X

1, 3, 17, 23

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

4-10-80

Recirculated: APR 10 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1779

George D. Owen, Petitioner, v. City of Independence, Missouri, et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[April —, 1980]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that the city of Independence may be liable in damages for violating a constitutional right that was unknown when the events in this case occurred. It finds a denial of due process in the city's failure to grant petitioner a hearing to clear his name after he was discharged. But his dismissal involved only the proper exercise of discretionary powers according to prevailing constitutional doctrine. The city imposed no stigma on petitioner that would require a "name clearing" hearing under the Due Process Clause.

On the basis of this alleged deprivation of rights, the Court interprets 42 U. S. C. § 1983 to impose strict liability on municipalities for constitutional violations. This strict liability approach inexplicably departs from this Court's prior decisions under § 1983 and runs counter to the concerns of the 42d Congress when it enacted the statute. The Court's ruling also ignores the vast weight of common-law precedent as well as the current state law of municipal immunity. For these reasons, and because this decision will hamper local governments unnecessarily, I dissent.

I

The Court does not question the District Court's statement of the facts surrounding Owen's dismissal. *Ante*, at 2. It

nevertheless rejects the District Court's conclusion that no due process hearing was necessary because "the circumstances of [Owen's] discharge did not impose a stigma of illegal or immoral conduct on his professional reputation." 421 F. Supp. 1110, 1122 (WD Mo. 1976); see *ante*, at 10, n. 13. Careful analysis of the record supports the District Court's view that Owen suffered no constitutional deprivation.

A

From 1967 to 1972, petitioner Owen served as Chief of the Independence Police Department at the pleasure of the City Manager.[1] Friction between Owen and City Manager Alberg flared openly in early 1972, when charges surfaced that the Police Department's property room was mismanaged. The City Manager initiated a full internal investigation.

In early April, the City Auditor reported that the records in the property room were so sparse that he could not conduct an audit. The City Counselor reported that "there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room." 560 F. 2d 925, 928 (CA8 1977). In a telephone call on April 10, the City Manager asked Owen to resign and offered him another position in the Department. The two met on the following day. Alberg expressed his unhappiness over the property room situation and again requested that Owen step down. When Owen refused, the City Manager responded that he would be fired. 421 F. Supp., at 1114–1115.

On April 13, the City Manager asked Lieutenant Cook of the Police Department if he would be willing to take over as

[1] Under § 3.3 (1) of the Independence City Charter in effect in 1972, the City Manager had the power 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. . . ." Section 3.8 of that Charter stated that the Chief of Police is the "director" of the Police Department. Charter of the City of Independence, Mo. (Dec. 5, 1961) (hereinafter cited as Charter).

Chief. Alberg also released the following statement to the public:

> "At my direction, the City Counselor's office, [i]n conjunction with the City Auditor ha[s] completed a routine audit of the police property room.
>
> "Discrepancies were found in the administration, handling and security of recovered property. There appears to be no evidence to substantiate any allegations of a criminal nature. . . ." 560 F. 2d, at 928–929.

The District Court found that the City Manager decided on Saturday, April 15, to replace Owen with Lieutenant Cook as Chief of Police. 421 F. Supp., at 1115. Before the decision was announced, however, City Council Member Paul Roberts obtained the internal reports on the property room. At the April 17 Council meeting, Roberts read a prepared statement that accused police officials of "gross inefficiencies" and various "inappropriate" actions. App. 24. He then moved that the Council release the reports to the public, refer them to the Prosecuting Attorney of Jackson County for presentation to a grand jury, and recommend to the City Manager that he "take all direct and appropriate action permitted under the Charter. . . ." *Id.*, at 25. The Council unanimously approved the resolution.

On April 18, Alberg "implemented his prior decision to discharge [Owen] as Chief of Police." 560 F. 2d, at 929. The notice of termination stated simply that Owen's employment was "[t]erminated under the provisions of Section 3.3 (1) of the City Charter." App. 17. That charter provision grants the City Manager complete authority to remove "directors" of administrative departments "when deemed necessary for the good of the service." Owen's lawyer requested a hearing on his client's termination. The Assistant City Counselor responded that "there is no appellate procedure or forum provided by the Charter or ordinances of the City of

Independence, Missouri, relating to the dismissal of Mr. Owen." App. 27.

The City Manager referred to the Prosecuting Attorney all reports on the property room. The grand jury returned a "no true bill," and there has been no further official action on the matter. Owen filed a state lawsuit against Councilman Roberts and City Manager Alberg, asking for damages for libel, slander, and malicious prosecution. Alberg won a dismissal of the state law claims against him, and Councilman Roberts reached a settlement with Owen.[2]

This federal action was filed in 1976. Owen alleged that he was denied his liberty interest in his professional reputation when he was dismissed without formal charges or a hearing. App. 8, 10.[3]

B

Due process requires a hearing on the discharge of a government employee "if the employer creates and disseminates a false and defamatory impression about the employee in con-

---

[2] In its answer to Owen's complaint in this action, the city cited the state-court action as *Owen* v. *Roberts and Alberg*, Case No. 778,640 (Jackson County, Mo., Circuit Ct.). App. 15.

[3] Owen initially claimed that his property interests in the job also were violated. The Court of Appeals affirmed the District Court's rejection of that contention, 560 F. 2d 925, 937 (CA8 1977), and petitioner has not challenged that ruling in this Court.

The Court suggests that the city should have presented a cross-petition for certiorari in order to argue that Owen has no cause of action. *Ante*, at 10, n. 13. It is well-settled that a respondent "may make any argument presented below that supports the judgment of the lower court." *Hankerson* v. *North Carolina*, 432 U. S. 233, 240, n. 6 (1977); see *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U. S. 479, 480–481 (1976), citing *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435 (1924). The judgment of the Court of Appeals in the instant case was to "deny[] Owen any relief . . ." by finding that the defendants were immune from suit. 589 F. 2d, at 388. Since the same judgment would result from a finding that Owen has no cause of action under the statute, respondents' failure to present a cross-petition does not prevent them from pressing the issue before this Court.

nection with his termination. . . ." *Codd* v. *Velger*, 429 U. S. 624, 628 (1977) (*per curiam*). This principle was first announced in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), which was decided in June of 1972, 10 weeks *after* Owen was discharged. The pivotal question after *Roth* is whether the circumstances of the discharge so blackened the employee's name as to impair his liberty interest in his professional reputation. *Id.*, at 572–575.

