STYLISTIC CHANGES THROUGHOUT
New footnote 30; footnotes thereafter renumbered
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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1919

CITY OF OKLAHOMA CITY, PETITIONER *v.*
ROSE MARIE TUTTLE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[March ——, 1985]

JUSTICE STEVENS, dissenting.

When a police officer is engaged in the performance of his official duties, he is entrusted with civic responsibilities of the highest order. His mission is to protect the life, the liberty and the property of the citizenry. If he violates the Federal Constitution while he is performing that mission, I believe that federal law provides the citizen with a remedy against his employer as well as a remedy against him as an individual. This conclusion is supported by the text of 42 U. S. C. § 1983, by its legislative history, and by the holdings and reasoning in several of our major cases construing the statute. The Court's contrary conclusion rests on nothing more than a recent judicial fiat that no litigant had asked the Court to decree.

I

As we have frequently noted, § 1983 "came onto the books as § 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13."[1] The law was an especially important, remedial measure, drafted in expansive language.[2] The class of potential de-

[1] *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961).

[2] The section reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

fendants is broadly defined by the words "every person."[3] It is now settled that the word "person" encompasses municipal corporations,[4] and, of course, it was true in 1871 as it is today, that corporate entities can only act through their human agents.[5] Thus, if Congress intended to impose liability on municipal corporations, it must have intended to make them responsible for at least some of the conduct of their agents.

At the time the statute was enacted the doctrine of *respondeat superior* was well recognized in the common law

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rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983.

[3] "Title 42 U. S. C. § 1983 provides that '[e]very person' who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages. The statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that it should be applied as stringently as it reads." *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976) (fotnotes omitted).

[4] *Monell* v. *New York City Department of Social Services*, 436 U. S. 658, 663 (1978). It should be noted that the contrary proposition announced in Part III of the Court's opinion in *Monroe* v. *Pape*, 365 U. S., at 187–192, had not been advanced by respondent City of Chicago in that case. Indeed, the primary defense asserted on behalf of the City was that neither the City nor the individual detectives were liable because the officers' conduct was forbidden by Illinois law and therefore *ultra vires*. The City did not take issue with petitioners' submission that the doctrine of *respondeat superior* applied to the City. Compare Brief for Petitioners, *Monroe* v. *Pape*, No. 39, at 8, 21 ("the theory of the complaint is that under the circumstances here alleged the City is liable for the acts of its police officers, by virtue of *respondeat superior*"), 25–27 with Repondents' Brief, *Monroe* v. *Pape*, No. 39, at 3.

[5] Indeed, "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell*, 436 U. S., at 687. Moreover, "municipal corporations were routinely sued in the federal courts and this fact was well known to Members of Congress." *Id.*, at 688 (footnotes omitted). See, *e. g.*, *Louisville, Cincinnati & Charleston R. R. Co.* v. *Letson*, 2 How. 497, 558 (1844); see also *Cowles* v. *Mercer County*, 7 Wall. 118, 121 (1869).

of the several states and in England.[6] An employer could be held liable for the wrongful acts of his agents, even when acting contrary to specific instructions,[7] and the rule had been

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[6] Thus William Blackstone wrote the following in 1765:

"As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium, facit per se.* Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it: not that the servant is excused, for he is only to obey his master in matters that are honest and lawful. If an inn-keeper's servants rob his guests, the master is bound to restitution: for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam, qui non prohibet, cum prohibere possit, jubet.* So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master: for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command." 1 *Blackstone's Commentaries on the Laws of England* 429–430.

He continued in the same volume:

"We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer: he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim that no man shall be allowed to make any advantage of his own wrong." *Id.*, at 432.

[7] In 1862, in *Limpus* v. *London General Omnibus Co.*, 1 Hurl. & C. 526, the Exchequer Chamber held that the owner of an omnibus company could be liable for injury inflicted on a rival omnibus company by a driver who violated the defendant's specific instructions. Judge Willes wrote:

"It is well known that there is virtually no remedy against the driver of an omnibus, and therefore it is necessary that, for injury resulting from an act done by him in the course of his master's service, the master should be responsible; for there ought to be a remedy against some person capable of paying damages to those injured by improper driving. . . . It may be said that it was no part of the duty of the defendants' servant to obstruct the plaintiff's omnibus, and moreover the servant had distinct instructions not to obstruct any omnibus whatever. In my opinion those instructions are

specifically applied to municipal corporations,[8] and to the wrongful acts of police officers.[9] Because it "is always appropriate to assume that our elected representatives, like

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immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to this servant, to discharge him from liability. Therefore, I consider it immaterial that the defendants directed their servant not to do the act. Suppose a master told his servant not to break the law, would that exempt the master from responsibility for an unlawful act done by his servant in the course of his employment?" *Id.*, at 539.

