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NOTES

The Municipal Zoning Power and Section 1983 Liability After Owen v. City of Independence

INTRODUCTION

The United States Supreme Court has instructed that municipal corporations are to be considered "persons" in actions pursuant to 42 U.S.C. § 1983.\(^1\) In Owen v. City of Independence,\(^2\) the Court extended the reach of this mandate by declining to find a qualified immunity for municipal corporations implied within the terms of the statute. The decision suggests that municipalities will now be held strictly accountable for any constitutional violations. In the area of land use regulation, however, local governments have not traditionally been subjected to a rigorous standard of review when the constitutional propriety of a municipal zoning restriction is challenged.\(^8\) The Supreme Court has consistently deferred to municipal discretion whenever it has addressed alleged

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3. A zoning ordinance is constitutional if its objectives bear a substantial relationship to the public health, safety, morals, or general welfare and if the classification is justifiable in any way. Village of Euclid v. Ambler, 272 U.S. 365 (1926). The concept of general welfare is not to be narrowly construed in this context, and has been held to include such things as traditional family values and historic and aesthetic concerns in city planning. See Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Village of Belle Terre v. Borass, 416 U.S. 1 (1974); Berman v. Parker, 348 U.S. 26 (1954).
unconstitutional actions involving zoning provisions. In light of this well established trend, it is questionable whether Owen v. City of Independence will diminish the discretion municipalities currently enjoy in the exercise of their zoning powers. Yet, the Supreme Court’s most recent review of municipal duty in Owen indicates that even land use regulation does not warrant such a relaxed standard of review, particularly where such regulation is challenged on the basis of section 1983.

This article will outline the developments leading to the Supreme Court’s present position in regard to municipal liability under section 1983. It will present the standard of review applicable to zoning questions and will examine what impact, if any, Owen will have on the decided judicial preference for upholding zoning ordinances. The article will consider how the decision might alter the remedies available when it is demonstrated that a zoning ordinance exceeds the limits permitted by the Constitution. Finally, the article will suggest an interpretation of Owen that attunes the seemingly contradictory positions the Supreme Court has assumed in the area of municipal liability.

SECTION 1983

History and Purpose

In the aftermath of the Civil War, Congress enacted Section 1983 in order to protect the rights, privileges, and immunities secured by the Constitution as applied to the states through the fourteenth amendment. Section 1983 provides a federal remedy for violations of constitutionally protected rights, incurred under color of law, whether the violation occurs by legislative, executive, or judicial action. Despite the broad purposes of this provision,
however, the narrow reading of the fourteenth amendment after the Civil War limited the effect section 1983 had in safeguarding fundamental rights. Nevertheless, the interests protected by section 1983 did not remain circumscribed. The gradual incorporation of the Bill of Rights into the due process clause of the fourteenth amendment and the emergence of the modern equal protection and due process doctrines served to broaden the bases from which section 1983 plaintiffs could seek remedies for violations of their constitutional rights.

The early, narrow interpretation of the fourteenth amendment was not the only impediment to actions under section 1983. The language "under color of law" was similarly held to a limited definition. The most recent interpretations of section 1983, however,
have broadened the remedies available under the provision. In *Monell v. Department of Social Services*, 11 for example, the Supreme Court overruled an earlier decision, 12 and held that a municipal corporation is a "person" within the parameters of section 1983 and can be liable for damages whenever official customs, policies, or ordinances result in constitutional violations. 13 This more expansive reading of section 1983 was continued by the Supreme Court in *Owen v. City of Independence*. 14

**Immunities**

In cases prior to *Owen*, the Supreme Court addressed questions of immunity under section 1983 against a common law background, and found that the functions of state legislators, 15 judges, 16

325 U.S. 91 (1945) (sheriff and deputy held liable under § 242 when they beat a handcuffed prisoner to death.)

Following these cases, it was no longer necessary to show, in a criminal context at least, that the conduct giving rise to the constitutional deprivation found its authority in a statute or ordinance. *Monroe v. Pape*, 365 U.S. 167 (1961) established the same interpretation in the civil context. The *Monroe* court held that plaintiff stated a cause of action against police officers who allegedly entered plaintiff's home without warning and forced the occupants to stand naked while the entire house was ransacked, even though the officers acted in a manner inconsistent with state law.

