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## By Disposition

RICHARD GARDELLA\*

Few people remember that Clarence Darrow was a municipal attorney before he became the "Great Defender." In his autobiography, Darrow recalled that his legal advice as Chicago's Corporation Counsel before the turn of the century often settled controversy. He explained that, in his opinion, success resulted from the fact that his words had the power of government behind them and from the tendency of the courts to side with government.<sup>1</sup> In other words, "You can't fight City Hall." Today's municipal lawyer can only look back on such halcyon days of success with rueful nostalgia. Now, it seems to many embattled local government defenders that the prevalent litigation battle cry is "Let's sue the City."

A string of recent court cases expanding municipal liability exposure has helped to feed a siege mentality among municipal lawyers. Foremost in this line of decision are opinions of the U.S. Supreme Court. First there were cases finding municipal liability pursuant to an 1871 congressional enactment originally designed to protect the rights of newly-freed slaves. Municipalities became "persons" subject to federal lawsuits for alleged civil rights violations under 42 U.S.C. § 1983<sup>2</sup> when the nation's top court overruled prior holdings in 1978. The decision, *Monell v. Department of Social Services of the City of New York*,<sup>3</sup> opened the door to a flood of potential litigation. The threat was heightened and the liability exposure broadened by cases which quickly followed.

In 1980, the Supreme Court ruled that a municipality was not protected by a "good faith" defense in section 1983 lawsuits even though individual public officials were. The majority re-

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1. C. DARROW, *THE STORY OF MY LIFE* 50 (1934).

2. 42 U.S.C. § 1983 (1976).

3. 436 U.S. 658 (1978).

vealed a "deep pocket" approach to municipal liability by concluding: "No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct."<sup>4</sup> The case, *Owen v. City of Independence Missouri (Owen)*,<sup>5</sup> made many observers worry that municipalities were headed for an era of strict liability.

*Owen* was followed by *Maine v. Thiboutot (Thiboutot)*,<sup>6</sup> in which the Court seemed to say any federal statutory violation could give rise to a section 1983 lawsuit against a municipality. Also, the Court ruled that a successful plaintiff was entitled to attorney fees in such suits. Last year, four Westchester communities learned how serious the attorney fee problem could become when they were found liable for more than \$300,000 of court-awarded legal fees for plaintiffs in a firefighter-hiring bias case which had been settled without a full trial.<sup>7</sup>

1981 saw the onslaught checked somewhat with the Court holding in *City of Newport v. Fact Concerts, Inc.*,<sup>8</sup> that municipalities were not subject to punitive damages in section 1983 lawsuits. In addition, lower courts seemed to mitigate the "every violation" holding of *Thiboutot*.

However, before municipal attorneys could enjoy the seeming respite, the top court sent a boulder crashing against what was left of municipal immunity. In *Community Communications, Co. Inc. v. City of Boulder*,<sup>9</sup> the Court said municipalities were subject to antitrust suit when they acted without strict statutory authority from the state. Borrowing a line from the lower court, Justice William J. Brennan, writing for the majority intoned: "We are a nation not of 'city-states' but of states." The decision was seen as a serious blow to the "Home Rule" movement in this country. It also raised the spectre of treble damages for municipalities and the open ended nature of antitrust

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4. *Owen v. City of Independence, Missouri*, 445 U.S. 622, 657 (1980).

5. 445 U.S. 622 (1980).

6. 448 U.S. 1 (1980).

7. *Vulcan Society of Westchester County, Inc. v. Fire Dep't of White Plains*, 533 F. Supp. 1054 (S.D.N.Y. 1982); *See \$600,000 Vulcan Legal Fee Sought, MUN. LAW.*, Feb. 28, 1981.

8. 453 U.S. 247 (1981).

9. 455 U.S. 40 (1982).

legislation.

The twin furies outlined above are foreboding for municipalities, but they do not threaten the very existence of local government the way a third line of court cases does. This last line of cases postulates a philosophy of "economic egalitarianism" under the equal protection clause—a philosophy, which if adopted, could inevitably lead to the demise of city hall.

School financing provided the focusing issue for this philosophy and state courts, not the nation's top court, provided the legal battle ground. The U.S. Supreme Court had earlier rejected the "dollar and cents" egalitarian approach to school financing in *San Antonio Independent School District v. Rodriguez (Rodriguez)*.<sup>10</sup> However, that approach found support in New York courts. Its most articulate expression came from a careful, scholarly majority opinion of the appellate division, second department, reputed to be one of the nation's busiest courts.

The majority opinion, in *Board of Education v. Nyquist (Nyquist)*,<sup>11</sup> covers nearly fifty pages in detailing economic disparity between school districts in the state. Because of that disparity, which saw per pupil costs range in the state from a high of \$6300 to a low of \$1000, the majority found both the equal protection clause and the education clause of the state constitution violated.<sup>12</sup> The argument was beguiling and on the side of right, but one judge saw clearly the danger. He agreed that the education clause had been violated because the patchwork of state school financing laws could not be found to be rationally based, but he dissented on the equal protection holding and rejected economic egalitarianism in state financing. He saw clearly the danger to local government explaining:

Leaving aside, therefore, the unproved claim of pupil deprivation, the plaintiffs are reduced to the plaint that their financial resources, based on real property assessments, do not equal the resources of other school districts. But this is a plight not derived

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10. 411 U.S. 1 (1973).

11. 83 A.D.2d 217, 443 N.Y.S.2d 843 (2d Dep't 1981), *modified*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 51 U.S.L.W. 3532 (U.S. Jan. 18, 1983) (Nos. 82-639 and 82-655).

