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To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia
Justice Kennedy

From: **Justice Brennan**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 86-772

CITY OF ST. LOUIS, PETITIONER *v.*
JAMES H. PRAPROTNIK

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

[March 2, 1988]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring.

Despite its somewhat confusing procedural background, this case at bottom presents a relatively straightforward question: whether respondent's supervisor at the Community Development Agency, Frank Hamsher, possessed the authority to establish final employment policy for the city of St. Louis such that the city can be held liable under 42 U. S. C. § 1983 for Hamsher's allegedly unlawful decision to transfer respondent to a dead-end job. Applying the test set out two Terms ago by the plurality in *Pembaur* v. *Cincinnati*, 475 U. S. 469 (1986), I conclude that Hamsher did not possess such authority and I therefore concur in the Court's judgment reversing the decision below. I write separately, however, because I believe that the commendable desire of today's plurality to "define more precisely when a decision on a single occasion may be enough" to subject a municipality to § 1983 liability, *ante*, at 10, has led it to embrace a theory of municipal liability that is both unduly narrow and unrealistic, and one that ultimately would permit municipalities to insulate themselves from liability for the acts of all but a small minority of actual city policymakers.

I

Respondent James H. Praprotnik worked for petitioner City of St. Louis for 15 years. A licensed architect, he began his career in 1968 as city planner and by 1980 had risen to a mid-level management position in the city's Community Development Agency (CDA), garnering consistently high job evaluations, substantial pay raises, and rapid promotions during the intervening 12 years. 1980, however, marked the turning point in respondent's fortunes as a civil servant. In April of that year, his supervisor, Charles Kindleberger, suspended him for 15 days for failing to comply with a secondary employment policy that required all city professionals to obtain prior approval before undertaking any outside work. Respondent, who had objected to the policy since the head of the agency, CDA Director Donald Spaid, first announced it in 1978, appealed the suspension to the city's Civil Service Commission (CSC), arguing that the advance approval requirement was an improper invasion of his privacy and that in any event he had consistently complied with it. Although the Commission apparently did not question the validity of the policy, it found the penalty excessive, and therefore directed respondent's supervisors to reinstate him with backpay and to issue a letter of reprimand in lieu of the suspension.

Testimony at the trial below revealed that neither Spaid nor Kindleberger was pleased with respondent's actions, and that Spaid in particular was "very down on" respondent for his testimony before the CSC. 3 Record 1–54 to 1–55, 5 *id.*, at 3–237. In October 1980, just before the Commission rendered its decision, Kindleberger gave respondent an overall rating of "good" for the year, but recommended a two-step decrease in his salary. Kindleberger, who had just six months earlier proposed raising respondent's salary two grades, justified the reduction as part of a city-wide pay scale reorganization. Respondent, however, viewed the recommendation as retaliation for his CSC appeal and petitioned the Department of Personnel for relief; the department, which considers initial challenges to all performance ratings,

granted partial relief, approving a one-step reduction, and the CSC affirmed this disposition on final appeal.

The following year witnessed a change in city administrations and the arrival of Frank Hamsher, who succeeded Spaid as CDA Director. Kindleberger, however, remained the supervisor responsible for respondent's performance evaluation, and in October 1981 he rated respondent merely "adequate" overall. A confidential memorandum from one of respondent's superiors to Kindleberger explained that respondent did not get along well with others, citing as an example respondent's prior difficulties with former Director Spaid. Respondent, who had previously never received a rating of less than "good," again appealed to the Department of Personnel, which again ordered partial relief.

Six months later CDA underwent major budget and staff reductions and, as part of the resulting reorganization, Director Hamsher proposed transferring respondent's duties to the Heritage and Urban Design Commission (Heritage) and consolidating his functions with those of a vacant position at Heritage. Although there was testimony indicating that Heritage Commissioner Henry Jackson thought the transfer unnecessary, both Jackson and his superior, Director of Public Safety Thomas Nash, agreed to the consolidation, and the Director of Personnel formally approved the proposal. Respondent objected to the move and appealed to the CSC, but the Commission declined to review the decision, reasoning that because Heritage classified the consolidated position at the same grade as respondent's former job, the transfer was merely "lateral" and respondent had therefore suffered no "adverse" employment action. Thereafter, respondent filed this § 1983 suit against the city, Kindleberger, Hamsher, and Hamsher's successor at CDA, Deborah Patterson, alleging that the transfer violated his constitutional rights.[1]

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[1] Respondent also initially named Heritage Commissioner Henry Jackson as a defendant, but later dropped him from the suit after the latter left city government and moved out of the jurisdiction.