13. The Court in *Monell* stated: "Local governing bodies can be sued directly under § 1983 for monetary, declaratory or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." 436 U.S. 658, 690 (1978).
15. The Supreme Court examined the question of absolute immunity for state legislators in *Tenney v. Brandhove*, 341 U.S. 367 (1951). The Court maintained that such an immunity had existed at common law when § 1983 was first enacted, and emphasized that the democratic process was dependent upon the ability of legislators to exercise independent judgment without the threat of liability under § 1983. Therefore, where the defendant is a state legislator acting within the legislative field, absolute immunity attaches to his conduct.

Similarly, in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the Court held that to the extent that members of a regional planning board were acting legislatively, they were immune from liability.

16. In extending immunity to judges, the Court noted that "imposing [a burden of damages liability] on the judges would not contribute to principled and fearless decision-making, but to intimidation." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Judges at all levels were protected by immunity at common law, and the question of whether the immunity applies turns on whether the individual and the institution are exercising judicial functions.

As a result, judicial immunity has been extended to justices of the peace, *Pennebaker v. Chamber*, 437 F.2d 66 (3rd Cir. 1971); municipal referees, *Lucarell v. McNair*, 453 F.2d 836 (6th Cir. 1972); and even members of quasi-judicial agencies, *Silver v. Dickson*, 403 F.2d 642 (9th Cir. 1968), *cert. denied*, 394 U.S. 990 (1969). It is generally accepted that judicial immunity is limited to damages and does not extend to injunctive relief. *See O'Shea v. Lit-
and prosecutors\textsuperscript{17} warranted the protection that absolute immunity affords. Furthermore, an individual defendant who was not absolutely immune from liability for damages could still assert a qualified immunity based upon his reasonable belief in the legality of the challenged conduct and on his good faith in exercising his authority.\textsuperscript{18} The development of immunity under section 1983 thus focused on the public need for independent and responsible decision making in every branch and at all levels of government.\textsuperscript{19}
Nonetheless, the Supreme Court maintained in *Owen* that its decision to deny a municipality even a qualified immunity paralleled both the developments in the common law and the Court's own decisions under section 1983.20

**LAND USE: REGULATION OF PRIVATE PROPERTY THROUGH ZONING PROVISIONS**

The right to own land finds clear expression in the "life, liberty and property" language of the fifth and fourteenth amendments.21 It is equally obvious, however, that the right is not absolute and that it is subject to restriction when the public welfare so demands.22 In the early part of this century, municipalities began to exercise land use control by enacting ordinances that prohibited nuisance-like conduct in certain areas of a city.24 The United

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of independent judgment. The discretionary-ministerial division is not more easily applied than was the governmental-proprietary distinction, and it arguably achieves only the same result, but under a different guise. See E. McQuillan, *Municipal Corporations*, § 53.22 a-g (3d ed. 1977); Comment, *The Discretionary Function Exception to Government Tort Liability*, 61 Marq. L. Rev. 163 (1977).


21. U.S. Const. amend. V provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."


24. See Hadacheck v. Sebastian, Chief of Police of City of Los Angeles, 239 U.S. 394 (1915) (ordinance prohibited the operation of a brick yard within the city's limits); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (ordinance barred the conduct of a livery
States Supreme Court upheld these ordinances as valid exercises of the police power. The Court then took the further step of approving a comprehensive zoning scheme in *Village of Euclid v. Ambler*.26

**Standard of Review**

*Euclid* presented the Court with its first opportunity to pass upon the validity of a comprehensive zoning scheme,26 and the standard of review formulated then has not since been altered. The Court held that a zoning ordinance is a valid exercise of municipal police power and will be declared unconstitutional only when its provisions are “arbitrary and unreasonable and [have] no substantial relation to the public health, safety, morals or general welfare.”27 The Supreme Court did not again review a comprehensive zoning scheme until *Village of Belle Terre v. Boraas*,28 nearly fifty years later, and it re-affirmed the standard of review established in *Euclid*. Thus, although the Court requires a more rigorous review over alleged constitutional violations in other areas of municipal stable business in a certain part of the city).