The events surrounding Owen's dismissal "were prominently reported in local newspapers." 560 F. 2d, at 930. Doubtless, the public received a negative impression of Owen's abilities and performance. But a "name clearing" hearing is not necessary unless the employer makes a public statement that "might seriously damage [the employee's] standing and associations in his community." *Board of Regents* v. *Roth*, *supra*, at 573. No hearing is required after the "discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge." *Bishop* v. *Wood*, 426 U. S. 341, 348 (1976).

The City Manager gave no specific reason for dismissing Owen. Instead, he relied on his discretionary authority to discharge top administrators "for the good of the service." Alberg did not suggest that Owen "had been guilty of dishonesty, or immorality." *Board of Regents* v. *Roth*, *supra*, at 573. Indeed, in his "property room" statement of April 13, Alberg said that there was "no evidence to substantiate any allegations of a criminal nature." This exoneration was reinforced by the grand jury's refusal to initiate a prosecution in the matter. Thus, nothing in the actual firing cast such a stigma on Owen's professional reputation that his liberty was infringed.

The Court does not address directly the question whether any stigma was imposed by the discharge. Rather, it relies on the Court of Appeals' finding that stigma derived from

events "connected with" the firing. *Ante*, at 10–12; 560 F. 2d, at 937. That court attached great significance to the resolution adopted by the City Council at its April 17 meeting. But the resolution merely recommended that Alberg take "appropriate action," and the District Court found no "causal connection" between events in the City Council and the firing of Owen. 421 F. Supp., at 1121. Two days before the Council met, Alberg already had decided to dismiss Owen. Indeed, Councilman Roberts stated at the meeting that the City Manager had asked for Owen's resignation. App. 23.[4]

Even if the Council resolution is viewed as part of the discharge process, Owen has demonstrated no denial of his liberty. Neither the City Manager nor the Council cast any aspersions on Owen's character. Alberg absolved all connected with the property room of any illegal activity, while the Council resolution alleged no wrongdoing. That events focused public attention upon Owen's dismissal is undeniable; such attention is a condition of employment—and of discharge—for high government officials. Nevertheless, nothing in the actions of the City Manager or the City Council triggered a constitutional right to a name-clearing hearing.[5]

---

[4] The City Charter prohibits any involvement of Council members in the City Manager's personnel decisions. Section 2.11 of the Charter states that Council members may not "participate in any manner in the appointment or removal of officers and employees of the city." Violation of § 2.11 is a misdemeanor that may be punished by ejection from office.

[5] The Court suggests somewhat cryptically that stigma was imposed on Owen when "the city—through the unanimous resolution of the City Council—released to the public an allegedly false statement impugning petitioner's honesty and integrity." *Ante*, at 10, n. 13. The Court fails, however, to identify any "allegedly false statement." The resolution did call for public disclosure of the reports on the property room situation, but those reports were never released. *Id.*, at 7. Indeed, petitioner's complaint alleged that the failure to release those reports left "a cloud or suspicion of misconduct" over him. App. 8. The resolution also referred the reports to the prosecutor and called on the City Manager to

The statements by Councilman Roberts were neither measured nor benign, but they provide no basis for this action against the city of Independence. Under *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 691 (1978), the city cannot be held liable for Roberts' statements on a theory of *respondeat superior*. That case held that § 1983 makes municipalities liable for constitutional deprivations only if the challenged action was taken "pursuant to official municipal policy of some nature. . . ." As the Court noted, "a municipality cannot be held liable *solely* because it employs a tortfeasor. . . ." *Ibid.* (emphasis in original). The statements of a single councilman scarcely rise to the level of municipal policy.[6]

As the District Court concluded, "[a]t most, the circumstances . . . suggested that, as Chief of Police, [Owen] had been an inefficient administrator." 421 F. Supp., at 1122. This Court now finds unconstitutional stigma in the interaction of unobjectionable official acts with the unauthorized statements of a lone councilman who had no direct role in the discharge process. The notoriety that attended Owen's firing resulted not from any city policy, but solely from public misapprehension of the reasons for a purely discretionary dismissal. There was no constitutional injury; there should be no liability.[7]

---

take appropriate action. Neither event could constitute the public release of an "allegedly false statement" mentioned by the Court.

[6] Roberts himself enjoyed absolute immunity from § 1983 suits for acts taken in his legislative capacity. *Lake Country Estates* v. *Tahoe Planning Agency*, 440 U. S. 391, 402–406 (1979). Owen did sue him in state court for libel and slander, and reached an out-of-court settlement. See *supra*, at 4.

[7] This case bears some resemblance to *Martinez* v. *California*, — U. S. — (1979) (No. 78–1268), which involved a § 1983 suit against state parole officials for injuries caused by a paroled prisoner. We found that the plaintiffs had no cause of action because they could not show a causal relationship between their injuries and the actions of the defendants. *Id.*,

II

Having constructed a constitutional deprivation from the valid exercise of governmental authority, the Court holds that municipalities are strictly liable for their constitutional torts. Until two years ago, municipal corporations enjoyed absolute immunity from § 1983 claims. *Monroe* v. *Pape*, 365 U. S. 167 (1961). But *Monell* v. *New York City Dept. of Social Services*, *supra*, held that local governments are "persons" within the meaning of the statute, and thus are liable in damages for constitutional violations inflicted by municipal policies. 436 U. S., at 690. *Monell* did not address the question whether municipalities might enjoy a qualified immunity or good-faith defense against § 1983 actions. *Id.*, at 695, 701; *id.*, at 713–714 (POWELL, J., concurring).