In the meantime, Jackson took over many of the architectural tasks CDA had ostensibly transferred to the new position and assigned respondent mainly clerical duties, an arrangement the latter found highly unsatisfactory. In November 1982, Jackson rated respondent "inadequate" overall and recommended a one-step reduction in his salary, as well as an overall reduction in the classification of his position. Respondent successfully appealed his performance rating to the Personnel Department, which again granted partial relief. Nonetheless, in March 1983 his position was substantially downgraded and by the summer of that year Jackson's successor at Heritage, Robert Killen, proposed abolishing the position altogether. In December 1983, Killen carried through on his plan and, with the approval of Public Safety Director Nash, laid respondent off. Respondent amended his complaint in the District Court to reflect the layoff and simultaneously appealed the action to the CSC, but the Commission stayed its proceedings in light of the pendency of this lawsuit.

At trial, respondent sought to prove that the individual defendants had transferred him and eventually laid him off in retaliation for his use of the city's grievance machinery, thereby violating his First Amendment and Due Process rights. For its part, the city contended that the individual defendants were not personally responsible for the alleged ills that had befallen respondent. Conspicuous by their absence, city counsel argued, were Donald Spaid, whose displeasure over respondent's testimony before the CSC was allegedly the motivating force behind respondent's first proposed grade reduction and allegedly infected later performance evaluations; Robert Killen, who initiated and ultimately authorized the elimination of respondent's position at Heritage; and Thomas Nash, who approved the layoff. Respondent's counsel, however, defended the choice of defendants as those "primarily responsible" for the constitutional deprivations. 6 *id.*, at 4–56.

The District Court instructed the jury that generally a city is not liable under § 1983 for the acts of its employees, but that it may be held to answer for constitutional wrongs "committed by an official high enough in the government so that his or her actions can be said to represent a government decision." App. 113. In a lengthy and involved instruction, the court further advised the jury that it must find in favor of respondent, and against the individual defendants, if it found six facts to be true, one of which was that "Hamsher and Kindleberger were personally involved in causing [respondent's] transfer and/or layoff." *Id.*, at 118. The jury exonerated the three individual defendants, but awarded respondent $15,000 on each of his constitutional claims against petitioner.

The Court of Appeals for the Eighth Circuit vacated the judgment entered on respondent's Due Process claim (a ruling not at issue here) but affirmed the judgment as to the First Amendment claim. 798 F. 2d 1168 (1986). With respect to this latter claim, the court reasoned that the city could be held accountable for an improperly motivated transfer and layoff if it had delegated to the responsible officials, either directly or indirectly, the authority to act on behalf of the city, and if the decisions made within the scope of this delegated authority were essentially final. Applying this test, the court noted that under the City Charter, "appointing authorities," or department heads, such as Hamsher could undertake transfers and layoffs subject only to the approval of the Director of Personnel, who undertook no substantive review of such decisions and simply conditioned his approval on formal compliance with city procedures. Moreover, because the CSC engaged in highly circumscribed and deferential review of layoffs and, at least so far as this case reveals, no review whatever of lateral transfers, the court concluded that an appointing authority's transfer and layoff decisions were final. *Id.*, at 1174–1175.

Having found that Hamsher was a final policymaker whose acts could subject petitioner to § 1983 liability, the court determined that the jury had ample evidence from which it could find that Hamsher transferred respondent in retaliation for the latter's exercise of his First Amendment rights, and that the transfer in turn precipitated respondent's layoff. This constructive discharge theory, the majority found, also reconciled the jury's apparently inconsistent verdicts: the jury could have viewed Hamsher's unlawful motivation as the proximate cause of respondent's dismissal but, because Nash and Killen administered the final blows, it could have concluded that Hamsher, Kindleberger, and Patterson were not "personally involved" in the layoff as required by the instructions; accordingly, the jury could have reasonably exonerated the individual defendants while finding the city liable. *Id.*, at 1176, and n. 8.[2]

II

In light of the jury instructions below, the central question before us is whether the city delegated to CDA Director Frank Hamsher the authority to establish final employment policy for the city respecting transfers. For if it did not, then his allegedly unlawful decision to move respondent to an unfulfilling, dead-end position is simply not an act for which the city can be held responsible under § 1983. I am constrained to conclude that Hamsher possessed no such policymaking power here, and that, on the contrary, his allegedly