These private and judicial methods of control were not always satisfactory for community planning, and some municipalities turned to their powers of eminent domain to exercise control over land development. The municipalities would impose restrictions on the private landowner and then compensate him for the limited use of the property. *See* Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969). This technique, however, proved economically prohibitive, and local governments were forced to find another method for regulating land use. *See* 1 Anderson, *American Law of Zoning* ¶¶ 1.02-2.05 (1968).


26. In *Euclid*, restrictions were placed on the plaintiff's property by a zoning ordinance that prohibited certain uses in particular districts. The ordinance in question disallowed the establishment of commercial and apartment buildings in an area zoned for single family dwellings. As a result, the value of the property declined from $10,000 per acre to not more than $2,500 per acre. The landowner attempted to enjoin enforcement of the ordinance on the ground that it violated the due process clause of the fourteenth amendment. The Supreme Court held that the zoning ordinance was a valid exercise of police power. 272 U.S. 365, 384-96 (1926).

27. *Id.* at 395.

28. 416 U.S. 1 (1974). The challenged ordinance in *Belle Terre* prohibited more than two unrelated persons from sharing a house. The plaintiffs, college students, could not legally share the dwelling they were renting. The Court found that the ordinance was a reasonable exercise of legislative discretion, and that it did not unnecessarily impinge on the plaintiffs' rights to privacy, association, or travel. *Id.* at 9.
regulation,\textsuperscript{29} land use restrictions have continued to be evaluated by this minimal standard of review.\textsuperscript{30}

\textit{Fundamental Rights and Municipal Zoning Power}

Zoning ordinances have been challenged on various constitutional grounds. When fundamental rights are juxtaposed with the municipal zoning power, however, the Supreme Court has given great deference to the local authority.\textsuperscript{31} In \textit{Young v. American Mini Theatres},\textsuperscript{32} the Court was confronted with the dilemma of resolving the competing interests between the first amendment and the municipal zoning power. An ordinance restricted the location of certain uses, such as pool halls and adult movie theatres, within one thousand feet of one another. The petitioners, owners of adult movie theatres, brought a claim pursuant to section 1983, alleging that the zoning controls impermissibly infringed upon their first amendment right to freedom of speech.\textsuperscript{33} The Court applied the standard announced in \textit{Euclid}, and rejected the first amendment claims.\textsuperscript{34} The city's interest in preserving the character

\begin{itemize}
\item \textsuperscript{29} See Cox v. Louisiana, 379 U.S. 559 (1965) (broad statute cannot regulate what views can be heard in city's effort to maintain peace and order); Cox v. New Hampshire, 312 U.S. 569 (1941) (regulation of parade on public street restricted only to time, place and manner requirements); Cantwell v. Conn., 310 U.S. 295 (1940) (street discussion of religious views not sufficient to demonstrate breach of peace).
\item \textsuperscript{30} See notes 31-47 infra and accompanying text.
\item \textsuperscript{32} 427 U.S. 50 (1976).
\item \textsuperscript{33} The owners contested the validity of the ordinance on the ground that the licensing procedures amounted to a prior restraint on the freedom of speech since the regulation was only applicable if the content of the film met the standard described as "adult" by the municipal code. \textit{Id.} at 62. The restraint, the owners contended, was not a reasonable time, place or manner regulation since it attempted to control the content of the film.
\item \textsuperscript{34} The difficulty with the result in \textit{American Mini Theatres} is that the Court departed from traditional first amendment standards of review. When it is necessary to resolve a conflict between government regulation and first amendment values, the Court should address "the character of the right, not of the limitation . . . [to] determine[s] what standard governs. . . ." Thomas v. Collins, 323 U.S. 516, 530 (1945); see Adderly v. Florida, 385 U.S. 39, 48 (1966) (Douglas, J., dissenting).
\end{itemize}

Although the ordinance licensing procedures prohibited the plaintiffs from presenting certain films, the Court refused to find that the effect was a prior restraint on protected speech. Regulation of the place where the adult films could be viewed was not repugnant to
of its neighborhoods outweighed the heavy presumption of unconstitutionality that always accompanies any prior restraint of speech and which extends to all manner of protected expression—even to expression that can be considered lewd or otherwise unacceptable.\textsuperscript{35}

In comparison, when the municipality in \textit{Erznoznik v. City of Jacksonville}\textsuperscript{36} prohibited the showing of films containing nudity at drive-in theatres whose screens were viewable from a public place, the ordinance failed to meet the constitutional test.\textsuperscript{37} While the city was restricting the same kind of speech under consideration in \textit{American Mini Theatres}, the regulation was not part of a zoning scheme. Thus, only where the challenged ordinance was an exercise over the city's land use control did the regulation withstand the constitutional challenge.