After today's decision, municipalities will have gone in two short years from absolute immunity under § 1983 to strict liability. As a policy matter, I believe that strict municipal liability unreasonably subjects local governments to damages judgments for actions that were reasonable when performed. It converts municipal governance into a hazardous slalom through constitutional obstacles that often are unknown and unknowable.

The Court's decision also impinges seriously on the prerogatives of municipal entities created and regulated primarily by the States. At the very least, this Court should not initiate a federal intrusion of this magnitude in the absence of explicit congressional action. Yet today's decision is supported by nothing in the text of § 1983. Indeed, it conflicts with the apparent intent of the drafters of the statute, with the common law of municipal tort liability, and with the current state law of municipal immunities.

---

at — (slip op., at 7–8). That relationship also is absent in this case. Any injury to Owen's reputation was the result of the Roberts statement, not the policies of the city of Independence.

A

1

Section 1983 provides a private right of action against "any person" acting under color of state law who imposes or causes to be imposed a deprivation of constitutional rights.[8] Although the statute does not refer to immunities, this Court has held that the law "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman*, 424 U. S. 409, 418 (1976); see *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951).

This approach reflects several concerns. First, the common-law traditions of immunity for public officials could not have been repealed by the "general language" of § 1983. *Tenney* v. *Brandhove*, *supra*, at 376; see *Imbler* v. *Pachtman*, *supra*, at 421–424 (1976); *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967). In addition, "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U. S. 232, 241 (1974). Because public officials will err at times, "[t]he concept of immunity assumes . . . that it is better to risk some error and possibly injury from such error than not to decide or act at all." *Id.*, at 242; see *Wood* v. *Strickland*, 420 U. S. 308, 319–320 (1975). By granting some immunity to governmental actors, the Court has attempted to ensure that public decisions will not be dominated by fears of liability for actions that may turn out to be unconstitutional. Public officials "cannot be expected to predict the future course of constitutional law. . . ." *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978).

---

[8] "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 . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." 42 U. S. C. § 1983.

In response to these considerations, the Court has found absolute immunity from § 1983 suits for state legislators, *Tenney* v. *Brandhove, supra,* judges, *Pierson* v. *Ray, supra,* at 553–555, and prosecutors in their role as advocates for the state, *Imbler* v. *Pachtman, supra.* Other officials have been granted a qualified immunity that protects them when in good faith they have implemented policies that reasonably were thought to be constitutional. This limited immunity extends to police officers, *Pierson* v. *Ray, supra,* at 555–558, state executive officers, *Scheuer* v. *Rhodes, supra,* local school board members, *Wood* v. *Strickland, supra,* the superintendent of a state hospital, *O'Connor* v. *Donaldson,* 422 U. S. 563, 576–577 (1975), and prison officials, *Procunier* v. *Navarette, supra.*

The Court today abandons any attempt to harmonize § 1983 with traditional tort law. It points out that municipal immunity may be abrogated by legislation. Thus, according to the Court, Congress "abolished" municipal immunity when it included municipalities "within the class of 'persons' subject to liability under § 1983." *Ante,* at 24.

This reasoning flies in the face of our prior decisions under this statute. We have held repeatedly that "immunities 'well grounded in history and reason' [were not] abrogated 'by covert inclusion in the general language' of § 1983." *Imbler* v. *Pachtman, supra,* 424 U. S., at 418, quoting *Tenney* v. *Brandhove, supra,* 341 U. S., at 376. See *Scheuer* v. *Rhodes, supra,* 416 U. S., at 243–244; *Pierson* v. *Ray, supra,* 386 U. S., at 554. The peculiar nature of the Court's position emerges when the status of executive officers under § 1983 is compared with that of local governments. State and local executives are personally liable for bad-faith or unreasonable constitutional torts. Although Congress had the power to make those individuals liable for all such torts, this Court has refused to find an abrogation of traditional immunity in a statute that does not mention immunities. Yet the Court now

views the enactment of § 1983 as a direct abolition of traditional municipal immunities. Unless the Court is overruling its previous immunity decisions, the silence in § 1983 must mean that the 42d Congress mutely accepted the immunity of executive officers, but silently rejected common-law municipal immunity. I find this interpretation of the statute singularly implausible.

2

Important public policies support the extension of qualified immunity to local governments. First, as recognized by the doctrine of separation of powers, some governmental decisions should be at least presumptively insulated from judicial review. Chief Justice Marshall wrote in *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803), that "[t]he province of the court is . . . not to inquire how the executive or executive officers, perform duties in which they have a discretion." Marshall stressed the caution with which courts must approach "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive." The allocation of public resources and the operational policies of the government itself are activities that lie peculiarly within the competence of executive and legislative bodies. When charting those policies, a local official should not have to gauge his employer's possible liability under § 1983 if he incorrectly—though reasonably and in good faith—forecasts the course of constitutional law. Excessive judicial intrusion into such decisions can only distort municipal decisionmaking and discredit the courts. Qualified immunity would provide presumptive protection for discretionary acts, while still leaving the municipality liable for bad faith or unreasonable constitutional deprivations.

Because today's decision will inject constant consideration of § 1983 liability into local decisionmaking, it may restrict the independence of local governments and their ability to respond to the needs of their communities. Only this Term,

we noted that the "point" of immunity under § 1983 "is to forestall an atmosphere of intimidation that would conflict with [officials'] resolve to perform their designated functions in a principled fashion." *Ferri* v. *Ackerman*, —— U. S. ——, —— (1980) (No. 78–5981, slip op., at 10).