[2] The instruction in question directed the jury to find in favor of respondent and against the individual defendants if it found, among other things, that Hamsher and Kindleberger "were personally involved in causing [respondent's] transfer and/*or* layoff." App. 118 (emphasis added). Although Hamsher was personally involved in the transfer, the Court of Appeals found the phrase "and/or" confusing and thus decided that the jury must have understood it to mean simply "and." 798 F. 2d, at 1172–1173, n. 3 (1986). Because I believe Hamsher was not a final policymaking official, I find it unnecessary to decide whether the court below properly construed the jury instructions or to determine whether the jury's verdicts were in fact inconsistent.

retaliatory act simply constituted an abuse of the discretionary authority the city had entrusted to him.

The scope of Hamsher's authority with respect to transfers derives its significance from our determination in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), that a municipality is not liable under § 1983 for each and every wrong committed by its employees. In rejecting the concept of vicarious municipal liability, we emphasized that "the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for the deprivation of rights protected by the Constitution." *Id.*, at 690. More recently we have explained that the touchstone of "official policy" is designed "to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur* v. *Cincinnati*, 475 U. S., at 479–480 (emphasis in original).

Municipalities, of course, conduct much of the business of governing through human agents. Where those agents act in accordance with formal policies, or pursuant to informal practices "so permanent and well settled as to constitute a 'custom or usage' with the force of law," *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 167–168 (1970), we naturally ascribe their acts to the municipalities themselves and hold the latter responsible for any resulting constitutional deprivations. *Monell*, which involved a challenge to a city-wide policy requiring all pregnant employees to take unpaid leave after their fifth month of pregnancy, was just such a case. Nor have we ever doubted that a single decision of a city's properly constituted legislative body is a municipal act capable of subjecting the city to liability. See, *e. g.*, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981) (city council canceled concert permit for content-based reasons); *Owen* v. *City of Independence*, 445 U. S. 622 (1980) (city council passed resolution firing police chief without any pretermina-

tion hearing). In these cases we neither required nor, as the plurality suggests, assumed that these decisions reflected generally applicable "policies" as that term is commonly understood, because it was perfectly obvious that the actions of the municipalities' policymaking organs, whether isolated or not, were properly charged to the municipalities themselves.[3] And, in *Pembaur* we recognized that "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level," 475 U. S., at 480, and that the isolated decision of an executive municipal policymaker, therefore, could likewise give rise to municipal liability under § 1983.

In concluding that Frank Hamsher was a policymaker, the Court of Appeals relied on the fact that the City had delegated to him "the authority, either directly or indirectly, to act on [its] behalf," and that his decisions within the scope of this delegated authority were effectively final. 798 F. 2d, at 1174. In *Pembaur*, however, we made clear that a municipality is not liable merely because the official who inflicted the constitutional injury had the final authority to *act* on its behalf; rather, as four of us explained, the official in question

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[3] The plurality's suggestion that in *Owen* and *Fact Concerts* we "*assumed* that an unconstitutional governmental policy could be *inferred* from a single decision," see *ante*, at 9–10 (emphasis added), elevates the identification of municipal policy from touchstone to talisman. Section 1983 imposes liability where a municipality "subjects [a person], or causes [a person] to be subjected . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." 42 U. S. C. § 1983. Our decision in *Monell*, interpreting the statute to require a showing that such deprivations arise from municipal policy, did not employ the policy requirement as an end in itself, but rather as a means of determining which acts by municipal employees are properly attributed to the municipality. Congress, we held, did not intend to subject cities to liability simply because they employ tortfeasors. But where a municipality's governing legislative body inflicts the constitutional injury, the municipal policy inquiry is essentially superfluous: the city is liable under the statute whether its decision reflects a considered policy judgment or nothing more than the bare desire to inflict harm.

