability will promote protection of civil rights proves true, then the decision will stand as a landmark in the history of civil rights. On the other hand, Congress may wish to amend § 1983 if the imposition of municipal liability paralyzes governmental action and renders municipalities bankrupt, as Justice Powell feared in his dissent.⁷⁹ Congress may revise § 1983 by adopting the qualified "good faith" municipal immunity which the court rejected in *Owen*, by including a negligence-based tort standard for municipal liability,⁸⁰ or by incorporating state law immunities.⁸¹

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75. See 445 U.S. at 657. See generally Kates & Kouba, *supra* note 1, at 144; Sherry, *The Myth that the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 AD. L. REV. 39, 58 (1969); Monell: *Emergence*, *supra* note 17, at 126.

76. See note 17 *supra*.

77. See 445 U.S. at 652 and nn. 35 & 36; Schnapper, *supra* note 22, at 248-49.

78. See note 17 *supra*.

79. See Kates & Kouba, *supra* note 1, at 167; *Liability after Monell*, *supra* note 20, at 1056 (legislative and not judicial function to correct problem); *Damage Remedies*, *supra* note 24, at 927 & n.31.

80. See Jaffe, *supra* note 1, at 235-37; Nahmod, *supra* note 11, at 22; Schnapper, *supra* note 22, at 247-50.

81. See 445 U.S. at 680-83 (Powell, J., dissenting); Kates & Kouba, *supra* note 1, at 155-61.