The Court now argues that local officials might modify their actions unduly if they face personal liability under § 1983, but that they are unlikely to do so when the locality itself will be held liable. *Ante*, at 32–33. This contention denigrates the sense of responsibility of municipal officers, and misunderstands the political process. Responsible local officials will be concerned about potential judgments against their municipalities for alleged constitutional torts. Moreover, they will be accountable within the political system for subjecting the municipality to adverse judgments. If officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability. Cf. *Wood* v. *Strickland*, 420 U. S., at 319–320; *Scheuer* v. *Rhodes*, 416 U. S., at 242.[9]

In addition, basic fairness requires a qualified immunity for municipalities. The good-faith defense recognized under § 1983 authorizes liability only when officials acted with malicious intent or when they "knew or should have known that their conduct violated the constitutional norm." *Procunier* v. *Navarette*, 434 U. S., at 562. The standard incorporates the

[9] The Court's argument is not only unpersuasive, but also is internally inconsistent. The Court contends that strict liability is necessary to "create an incentive for officials . . . to err on the side of protecting citizens' constitutional rights." *Ante*, at 28. Yet the Court later assures us that such liability will not distort municipal decisionmaking because "the inhibiting effect is significantly reduced, if not eliminated . . . when the threat of personal liability is removed." *Id.*, at 32–33. Thus, the Court apparently believes that strict municipal liability is needed to modify public policies, but will not have any impact on those policies anyway.

idea that liability should not attach unless there was notice that a constitutional right was at risk. This idea applies to governmental entities and individual officials alike. Constitutional law is what the courts say it is, and—as demonstrated by today's decision and its precursor, *Monell*—even the most prescient lawyer would hesitate to give a firm opinion on matters not plainly settled. Municipalities, often acting in the utmost good faith, may not know or anticipate when their action or inaction will be deemed a constitutional violation.[10]

The Court nevertheless suggests that, as a matter of social justice, municipal corporations should be strictly liable even if they could not have known that a particular action would violate the Constitution. After all, the Court urges, local governments can "spread" the costs of any judgment across the local population. *Ante*, at 31–32. The Court neglects, however, the fact that many local governments lack the resources to withstand substantial unanticipated liability under § 1983. Even enthusiastic proponents of municipal liability have conceded that ruinous judgments under the statute could imperil local governments. *E. g.*, Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 958 (1978).[11] By simplistically applying the theorems of welfare economics and ignoring the reality of municipal finance, the Court imposes strict liability on the

---

[10] The Court implies that unless municipalities are strictly liable under § 1983, constitutional law could be frozen "in its current state of development." *Ante*, at 28, n. 33. I find this a curious notion. This could be the first time that the period between 1961, when *Monroe* declared local governments absolutely immune from § 1983 suits, and 1978, when *Monell* overruled *Monroe*, has been described as one of static constitutional standards.

[11] For example, in a recent case in Alaska, a jury awarded almost $500,000 to a policeman who was accused of "racism and brutality" and removed from duty without notice and an opportunity to be heard. *Wayson* v. *City of Fairbanks*, No. 77-1851 (Alas. Fourth Dist. Super. Ct., Jan. 24, 1979), *reported in*, 22 ATLA L. Rep. 22 (June, 1979).

level of government least able to bear it.[12] For some municipalities, the result could be a severe limitation on their ability to serve the public.

B

The Court searches at length—and in vain—for legal authority to buttress its policy judgment. Despite its general statements to the contrary, the Court can find no support for its position in the debates on the civil rights legislation that included § 1983. Indeed, the legislative record suggests that the Members of the 42d Congress would have been dismayed by this ruling. Nor, despite its frequent citation of authorities that are only marginally relevant, can the Court rely on the traditional or current law of municipal tort liability. Both in the 19th century and now, courts and legislatures have recognized the importance of limiting the liability of local governments for official torts. Each of these conventional sources of law points to the need for qualified immunity for local governments.

1

The modern dispute over municipal liability under § 1983 has focused on the defeat of the Sherman amendment during the deliberations on the Civil Rights Act of 1871. *E. g., Monroe* v. *Pape*, 365 U. S., at 187–191; *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 664–683. Senator Sherman proposed that local governments be held vicariously liable for constitutional deprivations caused by riots within their boundaries. As originally drafted, the measure imposed liability even if municipal officials had no actual knowledge of the impending disturbance.[13] The amendment, which did not

[12] Ironically, the State and Federal Governments cannot be held liable for constitutional deprivations. The Federal Government has not waived its sovereign immunity against such claims, and the States are protected by the Eleventh Amendment.

[13] Congressional Globe, 42d Cong., 1st Sess., at 663 (1871). The proposal applied to any property damage or personal injury caused "by any

affect the part of the Civil Rights Act that we know as § 1983, was approved by the Senate but rejected by the House of Representatives. *Id.*, at 666. After two revisions by conference committees, both Houses passed what is now codified as 42 U. S. C. § 1986. The final version applied not just to local governments but to all "persons," and it imposed no liability unless the defendant knew that a wrong was "about to be committed." [14]

Because Senator Sherman initially proposed strict municipal liability for constitutional torts, the discussion of his amendment offers an invaluable insight into the attitudes of his colleagues on the question now before the Court. Much of the resistance to the measure flowed from doubts as to Congress' power to impose vicarious liability on local governments. *Monell* v. *New York City Dept. of Social Services, supra,* at 673–683; *id.*, at 706 (POWELL, J., concurring). But opponents of the amendment made additional arguments that strongly support recognition of qualified municipal immunity under § 1983.

First, several legislators expressed trepidation that the proposal's strict liability approach could bankrupt local governments. They warned that liability under the proposal could

---

persons riotously and tumultuously 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. . . ." As revised by the first Conference Committee on the Civil Rights Act, the provision still required no showing of notice. *Id.*, at 749.