[8] See, *e. g.*, *Allen* v. *City of Decatur*, 23 Ill. 332, 335 (1860), where the court stated:

"Governmental corporations then, from the highest to the lowest, can commit wrongful acts through their authorized agents from which they are responsible; and the only question is, how that responsibility shall be enforced. The obvious answer is, in courts of justice, where, by the law, they can be sued." See also *Thayer* v. *The City of Boston*, 36 Mass. 511, 516–517 (1835) (emphasis added), where the court stated:

"That an action sounding in tort, will lie against a corporation, though formerly doubted, seems now too well settled to be questioned. *Yarborough* v. *Bank of England*, 16 East, 6; *Smith* v. *Birmingham & Gas Light Co.*, 1 Adolph. & Ellis, 526. And there seems no sufficient ground for a distinction in this respect, between cities and towns and other corporations. *Clark* v. *Washington*, 12 Wheaton, 40; *Baker* v. *Boston*, 12 Pick. 184.

"Whether a particular act, operating injuriously to an individual, was authorized by the city, by any previous delegation of power, general or special, or by any subsequent adoption and ratification of particular acts, is a question of fact, to be left to a jury, to be decided by all the evidence in the case. As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii;* it must further appear, that they were expressly authorized to do the acts, by the city government, *or that they were done bona fide in pursuance of a general authority to act for the city, on the subject to which they relate;* or that, in either case, the act was adopted and ratified by the corporation."

In 1871, the year the Ku Klux Act was passed, *Thayer* was cited in support of the following statement:

"When officers of a town, acting as its agents, do a tortious act with an honest view to obtain for the public some lawful benefit or advantage, reason and justice require that the town in its corporate capacity should be

other citizens, know the law,"[10] it is equally appropriate to assume that the authors of the Civil Rights Act recognized that the rule of *respondeat superior* would apply to "a species of tort liability that on its face admits of no immunities."[11] Indeed, we have repeatedly held that § 1983 should be construed to incorporate common-law doctrine "absent specific provisions to the contrary."[12] We have consistently applied this principle of construction to federal legislation enacted in the nineteenth century.[13]

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liable to make good the damage sustained by an individual in consequence of the acts thus done." *Hawks* v. *Charlemont*, 107 Mass. 414, 417–418 (1871).

[9] In *Johnson* v. *Municipality No. One*, 5 La. Ann. 100 (1850), a Louisiana court affirmed a $600.00 damage judgment against a city for the illegal detention in its jail of the plaintiff's slave. In the course of its decision, the Court acknowledged the correctness of the following statement:

"The liability of municipal corporations for the acts of their agent is, as a general rule, too well settled at this day to be seriously questioned." *Id.*, at 100.

[10] *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979).

[11] *Imbler* v. *Patchman*, 424 U. S., at 417.

[12] The passage from which this language is culled is worth quoting in full:

"It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. In the Civil Rights Act of 1871, Congress created a federal remedy against a person who, acting under color of state law, deprives another of constitutional rights. . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258 (1981); see also *Briscoe* v. *LaHue*, 460 U. S. 325, 330, 334 (1983); *Pierson* v. *Ray*, 386 U. S. 547, 553–554 (1967).

In *Newport*, the Court further noted:

"Given that municipal immunity from punitive damages was well established at common law by 1871, we proceed on the familiar assumption that 'Congress would have specifically so provided had it wished to abolish the doctrine.' *Pierson* v. *Ray*, 386 U. S., at 555. Nothing in the legislative debates suggests that, in enacting § 1 of the Civil Rights Act, the 42d Congress intended any such abolition." 453 U. S., at 263–264.

The legislative history of the Ku Klux Act supports this conclusion for two reasons. First, the fact that "nobody" objected to § 1[14] is consistent with the view that Congress expected normal rules of tort law to be applied in enforcing it. Second, the debate on the Sherman Amendment—an amendment that would have imposed an extraordinary and novel form of absolute liability on municipalities—indicates that Congress seriously considered imposing *additional* responsibilities on muncipalities without ever mentioning the possibility that they should have any *lesser* responsibility than any other person.[15] The rejection of the Sherman Amendment sheds no light on the meaning of the statute, but the fact that such an extreme measure was even considered indicates that Congress thought it appropriate to require municipal corporations to share the responsibility for carrying out the commands of the Fourteenth Amendment.