A city has also relied on its zoning authority to limit the number of unrelated people permitted to live in a dwelling unit. In \textit{Village of Belle Terre v. Boraas},\textsuperscript{38} the Supreme Court found that an ordinance prohibiting three unrelated persons from living together was a valid exercise of the city's zoning authority. In upholding the ordinance, which was challenged on the basis of section 1983,\textsuperscript{39} the Court evaluated the regulation by applying only a minimum standard of review. According to the test established in \textit{Euclid}, it was only necessary that the ordinance bear a rational relationship to a permissible state objective.\textsuperscript{40} Significantly, the Court majority

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\textsuperscript{35} Since the films could be presented at certain locations in the city. Consequently, the market for this commodity remained unrestrained. \textit{Young v. American Mini Theatres}, 427 U.S. 50, 62 (1976).

\textsuperscript{36} For an interesting example, see \textit{Southeastern Promotion, Ltd. v. Conrad}, 420 U.S. 546 (1975), where the refusal to permit a showing of the musical “Hair” in a city auditorium because the showing was not in the best interest of the public amounted to an impermissible prior restraint.

\textsuperscript{37} \textit{422 U.S. 205} (1975).

\textsuperscript{38} The Court found the municipal regulation invalid on its face because it discriminated among movies solely on the basis of content. The prohibition against films containing any nudity could not be justified on the ground that a municipality may protect its citizens from being unwillingly exposed to materials that may be offensive. Nor could the ordinance be rationalized as an exercise of the city's police power to protect children, or to guard against distractions that would interfere with the flow of traffic and cause accidents. \textit{Id. at 212-215}.

\textsuperscript{39} \textit{416 U.S. 1} (1974).

\textsuperscript{40} The plaintiffs, pursuant to § 1983, sought injunctive and declaratory relief on the grounds that the restriction denied them equal protection of the laws and violated their rights of privacy, association and travel. \textit{Id. at 3, 7}.

\textsuperscript{40} \textit{Id. at 7-8}. In its conclusion, the Supreme Court stated that a community could utilize its zoning power to achieve a “quiet place where yards are wide, people few, and
placed heavy reliance on its previous decisions which granted great discretion to local governments in the zoning area.\textsuperscript{41}

Despite the Supreme Court's usual willingness to uphold zoning controls in the face of constitutional challenge, it might initially appear that the later case of Moore v. City of East Cleveland\textsuperscript{42} weakens the general premise that land use regulations can be sustained on the rational basis standard of Euclid and Belle Terre. In Moore, the Supreme Court held a zoning ordinance to a stricter standard of review when the city's specific definition of "family" prohibited the plaintiff from living with her son and two grandsons who were first cousins. The regulation was found to be an impermissible interference into the family structure and was held unconstitutional.\textsuperscript{43} Subsequent cases make clear, however, that Moore does not stand for the proposition that the rational basis test for zoning as established in Euclid and Belle Terre has been tempered by Moore's more stringent standard.

For example, in Penn. Central Transp. Co. v. City of New York,\textsuperscript{44} the Court relied on the rational basis test when it upheld a historic landmark designation scheme that required owners of landmark buildings to submit any plans for renovation or alteration for approval by the city planning commission. Historic and aesthetic concerns were permissible legislative objectives and the motor vehicles restricted . . ." to accommodate family needs. Id. at 9. The municipality was not required to present evidence that its ordinance did, in fact, achieve those goals.

41. Id. at 9-10.


42. 431 U.S. 494 (1977).

43. In earlier decisions, the Court recognized that the institution of the family is deserving of stringent constitutional protection, and that when legislation interferes with the family the Court shall not be willing to defer to legislative choice. In Moore, Justice Powell cited past decisions that recognized the protection of rights surrounding childbearing, Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); and child raising, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). These cases provide support for the Court's position that the legislature must demonstrate a compelling government interest before regulations can interfere with the family. Thus, it was this concern, rather than the land use regulation, which generated the Court's strict scrutiny of the ordinance.