[14] The final conference amendment stated:

"That any person or persons having knowledge that any of the wrongs . . . mentioned in the second section of this act, are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed, such person or persons shall be liable to the person injured or his legal representatives for all damages caused by any such wrongful act. . . ." *Id.*, at 819.

bring municipalities "to a dead stop." Cong. Globe, 42d Cong., 1st Sess., 763 (1871) (Sen. Casserly). See *id.*, at 762 (Sen. Stevenson); 772 (Sen. Thurman). Representative Bingham argued that municipal liability might be so great under the measure as to deprive a community "of the means of administering justice." *Id.*, at 798. Some congressmen argued that strict liability would inhibit the effective operation of municipal corporations. The possibility of liability, Representative Kerr insisted, could prevent local officials from exercising "necessary and customary functions." *Id.*, at 789. See *id.*, at 763 (Sen. Casserly); *id.*, at 808 (Rep. Garfield).

Most significant, the opponents objected to liability imposed without any showing that a municipality knew of an impending constitutional deprivation. Senator Sherman defended this feature of the amendment as a characteristic of riot acts long in force in England and this country. *Id.*, at 760. But Senator Stevenson argued against creating "a corporate liability for personal injury which no prudence or foresight could have prevented." *Id.*, at 762. In the most thorough critique of the amendment, Senator Thurman carefully reviewed the riot acts of Maryland and New York. He emphasized that those laws imposed liability only when a plaintiff proved that the local government had both notice of the impending injury and the power to prevent it. *Id.*, at 771.

> "Is not that right? Why make the county, or town, or parish liable when it had no reason whatsoever to anticipate that any such crime was about to be committed, and when it had no knowledge of the commission of the crime until after it was committed? What justice is there in that?" *Ibid.*

These concerns were echoed in the House of Representatives. Representative Kerr complained that "it is not required, before liability shall attach, that it shall be known

that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality." *Id.*, at 788. He denounced the "total and absolute absence of notice, constructive or implied, within any decent limits of law or reason," adding that the proposal "takes the property of one and gives it to another by mere force, without right, in the absence of guilt or knowledge, or the possibility of either." *Ibid.* Similarly, Representative Willard argued that liability "is only warranted when the community . . . has proved faithless to its duties. . . ." *Id.*, at 791. He criticized the absence of a requirement that it be "prov[ed] in court that there has been any default, any denial, any neglect on the part of the county, city, town, or parish to give citizens the full protection of the laws." *Ibid.*

Partly in response to these objections, the amendment as finally enacted conditioned liability on a demonstration that the defendant knew that constitutional rights were about to be denied. Representative Poland introduced the new measure, noting that "any person *who has knowledge* of any of the offenses named . . . shall [have a] duty to use all reasonable diligence within his power to prevent it." *Id.*, at 804 (emphasis supplied). The same point was made by Representative Shellabarger, the sponsor of the entire Act and, with Representative Poland, a member of the Conference Committee that produced the final draft. *Id.*, at 804–805; see *id.*, at 807 (Rep. Garfield).

On the Senate side, one conferee stated that under the final version

> "in order to make the [municipal] corporation liable as a body it must appear in some way to the satisfaction of the jury that the officers of the corporation, those persons whose duty it was to repress tumult, if they could, had reasonable notice of the fact that there was a tumult, or was likely to be one, and neglected to take the necessary means to prevent it." *Id.*, at 821 (Sen. Edmunds).

Senator Sherman disliked the revised provision. He complained that "before you can make [a person] responsible you have got to show that they had knowledge that the specific wrongs upon the particular person were about to be wrought." *Ibid.*[15]

These objections to the Sherman amendment apply with equal force to strict municipal liability under § 1983. Just as the 42d Congress refused to hold municipalities vicariously liable for deprivations that could not be known beforehand, this Court should not hold those entities strictly liable for deprivations caused by actions that reasonably and in good faith were thought to be legal. The Court's aproach today, like the Sherman amendment, could spawn onerous judgments against local governments and distort the decisions of officers who fear municipal liability for their actions. Congress' refusal to impose those burdens in 1871 surely undercuts any historical argument that federal judges should do so now.

The Court declares that its rejection of qualified immunity is "compelled" by the "legislative purpose" in enacting § 1983. *Ante*, at 27. One would expect powerful documentation to back up such a strong statement. Yet the Court notes only three features of the legislative history of the Civil Rights Act. Far from "compelling" the Court's strict liability approach, those features of the congressional record provide scant support for its position.

First, the Court reproduces statements by Congressmen attesting to the broad remedial scope of the law. *Ante*, at 13, and n. 17. In view of our many decisions recognizing the immunity of officers under § 1983, *supra*, at 9–10, those statements plainly shed no light on congressional intent with re-

---

[15] Under 42 U. S. C. § 1986, the current version of the language approved in place of the Sherman amendment, liability "is dependent on proof of actual knowledge by a defendant of the wrongful conduct. . . ." *Hampton* v. *City of Chicago*, 484 F. 2d 602, 610 (CA7 1973), cert. denied, 415 U. S. 917 (1974).

spect to immunity under the statute. Second, the Court cites Senator Stevenson's remark that frequently "a statutory liability has been created against municipal corporations for injuries resulting from a neglect of corporate duty." *Ante*, at 19, citing Cong. Globe, 42d Cong., 1st Sess., 762 (1871). The Senator merely stated the unobjectionable proposition that municipal immunity could be qualified or abolished by statute. This fragmentary observation provides no basis for the Court's version of the legislative history.

Finally, the Court emphasizes the lack of comment on municipal immunity when opponents of the bill did discuss the immunities of government officers. "Had there been a similar common-law immunity for municipalities, the bill's opponents doubtless would have raised the spectre of its destruction as well." *Ante*, at 20–21. This is but another example of the Court's continuing willingness to find meaning in silence. This example is particularly noteworthy because the very next sentence in the Court's opinion concedes, "To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability." *Id.*, at 21. Since the opponents of the Sherman amendment repeatedly expressed their conviction that strict municipal liability was unprecedented and unwise, the failure to recite the theories of municipal immunity is of no relevance here. In any event, that silence cannot contradict the many contemporary judicial decisions applying that immunity. See *infra*, at 20–21, and nn. 16, 17.