Of greatest importance, however, is the nature of the wrong for which § 1983 provides a remedy. The Act was primarily designed to provide a remedy for violations of the United States Constitution—wrongs of the most serious kind.[16] As the Court recognizes, the individual officer in this case was engaged in "unconstitutional activity."[17] But the conduct of an individual can be characterized as "unconstitutional" only if it is attributed to his employer. The Fourteenth Amendment does not have any application to purely private conduct.[18] Unless an individual officer acts under

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[13] See, *e. g.*, *Briscoe* v. *LaHue*, 460 U. S. 325, 330 (1983); *Associated General Contractors* v. *Carpenters Union*, 459 U. S. 519, 531 (1983).

[14] *Monroe* v. *Pape*, 365 U. S., at 171 (referring to § 1, which of course is now § 1983, Senator Edmunds, Chairman of the Senate Committee on the Judiciary, stated: "The first section is one that I believe nobody objects to").

[15] *Monell*, 436 U. S., at 666–676.

[16] *Id.*, at 683–686.

[17] *Ante*, at 15.

[18] As the Court in *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948), correctly noted:

color of official authority, § 1983 does not authorize any recovery against him. But if his relationship with his employer makes it appropriate to treat his conduct as state action for purposes of constitutional analysis, surely that relationship equally justifies the application of normal principles of tort law for the purpose of allocating responsibility for the wrongful state action.

The central holding in *Monroe* v. *Pape*, 365 U. S. 167 (1961), confirms this analysis. In that case, the City of Chicago had rested its entire defense on the claim that the individual officers had acted "*ultra vires*" when they invaded the petitioners' home.[19] Putting to one side the question whether the city was a "person" within the meaning of the Act, the only issue that separated the members of the Court was whether liability could attach without proof of a recurring "custom or usage." In terms of today's decision, the question was whether it was necessary for the petitioners to prove that the conduct of the police officers represented the city's official "policy." Over Justice Frankfurter's vehement dissent,[20] the Court held that a "single incident" could constitute a violation of the statute.[21]

Justice Harlan's statement of the opposing positions identifies the central issue in *Monroe*:

> "One can agree with the Court's opinion that:
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> 'It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion,

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"Since the decision of this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

[19] See *supra*, n. 4.

[20] 365 U. S., at 202–259.

[21] *Id.*, at 187.

> neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. . . .'
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> without being certain that Congress meant to deal with anything other than abuses so recurrent as to amount to 'custom, or usage.' One can agree with my Brother Frankfurter, in dissent, that Congress had no intention of taking over the whole field of ordinary state torts and crimes, without being certain that the enacting Congress would not have regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern."[22]

If the action of a police officer is "far more serious than an ordinary state tort" because it is "made possible by his position," the underlying reason that such an action is a "matter of federal concern" is that it is treated as the action of the officer's employer. If the doctrine of *respondeat superior* would impose liability on the city in an ordinary tort case, *a fortiori*, that doctrine must apply to the city in a § 1983 case.

II

While the Court purports to answer a question of statutory construction—which it properly introduces with a quotation of the statutory text, see *ante*, at 7—its opinion actually provides us with an interpretation of the word "policy" as it is used in Part II of the opinion in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690–695 (1978). The word "policy" does not appear in the text of § 1983, but it provides the theme for today's decision.[23] The Court concludes:

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[22] *Id.*, at 193 (Harlan, J., concurring).

[23] Notwithstanding the absence of the word "policy" in the statute, the Court makes the remarkable statement that "custom or policy" is language that "tracks the language of the statute." *Ante*, at 9.

> "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved."[24]

This parsimonious construction of the word "policy" may well be a fair interpretation of what the Court wrote in Part II of *Monell*, but I am persuaded that Congress intended no such bizarre result.

Part II of *Monell* contains dicta of the least persuasive kind. As JUSTICE POWELL noted in his separate concurrence, language that is "not necessary to the holding may be accorded less weight in subsequent cases."[25] Moreover, as he also pointed out, "we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations."[26] The commentary on *respondeat superior* in *Monell* was not responsive to any argument advanced by either party[27] and was not even relevant to the Court's actual holding.[28] Moreover, in the Court's earlier decision in *Monroe* v. *Pape*, although the petitioners had explained why it would be appropriate to apply the doctrine of *respondeat superior* in § 1983 litigation, no contrary argument had been advanced by the city.[29] Thus,

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[24] *Id.*, at 15.