must possess "final authority to establish municipal policy with respect to the [challenged] action." 475 U. S., at 481. Thus, we noted, "[t]he fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Id.*, at 481–482. By way of illustration, we explained that if, in a given county, the Board of County Commissioners established county employment policy and delegated to the County Sheriff alone the discretion to hire and fire employees, the county itself would not be liable if the Sheriff exercised this authority in an unconstitutional manner, because "the decision to act unlawfully would not be a decision of the Board." *Id.*, at 483, n. 12. We pointed out, however, that in that same county the Sheriff could be the final policymaker in other areas, such as law enforcement practices, and that if so, his or her decisions in such matters *could* give rise to municipal liability. *Ibid.* In short, just as in *Owen* and *Fact Concerts* we deemed it fair to hold municipalities liable for the isolated, unconstitutional acts of their legislative bodies, regardless of whether those acts were meant to establish generally applicable "policies," so too in *Pembaur* four of us concluded that it is equally appropriate to hold municipalities accountable for the isolated constitutional injury inflicted by an executive final municipal policymaker, even though the decision giving rise to the injury is not intended to govern future situations. In either case, as long as the contested decision is made in an area over which the official or legislative body *could* establish a final policy capable of governing future municipal conduct, it is both fair and consistent with the purposes of § 1983 to treat the decision as that of the municipality itself, and to hold it liable for the resulting constitutional deprivation.

In my view, *Pembaur* controls this case. As an "appointing authority," Hamsher was empowered under the City Charter to initiate lateral transfers such as the one chal-

lenged here, subject to the approval of both the Director of Personnel and the appointing authority of the transferee agency. The Charter, however, nowhere confers upon agency heads any authority to establish city *policy*, final or otherwise, with respect to such transfers. Thus, for example, Hamsher was not authorized to promulgate binding guidelines or criteria governing how or when lateral transfers were to be accomplished. Nor does the record reveal that he in fact sought to exercise any such authority in these matters. There is no indication, for example, that Hamsher ever purported to institute or announce a practice of general applicability concerning transfers. Instead, the evidence discloses but one transfer decision—the one involving respondent—which Hamsher ostensibly undertook pursuant to a city-wide program of fiscal restraint and budgetary reductions. At most, then, the record demonstrates that Hamsher had the authority to determine how best to *effectuate* a policy announced by his superiors, rather than the power to *establish* that policy. Like the hypothetical Sheriff in *Pembaur*'s footnote 12, Hamsher had discretionary authority to transfer CDA employees laterally; that he may have used this authority to punish respondent for the exercise of his First Amendment rights does not, without more, render the city liable for respondent's resulting constitutional injury.[4] The court below did not suggest that either Killen or

[4] While the Court of Appeals erred to the extent it equated the authority to act on behalf of a city with the power to establish municipal policy, in my view the lower court quite correctly concluded that the CSC's highly circumscribed and deferential review of Hamsher's decisions in no way rendered those decisions less than final. We of course generally accord great deference to the interpretation and application of state law by the courts of appeals, see *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 500 (1985); *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U. S. 797, 815, n. 12 (1984), and that deference is certainly applicable to the Court of Appeals' assessment of the scope of CSC review. Moreover, the facts of this case reveal that CSC believed it lacked the authority to review lateral transfers. Accordingly, had Frank Hamsher actually possessed

Nash, who together orchestrated respondent's ultimate layoff, shared Hamsher's constitutionally impermissible animus. Because the court identified only one unlawfully motivated municipal employee involved in respondent's transfer and layoff, and because that employee did not possess final policymaking authority with respect to the contested decision,[5] the city may not be held accountable for any constitutional wrong respondent may have suffered.

III

These determinations, it seems to me, are sufficient to dispose of this case, and I therefore think it unnecessary to decide, as the plurality does, who the actual policymakers in St. Louis are. I question more than the mere necessity of these determinations, however, for I believe that in the course of passing on issues not before us, the plurality announces legal principles that are inconsistent with our earlier cases and unduly restrict the reach of § 1983 in cases involving municipalities.

The plurality begins its assessment of St. Louis' power structure by asserting that the identification of policymaking

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policymaking authority with respect to such decisions, I would have little difficulty concluding that such authority was final. See *infra* at, ——.