In Moore, the city could not demonstrate that the need to eliminate overcrowding and traffic congestion justified the intrusion. Id. at 499-500. By implication, the language of the ordinance in Village of Belle Terre v. Borass, 416 U.S. 1 (1974), did not cut so deeply into the family structure and was allowed to stand. See notes 38-41 supra and accompanying text.

city was not required to show that the regulation in fact achieved those goals. Moreover, during the same term in which Moore was decided, the Court held in Village of Arlington Heights v. Metro. Housing Corp. that a refusal to change a zoning classification to accommodate plans to build racially integrated low and moderate income housing is contrary to the fourteenth amendment only if the plaintiffs could show a racially discriminatory intent. The presumption of constitutionality attended the municipality's zoning ordinance, and the plaintiffs carried the burden of proving that a racially discriminatory purpose was a motivating factor in the zoning decision.

It is apparent from these cases that the Court is not willing to intervene in land use regulation disputes, even if the plaintiff can demonstrate strong indicia of questionable conduct on the part of a municipality. In other areas, however, as exemplified by Owen v. City of Independence, the Court appears to demand strict municipal accountability and seems less willing to permit local governments to exercise their authority at the expense of fundamental rights.

Owen v. City of Independence

Background

In Owen, the petitioner, George D. Owen, Chief of Police in Independence, Missouri, was dismissed after reports of an investigation of the City Police Department had been released to the news media and turned over to the prosecutor for presentation to the grand jury. Owen was not given any reasons to substantiate his dismissal. He was only given written notice that the discharge was

45. Pennsylvania Central Railroad, as owner of Grand Central Station in New York, leased air rights over the station to a development firm to build a 53-story office tower. Two design schemes were submitted to the planning commission, and both were rejected. Id. at 116-120.

The Court maintained that the restrictions did not impose an effective taking of private property for public use without compensation. Implicit in its reasoning was that the ordinance was related to a legitimate state objective, that the public had great interest in the historic and aesthetic characteristics of the building, and that the burden on the private landowner was small. Id. at 130-32.


47. The Supreme Court established in Washington v. Davis, 426 U.S. 229 (1976) that discriminatory effect and intent are generally required in all equal protection cases, and must be present before a violation of the fourteenth amendment is demonstrated by the plaintiff.

authorized by the city charter. Subsequently, the grand jury returned a "no true bill" and no further action was taken by the city.  

The petitioner brought an action under 42 U.S.C. § 1983 against the city, the City Manager, and members of the City Council, alleging that he was denied his substantive and procedural due process rights by the discharge. The district court entered judgment for the respondents on the ground that the dismissal did not deprive Owen, an untenured employee, of any protected property interest. The lower court further found that the circumstances of the discharge did not stigmatize his professional reputation, and therefore he was not denied any liberty interest.

On appeal, the Eighth Circuit determined that the near simultaneous discharge of Owen and release of the investigation reports to the news media damaged the petitioner's name and reputation and deprived him of liberty without due process of law. The court of appeals, however, held that all the respondents, including the city, were entitled to a qualified immunity. The right to a name-clearing hearing had only been crystallized after the petitioner's discharge, and the Eighth Circuit extended the immunity to the city because the court did not want to charge municipalities with predicting the "future course of constitutional law."

Supreme Court's Decision

Owen v. City of Independence thus presented the Supreme Court with the opportunity to decide whether a municipal corporation can assert a qualified immunity as a defense to section 1983 actions. The Court unequivocally held that the good faith of the
municipality's officers cannot protect the local government from damages liability flowing from constitutional violations under the statute. The Court further held that municipal corporations cannot assert any qualified immunity to escape such liability.

The Court arrived at this conclusion by conducting a historical analysis of the doctrine of qualified immunity. The purpose of section 1983 is to provide a broad remedy for persons wronged by the misuse of power. This power is possessed by virtue of state law and can be exercised to inflict injury only because the wrongdoer acts under the authority of state law. The Supreme Court has found that Congress intended to incorporate an immunity into section 1983 if, at the time the statute was enacted, the immunity was well established at common law. Thus, the decision in Owen is predicated on the premise that there was no immunity for municipal corporations at the time section 1983 was first passed by Congress, and neither history nor policy can support a construction of the statute that would extend a qualified immunity to a municipal corporation.

