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BENCH MEMORANDUM

TO: Mr. Justice Powell
FROM: David
DATE: March 29, 1980
RE: Revisions to Owen dissent

I attach eight suggested additions to your dissent. The most substantial is Insert C, which has induced me to subdivide § II(A) into suparts (1) and (2). Insert C focuses on the statement at p. 24 of the Court opinion, that § 1983 abrogated any municipal immunity that derived from the states' sovereign immunity. I find this assertion ludicrous, since it calls into question every prior decision on immunity under § 1983 -- or else it reduces the statute to incomprehensibility. Accordingly, I have featured our retort fairly prominently. I would suggest two reservations about this course: 1) Any time a dissent focuses on a broad majority statement, you have the problem of the self-fulfilling prophecy; by highlighting the statement, you make it even more prominent; and 2) The Court's observation was limited to that form of municipal immunity that derived from sovereign immunity, and did not refer to immunity for discretionary acts; my point is that Congress could have silently overruled immunity for discretionary acts just as it appears to have silently overruled immunity for governmental acts.

Yes!

I have some question whether Insert D, new footnote 7a, is superfluous. Also, on reflection, I think that Insert F might be better confined to footnotes.

*Insert - see note above the
of an account for full effect*

and all should be included in

157 The Court cited eight cases before 1871 for "interstitial" and "practical" announced in Thayer while regarding damages against municipalities for good-faith torts. Three of these cases, however, involved the "special and peculiar" liability of New England towns for highway maintenance, Williams v. Worcester, 141 Mass. 379, 332-333 (1865), a liability that was established by statute. Barton v. Ipswich, 25 Mass. 448, 181 (1810) (trial court ruled to the jury the provisions of the statute prescribing the duties of towns to keep roads safe . . . and giving a remedy in damages against town defects in highways); Elliot v. Concord, 27 N.H. 204 (1854) (finding similar statute); see J. G. Wilson, Commentaries on the Law of Municipal Corporations, § 1001, at 516 (1875) & n.2 (3d ed. 1881). Yong v. City of New York, 120 N.Y. 229 (1897), recognized damages caused by negligence, but was not expressly restricted to those facts. Metropolitan College of Pharmacy v. Medicine v. City of Cleveland, 120 N.Y. 229 (1897), was one of the other cases cited by the court, involving the enforcement of ministerial acts, 120 N.Y. 229 (1897), 120 N.Y. 229 (1897) (1849) (liability for damages caused by negligence when the city was under a "duty" to open the streets), 120 N.Y. 229 (1897) (1840) (improper tax collection, which was not prohibited by