2

The Court's decision also runs counter to the common law in the 19th century, which recognized substantial tort immunity for municipal actions. *E. g.*, 2 J. Dillon, The Law of Municipal Corporations §§ 753, 765, at 862–863, 875–876 (2d ed. 1873); W. Williams, The Liability of Municipal Corporations for Tort 9, 16 (1901). Nineteenth-century courts

generally held that municipal corporations were not liable for acts undertaken in their "governmental," as opposed to their "proprietary," capacity.[16] Most States now use other criteria for determining when a local government should be liable for damages. See *infra*, at 24–26. Still, the governmental/proprietary distinction retains significance because it was so widely accepted when § 1983 was enacted. It is inconceivable that a Congress thoroughly versed in current legal doctrines, see *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 669, would have intended through silence to create the strict liability regime now imagined by this Court.

More directly relevant to this case is the common-law distinction between the "discretionary" and "ministerial" duties of local governments. This Court wrote in *Harris* v. *District of Columbia*, 256 U. S. 650, 652 (1921): "When acting in good faith municipal corporations are not liable for the manner in which they exercise discretionary powers of a public or legislative character." See *Weightmann* v. *The Corporation of Washington*, 66 U. S. (1 Black) 39, 49–50 (1861). The rationale for this immunity derives from the theory of separation of powers. In *Carr* v. *The Northern Liberties*, 35 Pa. St. 324, 329 (1860), the Pennsylvania Supreme Court ex-

[16] In the leading case of *Bailey* v. *Mayor & C. of the City of New York*, 3 Hill 531, 539 (NY 1842), the court distinguished between municipal powers "conferred for the benefit of the public" and those "made as well for the private emolument and advantage of the city. . . ." Because the injury in *Bailey* was caused by a water utility maintained for the exclusive benefit of the residents of New York City, the court found the municipality liable "as a private company." *Id.*, at 539. This distinction was construed to provide local governments with immunity in actions alleging inadequate police protection, *Western College of Homeopathic Medicine* v. *City of Cleveland*, 12 Ohio St. 375 (1861), improper sewer construction, *Child* v. *City of Boston*, 86 Mass. (4 Allen) 41 (1862), negligent highway maintenance, *Hewison* v. *City of New Haven*, 37 Conn. 475 (1871), and unsafe school buildings, *Hill* v. *City of Boston*, 122 Mass. 344 (1877).

plained why a local government was immune from recovery for damage caused by an inadequate town drainage plan.

> "[H]ow careful we must be that courts and juries do not encroach upon the functions committed to other public officers. It belongs to the province of town councils to direct the drainage of our towns, according to the best of their means and discretion, and we cannot directly or indirectly control them in either. No law allows us to substitute the judgment of the jury, for that of the representatives of the town itself, to whom the business is especially committed by law."

That reasoning, frequently applied in the 19th century,[17] parallels the theory behind qualified immunity under § 1983. This Court has recognized the importance of preserving the autonomy of executive bodies entrusted with discretionary powers. *Scheuer* v. *Rhodes* held that executive officials who have broad responsibilities must enjoy a "range of discretion [that is] comparably broad." 416 U. S., at 247. Consequently, the immunity available under § 1983 varies directly with "the scope of discretion and responsibility of the office. . . ." *Ibid.* Strict municipal liability can only undermine that discretion.[18]

---

[17] *E. g., Goodrich* v. *City of Chicago*, 20 Ill. 445 (1858); *City of Logansport* v. *Wright*, 25 Ind. 512 (1865); *Mills* v. *City of Brooklyn*, 32 N. Y. 489, 498–499 (1865); *Wilson* v. *Mayor & C. of City of New York*, 1 Denio 595, 600–601 (N. Y. 1845); *Wheeler* v. *City of Cincinnati*, 19 Ohio St. 19 (1869) (*per curiam*); *City of Richmond* v. *Long's Adm'rs*, 17 Gratt. 375 (Va. 1867); *Kelley* v. *City of Milwaukee*, 18 Wisc. 83 (1864).

[18] The Court cannot wish away these extensive municipal immunities. It quotes two 19th-century treatises as referring to municipal liability for some torts. *Ante*, at 17. Both passages, however, refer to exceptions to the existing immunity rules. The first treatise cited by the Court concedes, though deplores, the fact that many jurisdictions embraced the governmental/proprietary distinction. T. Shearman & A. Redfield, A Treatise on the Law of Negligence § 120, at 140–141 (1869). The same volume notes that local governments could not be sued for injury caused by discretionary acts, *id.*, § 127, at 154, or for officers' acts beyond

The lack of support for the Court's view of the common law is evident in its reliance on *Thayer* v. *Boston*, 36 Mass. 511 (1837), as its principal authority. *Ante*, at 18–19. *Thayer* did hold broadly that a city could be liable for the authorized acts of its officers. 36 Mass., at 516. But *Thayer* was limited severely by later Massachusetts decisions. *Bigelow* v. *Inhabitants of Randolph*, 80 Mass. 541, 544–545 (1860), ruled that *Thayer* applied only to situations involving official malfeasance—or wrongful, bad-faith actions—not to actions based on neglect or nonfeasance. See *Child* v. *City of Boston*, 86 Mass. 41 (1862); *Buttrick* v. *City of Lowell*, 83 Mass. 172 (1861). Finally, *Hill* v. *City of Boston*, 122 Mass. 334, 359 (1877), squarely repudiated the broad holding of *Thayer* and limited municipal liability to acts performed in the proprietary interest of the municipality.[19]

---

the powers of the municipal corporation, *id.*, § 140, at 169. The Court's quotation from Dillon on Municipal Corporations stops just before that writer acknowledges that local governments are liable only for injury caused by nondiscretionary acts involving "corporate duties." 2 J. Dillon, The Law of Municipal Corporations, § 764, at 875 (2d ed. 1873). That writer's full statement of municipal tort liability recognizes immunity for both governmental and discretionary acts. Dillon observes that municipal corporations may be held liable only "*where a duty is a corporate one*, that is, one which rests upon the municipality in respect to its special or local interests, and not as a public agency, and is *absolute and perfect*, and not discretionary or judicial in its nature. . . ." *Id.*, at § 778, at 891 (emphasis in original).