In the Court's estimation, the rationales underlying governmental immunity from tort liability and immunity based upon good faith are not applicable under section 1983. The presence of immunity under these theories is based upon sovereign immunity which totally insulates the municipality from unconsented suits. The Court maintained that "good faith" is not relevant once the government becomes amenable to suit by enacting a statute such as section 1983. Similarly, the doctrine of immunity for discretionary or governmental actions cannot serve to promote municipal immunity under section 1983 because a municipality has no "discretion to violate the Federal Constitution." In Owen, the majority determined that since "elemental notions of fairness dictate that one who causes a loss should bear the loss" municipal corpo-

58. Id.
59. Id. at 650.
60. By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunity." Imbler v. Pachtman, 424 U.S. 409, 417 (1976) (emphasis added). Consequently, if any immunities are to exist under § 1983, they must have been available at common law when the statute was enacted by Congress. See notes 15-17 supra and accompanying text.
62. See note 19 supra.
64. Id. at 649.
65. Id. at 654.
rations should compensate individuals who are wrongfully deprived of their constitutional rights. The Court indicated that the government must serve as the harbinger of liberty and justice and that it would be "uniquely amiss . . . if the government itself were permitted to disavow liability for the injury it has begotten.""66

Owen's Impact on the Municipal Zoning Authority: An Analysis

Judicial Deference to Land Use Regulation: A Substitute Immunity

When the Supreme Court's decision in Owen is superimposed over the line of cases dealing with municipal land use regulation, an inconsistency in the Court's philosophy becomes apparent. The import of Owen is to ensure that municipalities are held accountable for their violations of federally protected rights. In the critical area of land use regulation, however, municipalities have traditionally been able to exercise wide control without being required to demonstrate that a particular restriction is necessary to achieve a valid purpose.67

A combined reading of Monell v. Department of Social Services68 and Owen indicates that a municipality's official policy or ordinance must be the cause in fact of the injury before a plaintiff can recover damages from a municipal corporation under section 1983. This burden, however, should not significantly inhibit a plaintiff-landowner's action.69 Still, the fact that municipalities are now subject to liability under section 1983, and cannot claim the protection of any immunity, will not have great meaning for most plaintiffs who claim injury from zoning restrictions.70 Despite the

67. See notes 44-47 supra and accompanying text.
69. When a landowner attempts to challenge a zoning restriction on a constitutional basis under § 1983, it will not be difficult to show that the municipality's policy is the cause of the constitutional injury. The property owner is deprived of the full and beneficial use of his property due to the zoning restriction; "but for" the municipal corporation's official zoning policy, no injury would have occurred.
70. While establishing cause in fact from the municipal ordinance to the injury might not present a problem, the more difficult burden for the plaintiff-landowner will be to demonstrate that there in fact has been a constitutional deprivation. This is due to the wide discretion given to local governments in zoning decisions. See notes 26-47 supra and accompanying text.

More importantly, the present situation places the municipality in an even more favored
Court's intention to make municipalities bear the burden of the cost of operation, they still enjoy considerable latitude in the exercise of their zoning authority. Indeed, even a qualified immunity could not provide them a better shield from liability.

In Young v. American Mini Theatres, a city's interest in planning land usage was subject only to the "arbitrary and unreasonable" standard announced in Euclid, and the Supreme Court rejected the petitioners' first amendment claims. Although American Mini Theatres preceded both Monell and Owen, and a municipality was immune from liability under section 1983 at the time, the considerable presumption of validity given to the city's zoning ordinance weakens the strength of a first amendment or other constitutional claim that a future litigant might have under a similar ordinance. American Mini Theatres does not, of course, expressly stand for the proposition that public policy requires municipalities to have immunity in the exercise of their zoning authority, but it implicitly supports that result. At the very least, it tends to place the municipality in a preferred position when the exercise of its zoning power clashes with a property owner's first amendment rights. In contrast, a similar attempt to regulate speech in Erznoznik v. City of Jacksonville did not merit the same deference extended in American Mini Theatres when the ordinance was not based upon the municipality's zoning authority.