[5] I am unable to agree with JUSTICE STEVENS that the record provides sufficient evidence of complicity on the part of other municipal policymakers such that we may sustain the jury's verdict against petitioner on a conspiracy theory neither espoused nor addressed by the court below. JUSTICE STEVENS' dissent relies to a large extent on respondent's controversial public testimony about the Serra sculpture, and the unwelcome reception that testimony drew in the mayor's office. See *post*, at ——. Whatever else may be said about the strength of this evidence, however, the dissent's reliance on it is flawed in one crucial respect: the jury instructions concerning respondent's First Amendment claim refer exclusively to the exercise of his appellate rights before the CSC and make no mention whatever of his public testimony. Under these circumstances, the jury was simply not at liberty to impose liability against petitioner based on the allegedly retaliatory actions of the mayor and his close associates, thus we may not sustain its verdict on the basis of such evidence.

officials is a question of state law, by which it means that the question is neither one of federal law nor of fact, at least "not in the usual sense." See *ante*, at 11. Instead, the plurality explains, courts are to identify municipal policymakers by referring exclusively to applicable state statutory law. *Ante*, at 11–12. Not surprisingly, the plurality cites no authority for this startling proposition, nor could it, for we have never suggested that municipal liability should be determined in so formulaic and unrealistic a fashion. In any case in which the policymaking authority of a municipal tortfeasor is in doubt, state law will naturally be the appropriate starting point, but ultimately the factfinder must determine where such policymaking authority actually resides, and not simply "where the applicable law purports to put it." *Ante*, at 13. As the plurality itself acknowledges, local governing bodies may take myriad forms. We in no way slight the dignity of municipalities by recognizing that in not a few of them real and apparent authority may diverge, and that in still others state statutory law will simply fail to disclose where such authority ultimately rests. Indeed, in upholding the Court of Appeals' determination in *Pembaur* that the County Prosecutor was a policymaking official with respect to county law enforcement practices, a majority of this Court relied on testimony which revealed that the County Sheriff's office routinely forwarded certain matters to the Prosecutor and followed his instructions in those areas. See 475 U. S., at 485; *ibid.* (WHITE, J., concurring); *id.*, at 491 (O'CONNOR, J., concurring). While the majority splintered into three separate camps on the ultimate theory of municipal liability, and the case generated five opinions in all, not a single member of the Court suggested that reliance on such extra-statutory evidence of the county's actual allocation of policymaking authority was in any way improper. Thus, although I agree with the plurality that juries should not be given open-ended "*discretion* to determine which officials are high enough in the government that their actions can be said to represent a decision of the

government itself," *ante*, at 13 (emphasis added), juries can and must find the predicate facts necessary to a determination of whether a given official possesses final policymaking authority. While the jury instructions in this case were regrettably vague, the plurality's solution tosses the baby out with the bath water. The identification of municipal policymakers is an essentially factual determination "in the usual sense," and is therefore rightly entrusted to a properly instructed jury.

Nor does the "custom or usage" doctrine adequately compensate for the inherent inflexibility of a rule that leaves the identification of policymakers exclusively to state statutory law. That doctrine, under which municipalities and States can be held liable for unconstitutional practices so well settled and permanent that they have the force of law, see *Adickes* v. *Kress & Co.*, 398 U. S., at 167, has little if any bearing on the question whether a city has delegated *de facto* final policymaking authority to a given official. A city practice of delegating final policymaking authority to a subordinate or mid-level official would not be unconstitutional in and of itself, and an isolated unconstitutional act by an official entrusted with such authority would obviously not amount to a municipal "custom or usage." Under *Pembaur*, of course, such an isolated act *should* give rise to municipal liability. Yet a case such as this would fall through the gaping hole the plurality's construction leaves in § 1983, because state statutory law would not identify the municipal actor as a policymaking official, and a single constitutional deprivation, by definition, is not a well settled and permanent municipal practice carrying the force of law.[6]

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[6] Indeed, the plurality appears to acknowledge as much when it explains that the "custom or usage" doctrine will forestall "*egregious* attempts by local government to insulate themselves from liability for unconstitutional policies," and that "*most* deliberate municipal evasions of the Constitution will be sharply limited." *Ante*, at 13–14 (emphases added). Congress, however, did not enact § 1983 simply to provide redress for "most" con-

For these same reasons, I cannot subscribe to the plurality's narrow and overly rigid view of when a municipal official's policymaking authority is "final." Attempting to place a gloss on *Pembaur*'s finality requirement, the plurality suggests that whenever the decisions of an official are subject to some form of review—however limited—that official's decisions are nonfinal. Under the plurality's theory, therefore, even where an official wields policymaking authority with respect to a challenged decision, the city would not be liable for that official's policy decision unless *reviewing* officials affirmatively approved both the "decision and the basis for it." *Ante*, at 14. Reviewing officials, however, may as a matter of practice never invoke their plenary oversight authority, or their review powers may be highly circumscribed. See n. 4, *supra*. Under such circumstances, the subordinate's decision is in effect the final municipal pronouncement on the subject. Certainly a § 1983 plaintiff is entitled to place such considerations before the jury, for the law is concerned not with the niceties of legislative draftsmanship but with the realities of municipal decisionmaking, and any assessment of a municipality's actual power structure is necessarily a factual and practical one.[7]

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stitutional deprivations, nor did it limit the statute's reach only to those deprivations that are truly "egregious."