12. *Id.* at 227, 443 N.Y.S.2d at 850.

from educational disadvantage; it is a common plight for a large number of municipal units, whether county, city, town, village, special service district, or authority. Whenever geographical area measures the unit, it follows that the value and kind of land and improvements within the unit will vary, and that equality of resources of the units (or category of units) cannot be attained, without at the same time destroying community lines.

The inequality of resources within school districts thus presumed, the claim of unequal protection of the law must therefore fail, unless we are to say that the State cannot delegate a constitutional function to municipalities except by equalizing the financial burden in each municipality out of State funds. But the delegation of State functions to its municipalities and the financing of such functions out of real property taxes levied by the individual municipality is so much a part of the fundamental pattern of our government that to assert a claim of a violation of equal protection of the law, because the resources of the municipality are unequal, is at complete odds with the historical development of the law, as well as the elementary structure of State government. It cannot be said, for example, that because the financial resources of the counties of the State vastly differ, that the court function or law enforcement function within the counties may not be delegated by the State without the use of State funds, or that as a consequence a constitutional violation of equal protection of law must be implicated.

Indeed, the claim in this case of an infringement of equal protection, if sustained, essentially would require that other constitutional mandates must be similarly treated. For example, the Constitution imposes the support of the needy on the State and its subdivisions, to be provided 'in such manner and by such means, as the legislature may from time to time determine.' (N.Y. Const., art. XVII, § 1.) Again, the same constitutional strictures are laid on the State to be discharged by the Legislature with respect to public health (N.Y. Const., art. XVII, § 3), the care of persons suffering from natural disorders (N.Y. Const., art. XVII, § 4), and public housing (N.Y. Const., art. XVIII, § 1). Thus, the argument of the plaintiffs underpinning their claim of constitutional discrimination on the ground of disparity of wealth proves too much and would, if accepted, effectively destroy the long-established governmental principle that the municipality can be expected to deal competently with State functions delegated to

it . . . .<sup>13</sup>

The judge also chided his brethren for straying from the *Rodriguez* holding.<sup>14</sup> Reviewing the parallel language of the state constitution and the fourteenth amendment, he wrote:

There appears no reason to suppose that the purpose and effect of the two provisions are or should be different . . . at the same time it is clear that the State courts must be the final arbiters of the interpretation to be given to the State Constitution. Nevertheless, at the very least the interpretation made by the Supreme Court of the United States concerning the meaning and effect of the Fourteenth Amendment must be granted great respect by the State courts when they are called on to construe the equal protection clause of the State Constitution.

Hence, we should not only acknowledge the binding judgment of the Supreme Court in *San Antonio School Dist. v Rodriguez* (411 U.S. 1) concerning the meaning of Federal equal protection, but also pay full regard to the reasoning by which that judgment was reached by the Supreme Court, when we determine the meaning of the equal protection article in the State Constitution.<sup>15</sup>

These words bucked a state judicial trend to seek a path different from the nation's top court under the guise of state constitutional interpretation.

The judge who foresaw the danger and gave the lesson on constitutional interpretation in *Nyquist* is former Justice James D. Hopkins. This fact comes as no surprise to the knowledgeable municipal attorney who is acquainted with Judge Hopkins' career — a career which involved major local government experience. The opinion was the kind of thoughtful opinion municipal lawyers had come to expect from this distinguished jurist. It was not a popular opinion nor one designed to satisfy any special interest or pressure group. Of course, it did not receive much popular attention. Headlines cannot be composed from wise words. But the opinion had its impact. This year the court of appeals reversed the appellate division's equal protection argu-

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13. *Id.* at 260-61, 443 N.Y.S.2d at 870-71 (Hopkins, J., concurring in part and dissenting in part) (citation omitted).

14. *See supra* note 10.

15. 83 A.D.2d at 288-89, 443 N.Y.S.2d at 869.

ment citing Judge Hopkins' opinion in *Board of Education v. Nyquist*.<sup>16</sup>

Such reliance on a Hopkins dissent by the state's top court is not an uncommon occurrence. As a matter of fact, the concurring portion of Judge Hopkins' opinion below was cited by the court of appeals dissent in *Nyquist*.<sup>17</sup> This peer respect shown Judge Hopkins could not surprise the knowledgeable municipal lawyer. His last dissenting municipal law opinion formed the basis of a court of appeals reversal. The case, *Marcus v. Baron*,<sup>18</sup> involved weighty questions of statutory construction and the state law involving creation of villages.

Municipal lawyers were not always pleased with his decisions, but they always respected his judgment. This writer remembers a carefully crafted legal argument which dissolved under a simple sounding question from Justice Hopkins: "But what does the judgment say?" Eventually the import of the question sank in and this writer knew he lost the case.

Justice Hopkins' judicial career makes one suspect that Plautus, a Roman dramatist, was right when he said:

"Not by years but by disposition is wisdom acquired."

Judge Hopkins has that rare judicial disposition which gives birth to wisdom. The exercise of that disposition is missed by municipal lawyers.

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16. 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 51 U.S.L.W. 3532 (U.S. Jan. 18, 1983)(Nos. 82-639 and 82-655).

17. *Id.* at 55, 439 N.E.2d at 373, 453 N.Y.S.2d at 657 (Fuchsberg, J., dissenting).

18. 57 N.Y.2d 862, 442 N.E.2d 437, 456 N.Y.S.2d 39 (1982).