The case of Village of Belle Terre v. Borass also illustrates the Court's deferential review of zoning cases. The text of the opinion and the majority's lengthy explanation of prior zoning cases give rise to the inference that a municipality, in the exercise of its zoning authority, bears a lesser burden of demonstrating the need for its classifications than it would in other areas of regulation. Thus, this discretionary posture toward a land use policy implemented.

position. The defense of a qualified immunity would shift the burden of proof onto the defendant. See note 18 supra. Now, of course, the burden is on the plaintiff who must demonstrate that the regulation is not reasonable, but arbitrary. Village of Euclid v. Ambler, 272 U.S. 365 (1926).

72. See notes 32-35 supra and accompanying text.
73. 422 U.S. 205 (1975).
74. See notes 36-37 supra and accompanying text.
76. See notes 38-41 supra and accompanying text.
by a municipal corporation eclipses whatever force Owen might give to a section 1983 plaintiff who is injured by a zoning restriction.78

Although the direction of Owen is to hold municipalities strictly accountable for their actions, the law surrounding judicial review of zoning cases dilutes this mandate. While it may be argued that Monell and Owen are indications that courts must review all municipal activities in a more probing fashion for purposes of section 1983—including alleged violations of the municipal zoning authority—it is not likely that these two cases will reverse the flow established by Euclid and its progeny. As long as the judiciary continues to defer to municipal discretion in the area of land use regulation, municipalities will not bear the full consequences of their actions as Owen requires.

For purposes of challenging zoning provisions, then, the broadened, unqualified section 1983 remedy will have little real benefit. Although the logical result of Monell and Owen is that the judiciary should homogenize the duty of care municipalities generally owe under section 1983, municipalities will continue to enjoy the benefit of exercising nearly untempered discretion in the area of land use regulation. Municipalities are not held to the same strict standard of review when they are alleged to impinge fundamental rights in the exercise of their zoning authority as they are when they allegedly violate constitutional rights through the exercise of other powers. Therefore, the judicial tendency to defer to municipal zoning authority will continue to be a steadfast bar to recovery.79 Consequently, the remedies now available under section 1983

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78. For example, in Penn. Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), a municipal planning ordinance denied the bankrupt owner of Grand Central Station the possibility of leasing the air rights over the station to relieve some of the owner's financial liability. The ordinance was upheld as a constitutional exercise of the zoning authority. See notes 44-45 supra and accompanying text. See also Agins v. City of Tiburon, ___ U.S. ___, 100 S. Ct. 2138 (1980).


79. The judiciary is often reluctant to involve itself in zoning decisions because there is
are virtually unattainable when zoning irregularities are involved. Municipalities, contrary to the tenor of the Owen decision, will remain unaccountable.

**The Possibility of Greater Liability**

Once, however, a plaintiff has successfully demonstrated a constitutional violation caused by a zoning ordinance based on the traditional standard of review, a city could be held accountable for greater liability than the Court in Owen intimated. For example, a developer may need to delay a construction project in order to have a zoning scheme amended to qualify for a building permit. If the proposed amendment were denied and the developer ultimately prevailed on the theory that the ordinance was an unconstitutional exercise of the zoning authority, then the city could be liable for damages of increased construction costs and for lost profits during the period of delay.80

Usually, damages are not available in zoning cases because zoning has been considered a legislative function, and municipalities have been immune from liability in the exercise of their discretionary responsibilities.81 The Owen decision, however, removes that

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some doubt whether it has the power to invade the legislative sphere and compel a municipality to structure its zoning to accommodate the plaintiff—usually a developer who is concerned only with a specific site. The courts are faced with the dilemma of balancing the site-specific interests of the developer with the community's general interest in planned growth.


Moreover, the municipality would be liable not only if the ordinance were unconstitutional on its face, but also if it were unconstitutional as applied to the specific site. See Nectow v. Cambridge, 277 U.S. 183 (1928) (zoning ordinance may be reasonable as it appears on its face, but unreasonable as it applies to a particular site).

A landowner is not strictly bound by the zoning choice for his property and can seek to change the existing regulations as they apply to his parcel. Seemingly, the duty imposed by § 1983 requires not only that the municipality's zoning ordinance fall within constitutional parameters generally, but that the city must also anticipate what proposed uses a developer may want to place on a specific parcel of land.