The Court takes some solace in the absence in the 19th century of a qualified immunity for local governments. *Ante*, at 21–27. That absence, of course, was due to the availability of absolute immunity for governmental and discretionary acts. There is no justification for discovering strict municipal liability in § 1983 when that statute was enacted against a background of extensive municipal immunity.

The Court also points out that municipalities were subject to suit for some statutory violations and neglect of contractual obligations imposed by state or federal constitutions. *Ante*, at 16–17. That amenability to suit is simply irrelevant to the immunity available in tort actions, which controls the immunity available under § 1983.

[19] The Court cites eight cases decided before 1871 as "reiterat[ing]" the

3

Today's decision also conflicts with the current law in 44 States and the District of Columbia. All of those jurisdictions provide municipal immunity at least analogous to a

---

principle announced in *Thayer* while awarding damages against municipalities for good-faith torts. Three of those cases involved the "special and peculiar" statutory liability of New England towns for highway maintenance, and are wholly irrelevant to the Court's argument. *Billings* v. *Worcester*, 102 Mass. 329, 332–333 (1869); *Horton* v. *Ipswich*, 66 Mass. 448, 491 (1853) (trial court "read to the jury the provisions of the statutes prescribing the duties of towns to keep roads safe . . . and giving a remedy for injuries received from defects in highways"); *Elliot* v. *Concord*, 27 N. H. 204 (1853) (citing similar statute); see 2 J. Dillon, Commentaries on the Law of Municipal Corporation, § 1000, at 1013–1015, and n. 2 (3d ed. 1881). A fourth case, *Town Council of Akron* v. *McComb*, 18 Ohio 229 (1849), concerned damages caused by street-grading, and was later expressly restricted to those facts. *Western College of Homeopthic Medicine* v. *City of Cleveland*, *supra*, 12 Ohio St., at 378–379. Two of the other cases cited by the Court involved the performance of ministerial acts that were widely recognized as giving rise to municipal liability. *Lee* v. *Village of Sandy Hill*, 40 N. Y. 442, 451 (1869) (liability for damage caused by street-opening when city was under a "duty" to open that street); *Hurley* v. *Town of Texas*, 20 Wis. 634 (1860) (improper tax collection). The seventh case presented malfeasance, or bad-faith acts, by the municipality's agents. *Hawks* v. *Charlemont*, 107 Mass. 414 (1871) (city took material from plaintiff's land to repair bridge). Thus, despite any discussion of *Thayer* in the court opinions, seven of the eight decisions noted by the Court involved thoroughly unremarkable exceptions to municipal immunity as provided by statute or common law. They do not buttress the Court's theory of strict liability.

The Court also notes that Senator Stevenson mentioned *Thayer* during the debates on the Sherman Amendment. *Ante*, at 19, and nn. 23, 24. That reference, however, came during a speech denouncing the Sherman amendment for imposing tort liability on municipal corporations. To reinforce his contention, Senator Stevenson read from the decision in *Prather* v. *City of Lexington*, 52 Ky. 559, 560–652 (1852) which cited *Thayer* for the general proposition that a municipal corporation is not liable on a *respondeat superior* basis for the unauthorized acts of its officers. Cong. Globe, 42d Cong., 1st Sess., at 762 (1871). But the point of the passage in *Prather* read by Senator Stevenson—and the holding of that case—was that "no principle of law . . . subjects a municipal corporation

"good faith" defense against liability for constitutional torts. Thus, for municipalities in almost 90% of our jurisdictions, the Court creates broader liability for constitutional deprivations than for state-law torts.

Twelve States have laws creating municipal tort liability but barring damages for injuries caused by discretionary decisions or by the good-faith execution of a validly enacted, though unconstitutional, regulation.[20] Municipalities in those States have precisely the form of qualified immunity that this Court has granted to executive officials under § 1983. Another 11 States provide even broader immunity for local governments. Five of those have retained the governmental/proprietary distinction,[21] while Arkansas and South

---

to a responsibility for the safety of the property within its territorial limits." *Ibid.*, quoting *Prather*, *supra*, at 561. So Stevenson cited *Prather* to demonstrate that municipalities should not be held vicariously liable for injuries caused within their boundaries. *Prather*, in turn, cited *Thayer* for a subsidiary point. Nowhere in this sequence is there any support for the Court's idea that local governments should be subjected to strict liability under § 1983.

[20] Idaho Code § 6-904 (1) (1979); Ill. Rev. Stat., Ch. 85, §§ 2-103, 2-109, 2-201, 2-203 (Hurd 1966); Ind. Code § 34-4-16.5-3 (6) & (8) (1979 Supp.); 1979 Kan. Sess. Laws, Ch. 186, § 4 (including specific exceptions to immunity); Mass. Gen. Laws Ann., Ch. 258, §§ 10 (a), (b) (West Supp. 1979); Minn. Stat. § 466.03 (5) & (6) (1977); Mont. Rev. Codes Ann. §§ 82-4328, 82-4329, 82-4333 (1977 Supp.); Neb. Rev. Stat. § 23-2409 (1) & (2) (1977 Reissue); Nev. Rev. Stat. § 41.032 (1973); N. D. Cent. Code Ann. § 32-12.1-03 (3) (Supp. 1979); Okla. Stat. Ann., Tit. 51, §§ 155 (1)-(5) (Supp. 1979); Ore. Rev. Stat. § 30.265 (3)(c) & (f) (1977).

The Federal Tort Claims Act provides a similar exemption for damage suits against the Federal Government. 28 U. S. C. § 2680 (a). The goal of that provision, according to this Court, is to protect "this discretion of the executive or the administrator to act according to one's judgment of the best course. . . ." *Dalehite* v. *United States*, 346 U. S. 15, 34 (1953).