[7] The plurality also asserts that "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Ante*, at 14. While I have no quarrel with such a proposition in the abstract, I cannot accept the plurality's apparent view that a municipal charter's precatory admonition against discrimination or any other employment practice not based on merit and fitness effectively insulates the municipality from any liability based on acts inconsistent with that policy. Again, the relevant inquiry is whether the policy in question is actually and effectively enforced through the city's review mechanisms. Thus in this case, a policy prohibiting lateral transfers for unconstitutional or discriminatory reasons would not shield the city from liability if an official possessing final policymaking authority over such transfers acted in violation of the prohibition, because the CSC would lack jurisdiction to re-

Accordingly, I cannot endorse the plurality's determination, based on nothing more than its own review of the City Charter, that the mayor, the aldermen, and the CSC are the only policymakers for the city of St. Louis. While these officials may well have policymaking authority, that hardly ends the matter; the question before us is whether the officials responsible for respondent's allegedly unlawful transfer were final policymakers. As I have previously indicated, I do not believe that CDA Director Frank Hamsher possessed any policymaking authority with respect to lateral transfers and thus I do not believe that his allegedly improper decision to transfer respondent could, without more, give rise to municipal liability. Although the plurality reaches the same result, it does so by reasoning that because others could have reviewed the decisions of Hamsher and Killen, the latter officials simply could not have been final policymakers.

This analysis, however, turns a blind eye to reality, for it ignores not only the lower court's determination, nowhere disputed, that CSC review was highly circumscribed and deferential, but that in this very case the Commission *refused* to judge the propriety of Hamsher's transfer decision because a lateral transfer was not an "adverse" employment action falling within its jurisdiction. Nor does the plurality account for the fact that Hamsher's predecessor, Donald Spaid, promulgated what the city readily acknowledges was a binding policy regarding secondary employment;[8] although the CSC ultimately modified the sanctions respondent suffered as a re-

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view the decision and thus could not enforce the city policy. Where as here, however, the official merely possesses discretionary authority over transfers, the city policy is irrelevant, because the official's actions cannot subject the city to liability in any event.

[8] Although the plurality is careful in its discussion of the facts to label Director Spaid's directive a "requirement" rather than a "policy," the city itself draws no such fine semantic distinctions. Rather, it states plainly that Spaid "promulgated a 'secondary employment' *policy* that sought to control outside employment by CDA architects," and that "[respondent] resented the policy . . . ." Brief for Petitioner 2–3 (emphasis added).

sult of his apparent failure to comply with that policy, the record is devoid of any suggestion that the Commission reviewed the substance or validity of the policy itself. Under the plurality's analysis, therefore, even the hollowest promise of review is sufficient to divest all city officials save the mayor and governing legislative body of final policymaking authority. While clarity and ease of application may commend such a rule, we have remained steadfast in our conviction that Congress intended to hold municipalities accountable for those constitutional injuries inflicted not only by their lawmakers, but "by those whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U. S., at 694. Because the plurality's mechanical "finality" test is fundamentally at odds with the pragmatic and factual inquiry contemplated by *Monell*, I cannot join what I perceive to be its unwarranted abandonment of the traditional factfinding process in § 1983 actions involving municipalities.

Finally, I think it necessary to emphasize that despite certain language in the plurality opinion suggesting otherwise, the Court today need not and therefore does not decide that a city can only be held liable under § 1983 where the plaintiff "prove[s] the existence of an unconstitutional municipal policy." See *ante*, at 15. Just last Term, we left open for the second time the question whether a city can be subjected to liability for a policy that, while not unconstitutional in and of itself, may give rise to constitutional deprivations. See *Springfield* v. *Kibbe*, 480 U. S. —— (1987); see also *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985). That question is certainly not presented by this case, and nothing we say today forecloses its future consideration.

IV

For the reasons stated above, I concur in the judgment of the Court reversing the decision below and remanding the case so that the Court of Appeals may determine whether re-

spondent's layoff resulted from the actions of any improperly motivated final policymakers.