80. Moreover, the municipality would be liable not only if the ordinance were unconstitutional on its face, but also if it were unconstitutional as applied to the specific site. See Nectow v. Cambridge, 277 U.S. 183 (1928) (zoning ordinance may be reasonable as it appears on its face, but unreasonable as it applies to a particular site).

81. Although the fifth and fourteenth amendments require municipalities to compensate landowners when private property is taken for public use, the sovereign immunity doctrine traditionally prevents damages in zoning cases. See United States v. Causby, 328 U.S. 256 (1946); Penn. Coal Co. v. Mahon, 260 U.S. 393 (1922). For an interesting discussion of this topic, see Badler, *Municipal Zoning Liability in Damages—A New
limitation. While the burden of demonstrating a constitutional violation of rights remains high, the exposure to potential liability from unreasonable land use restrictions is now greatly increased. Owen should thus deter decision makers from using the municipal zoning power to achieve improper purposes.82

The nature of building and developing is necessarily costly and, in order to avoid burdensome liability, municipalities will likely carefully consider whether a zoning ordinance is within constitutional parameters before enacting or amending the provision. Thus, while Owen does not alter the judicial standard of review applicable to zoning issues and does not serve as a ready compensatory vehicle for alleged violations of the zoning authority, it may still have a valuable impact as a deterrent to future questionable zoning restrictions. Although the laxed standard of review remains constant, the possible scope of municipal liability is significantly broadened.

CONCLUSION

The United States Supreme Court's expressed intention in Owen v. City of Independence is to hold municipal corporations accountable for their violations of federally protected rights. Owen and the earlier decision of Monell v. Department of Social Services work


82. The decision in Owen is potentially most useful in the area of exclusionary zoning. Under § 1983, a zoning ordinance can be declared unconstitutional if it can be established that there is a racially discriminatory effect, and if there is some evidence of discriminatory intent. These kinds of cases are most often based on facts that are typical of the urban-suburban conflict.

When suburban communities choose to limit the type and the number of available housing units within their boundaries, the cost of the housing remains high and effectively keeps the poor and minorities out. A developer purchases property within the community, and then petitions for a zoning change from single family dwellings to multiple family dwelling which would house the poor and minorities. Of course, this is arguably the result against which zoning might have been structured to guard.

If the court requires the municipality to provide the specific zoning request the developer is seeking, then it denies the community its prerogative to determine at what site multiple family dwellings might best serve the public interest. If the court does not grant the specific relief the developer is asking, but permits the zoning change on another site, then later developers will not attempt to challenge exclusionary zoning schemes because the risk of receiving any compensation would be too great.

Now that a municipal corporation may be held liable for its constitutional torts under § 1983, a court can award damages to the plaintiff-developer and allow the city to amend its total zoning scheme without requiring it to provide site-specific relief to the developer. After Owen, a court can give damages to the injured plaintiff, yet not intrude in the legislative sphere. A remedy will be provided, and the threatening presence of liability will help deter municipalities from planning their communities to wholly exclude certain types of uses.
together to provide an unqualified remedy when plaintiffs are denied their constitutionally protected rights due to the implementation or execution of a municipality's official policy. The magnitude of these decisions, however, fades when it meets the well-established precedents regarding the exercise of the municipal zoning authority. In the area of land use regulation, the broadened remedy will have little real benefit. When a fundamental right is allegedly violated through the exercise of the municipal zoning power, it will receive less protection than it would if the municipality attempted to curtail the right through another channel of authority. This is due to the fact that the standard of review differs. Thus, while a municipality may now be liable to a landowner for economic losses caused by a zoning ordinance, the plaintiff who relies upon section 1983 must still shoulder a particularly heavy burden to demonstrate that the implementation of land use controls denied him a federally protected right.

The decision in Owen, however, indicates a clear intention to hold municipalities liable for their actions and to spread the cost of their transgressions on all of those who benefit from municipal government. It is not difficult to urge that the new standard of accountability generally under section 1983, necessarily requires a stricter standard of review when zoning ordinances meet fundamental rights. This position, of course, is dependent upon a broad interpretation of the Owen decision. In the absence of more specific articulation by the Supreme Court, the line of cases dealing with municipal authority in the area of land use regulation defeats the Owen mandate of strict municipal accountability.

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