[21] *Mayor and City Council of Baltimore* v. *Seidel*, 409 A. 2d 747 (Md. Ct. Sp. App. 1980); Mich. Comp. Laws § 691.1407 (Supp. 1979); *Parks* v. *City of Long Beach*, 372 So. 2d 253, 253-254 (Miss. 1979); *Haas* v.

Dakota grant even broader protection for municipal corporations.[22] Statutes in four more States protect local governments from tort liability except for particular injuries not relevant to this case, such as those due to motor vehicle accidents or negligent maintenance of public facilities.[23] In Iowa, local governments are not liable for injuries caused by the execution with due care of any "officially enacted" statute or regulation.[24]

Sixteen States and the District of Columbia follow the traditional rule against recovery for damages imposed by discretionary decisions that are confided to particular officers or organs of government.[25] Indeed, the leading commentators on governmental tort liability have noted both the appropri-

---

Hayslip, 51 Ohio St. 2d 135, 139, 364 N. E. 2d 1376, 1379 (1977); *Virginia Electric Power Co.* v. *Hampton Redevelopment & Housing Authority*, 217 Va. 30, 34, 225 S. E. 2d 364, 368 (1976).

[22] Ark. Stat. Ann. § 12–2901 (1979 Repl.); *Shaw* v. *City of Mission*, 88 S. D. 557, 225 N. W. 2d 593 (1975).

[23] 1977 N. M. Laws, Ch. 386, §§ 4–9; Pa. Stat. Ann., Tit. 53, § 5311.202 (b) (Purdon Supp. 1979); *Wright* v. *City of North Charleston*, 271 S. C. 515, 516–518, 248 S. E. 2d 480, 481–482 (1978), see S. C. Code §§ 5–7–70, 15–77–230 (1976); 1979 Wyo. Sess. Laws, Ch. 157, §§ 1–39–105 to 112.

[24] Iowa Code § 613A.4 (3) (1979 Supp.)

[25] Cal. Gov't Code Ann. §§ 815.2, 820.2 (West 1966); *Tango* v. *City of New Haven*, 173 Conn. 203, 204–205, 377 A. 2d 284, 285 (1977); *Biloon's Electrical Serv., Inc.* v. *City of Wilmington*, 401 A. 2d 636, 639–640, 643 (Del. Super. 1979); *Spencer* v. *General Hospital of the District of Columbia*, 425 F. 2d 479, 484 (CADC 1969) (*en banc*); *Commercial Carrier Corp.* v. *Indian River County*, 371 So. 2d 1010, 1020 (Fla. 1979); Ga. Code § 69–302; *Frankfort Variety, Inc.* v. *City of Frankfort*, 552 S. W. 2d 653 (Ky. 1977); Me. Rev. Stat. Ann., Tit. 14, § 8103 (2) (c) (1980); *Merrill* v. *Manchester*, 114 N. H. 722, 729, 332 A. 2d 378, 383 (1974); N. J. Stat. Ann. §§ 59:2–2 (b) and 59:2–3 (West Supp. 1979); *Weiss* v. *Fote*, 7 N. Y. 2d 579, 585–586, 167 N. E. 2d 63, 65–66 (1960); *Calhoun* v. *City of Providence*, 390 A. 2d 350, 355–356 (R. I. 1978); Tenn. Code Ann. § 23–3311 (1) (Supp. 1979); Tex. Rev. Civ. Stat. Ann., Art. 6252–19, § 15 (7) (Vernon 1970); Utah Code Ann. § 63–30–10 (1) (2d Repl. 1978); *King* v. *City of Seattle*, 84 Wash. 2d 239, 246, 525 P. 2d 228, 233 (1974) (en banc); Wis. Stat. § 895.43 (3) (1966).

ateness and general acceptance of municipal immunity for discretionary acts. See Restatement (Second) of the Law of Torts, § 895C (2) and comment g (1979); K. Davis, Administrative Law of the Seventies, § 25.13 (1976); W. Prosser, Law of Torts 986–987 (4th ed. 1971). In four States, local governments enjoy complete immunity from tort actions unless they have taken out liability insurance.[26] Only five States impose the kind of blanket liability constructed by the Court today.[27]

C

The Court turns a blind eye to this overwhelming evidence the municipalities have enjoyed a qualified immunity and to the policy considerations that for the life of this Republic have justified its retention. This disregard of precedent and policy is especially unfortunate because suits under § 1983 typically implicate evolving constitutional standards. A good-faith defense is much more important for those actions than in those involving ordinary tort liability. The duty not to run over a pedestrian with a municipal bus is far less likely to change than is the rule as to what process, if any, is due the bus driver if he claims the right to a hearing after discharge.

The right of a discharged government employee to a "name clearing" hearing was not recognized until our decision in *Board of Regents* v. *Roth*, *supra*. That ruling was handed down 10 weeks after Owen was discharged and eight weeks after the city denied his request for a hearing. By stripping the city of any immunity, the Court punishes it for

---

[26] Colo. Rev. Stat. § 24–10–104 (1973); Mo. Stat. Ann. § 71.185 (Vernon Supp. 1980); N. C. Gen. Stat. § 160A–485 (Repl. 1976); Vt. Stat. Ann., Tit. 29, § 1403 (1970).

[27] Ala. Code, Tit. 11, § 47–190 (1975); *Anderson* v. *State*, 555 P. 2d 248, 251 (Alaska 1976); 1979 Ariz. Sess. Laws, Ch. 185, § 11–981 (A)(2); La. Const., Art. 12, § 10 (a) (West 1974); *Long* v. *City of Weirton*, 214 S. E. 2d 832, 859 (W. Va. 1975). It is difficult to determine precisely the tort liability rules for local governments in Hawaii.

failing to predict our decision in *Roth*. As a result, local governments and their officials will face the unnerving prospect of crushing damage judgments whenever a policy valid under current law is later found to be unconstitutional. I can see no justice or wisdom in that outcome.