[25] *Monell*, 436 U. S., at 709, n. 6.

[26] *Ibid.*

[27] Compare Brief for Petitioners and Brief for Respondents, *Monell* v. *New York Department of Social Services*, No. 75–1914, with the Court's dicta in Part II of *Monell*, 436 U. S., at 690–695.

[28] For that reason I did not join Part II of the opinion and did not express the views that I am expressing today. See 436 U. S., at 714 (STEVENS, J., concurring in part). Today the Court deems it appropriate to characterize the discussion of *respondeat superior* as a "holding," see *ante*, at 9; thus one *ipse dixit* is used to describe another.

[29] See *supra*, n. 4.

the views expressed in Part II of *Monell* constitute judicial legislation of the most blatant kind. Having overruled its earlier—and, ironically also volunteered—misconstruction of the word "person" in *Monroe* v. *Pape*, in my opinion, the Court in *Monell* should simply have held that municipalities are liable for the unconstitutional activities of their agents that are performed in the course of their official duties.[30]

III

In a number of decisions construing § 1983, the Court has considered whether its holding is supported by sound considerations of policy.[31] In this case, all of the policy considerations that support the application of the doctrine of *respondeat superior* in normal tort litigation against municipal corporations apply with special force because of the special quality of the interests at stake. The interest in providing fair compensation for the victim,[32] the interest in

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[30] The Court's principal response to this dissent is based on the doctrine of *stare decisis*. See *ante*, at 9–10, n. 5. That doctrine, however, does not apply to Part II of *Monell* because that part of the opinion was wholly irrelevant to the *ratio decidendi* of the case. See *Carroll* v. *Lessee of Carroll*, 16 How. 275, 287 (1853); *Cohens* v. *Virginia*, 6 Wheat. 264, 399–400 (1821). As is so often true, Justice Cardozo has provided us with the proper response:

"I own that it is a good deal of mystery to me how judges, of all persons in the world, should put their faith in dicta." B. Cardozo, The Nature of the Judicial Process 29 (1921).

[31] See, *e. g.*, *City of Newport* v. *Fact Concerts, Inc.*, 453 U. S., at 266–271; *Owen* v. *City of Independence*, 445 U. S., at 650–656 ("In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates. The need to institute system-wide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights is, of course, particularly acute where the frontline officers are judgment-proof in their individual capacities"). *Id.*, at 652, n. 36.

[32] Cf. *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the

deterring future violations by formulating sound municipal policy,[33] and the interest in fair treatment for individual officers who are performing difficult and dangerous work,[34] all militate in favor of placing primary responsibility on the municipal corporation.

The Court's contrary conclusion can only be explained by a concern about the danger of bankrupting municipal corporations. That concern is surely legitimate, but it is one that should be addressed by Congress—perhaps by imposing maximum limitations on the size of any potential recovery or by requiring the purchase of appropriate liability insurance—rather than by this Court. Moreover, it is a concern that is relevant to the law of damages rather than to the rules defining the substantive liability of "every person" covered by § 1983.[35]

The injection into § 1983 litigation of the kind of debate over policy that today's decision will engender can only complicate the litigation process. My rather old-fashioned and simple approach to the statute would eliminate from this

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protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection").

[33] As one observer stated:

"The great advantage of police compliance with the law is that it helps to create an atmosphere conducive to a community respect for officers of the law that in turn serves to promote their enforcement of the law. Once they set an example of lawful conduct they are in a position to set up lines of communication and to gain its support." R. Traynor, Lawbreakers, Courts, and Law-Abiders, 41 Journal of the State Bar of California 458, 478 (July–August 1966).

[34] "A public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability." *Procunier* v. *Navarette*, 434 U. S. 555, 569 (1978) (STEVENS, J., dissenting).

[35] D. Dobbs, Handbook on the Law of Remedies 1 (1973) ("The law of judicial remedies concerns itself with the nature and scope of the relief to be given a plaintiff once he has followed appropriate procedure in court and has established a substantive right. The law of remedies is thus sharply distinguished from the law of substance and procedure").

class of civil-rights litigation the time consuming "policy" issues that *Monell* gratuitously engrafted onto the statute. Of greatest importance, it would serve the administration of justice and effectuate the intent of Congress.

I respectfully dissent.