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

From: Justice Steve

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1st 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

[December ——, 1987]

JUSTICE STEVENS, dissenting.

If this case involved nothing more than a personal vendetta between a municipal employee and his superiors, it would be quite wrong to impose liability on the City of St. Louis. In fact, however, the jury found that top officials in the City administration, relying on pretextual grounds, had taken a series of retaliatory actions against respondent because he had testified truthfully on two occasions, one relating to personnel policy and the other involving a public controversy of importance to the Mayor and the members of his cabinet. No matter how narrowly the Court may define the standards for imposing liability upon municipalities in § 1983 litigation, the judgment entered by the District Court in this case should be affirmed.

In order to explain why I believe that affirmance is required by this Court's precedents,[1] it is necessary to begin

[1] This would, of course, be an easy case if the Court disavowed its dicta in Part II of the opinion in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 691–695 (1978), see *id.*, at 714, statement of STEVENS, J., concurring in part. Like many commentators who have confronted the question, I remain convinced that Congress intended the doctrine of *respondeat superior* to apply in § 1983 litigation. See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 834–844 (1985) (STEVENS, J., dissenting); *Pembaur* v. *City of Cincinnati*, 106 S. Ct. 1292, 1303 n. 4 (STEVENS, J., dissenting); see also Whitman, Government Responsibility for Constitutional Torts, 85 Mich. L. Rev. 225, 236, n. 43 (1987). Given the Court's reiteration of the

with a more complete statement of the disputed factual issues that the jury resolved in respondent's favor, and then to comment on the procedural posture of the case. Finally, I shall discuss the special importance of the character of the wrongful conduct disclosed by this record.

I

The City of St. Louis hired respondent as a licensed architect in 1968. During the ensuing decade, he was repeatedly promoted and consistently given "superior" performance ratings. In April of 1980, while serving as the Director of Urban Design in the Community Development Agency (CDA), he was recommended for a two-step salary increase by his immediate superior. See Tr. 1–51.

Thereafter, on two occasions he gave public testimony that was critical of official City policy. In 1980 he testified before the Civil Service Commission in support of his successful appeal from a 15-day suspension. In that testimony he explained that he had received advance oral approval of his outside employment and voiced his objections to the requirement of prior written approval.[2] The record demonstrates

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contrary *ipse dixit* in *Monell* and subsequent opinions, however, see *Tuttle*, 471 U. S., at 818; *Pembaur*, 106 S. Ct., at 1297–1298, I shall join the Court's attempt to draw an intelligible boundary between municipal agents' actions that bind and those that do not.

[2] "Q. [Mr. Oldham, respondent's attorney] Mr. Praprotnik, during this period of time, was there a salary limit on salaries imposed by the City Charter?

"A. [Mr. Praprotnik] Yes. It was established at $25,000 annually.

"Q. All right. And were employees in CDA permitted to have secondary employment—

"A. Yes, they were.

. . . . .

"Q. And were you required to fill out any particular type of form or document?

"A. Yes. We had to fill out an employee secondary employment questionnaire on an annual basis at the time of our review of our service rating.

"Q. Now, did you fill out a secondary employment form?

"A. Yes, I did, for each year.

that this testimony offended his immediate superiors at the CDA.[3]

In 1981 respondent testified before the Heritage and Urban Design Commission (HUD) in connection with a proposal

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"Q. Now. Were you then at any time suspended for a matter involving the secondary employment?

"A. Yes. I was suspended in April, April 29th, 1980, for failure to provide information to my immediate supervisors.

"Q. And did you provide that information to your immediate supervisors?

"A. Yes, I did.

"Q. Did you fill out a form which gave, in detail, the places where you had worked?

"A. Yes. As had always been required in the past, I had filled out the questionnaire and submitted it each year explaining that I had practiced architecture.

"Q. Now, after you were suspended, did you take any action to protest that suspension or petition anybody for correction of the action taken against you?

"A. Yes. I had appealed that to the Civil Service Commission.

. . . . .

"Q. And after the hearing, was there a decision by the Commission?

"A. Yes. The Commission had ruled in favor of myself.

"Q. Could you tell me what your length of suspension was?

"A. It was for fifteen days.

"Q. And were you reinstated with back pay?

"A. Yes, I was." Tr. 1–45—1–47.

"A. [Mr. Praprotnik to Ms. Ronzio, petitioner's attorney] I had been singled out to provide this information. No one else, as was—in the Civil Service Commission, no one else was asked to do this, to provide the listing of clients. And this was—and I had indicated the reason for that, because of the standards of ethical practice." Tr. 2–35.

[3] "Q. [Mr. Oldham] And in this rating, what recommendation is made for you?

"A. [Mr. Praprotnik] This recommendation is—this is October 30th, 1980. This is a recommendation for a two-step decrease in salary.

"Q. Did you ever discuss with Mr. Kindleberger [Director of Planning, CDA] the reason why you were given two ratings on almost the same day, one for no change and one for a two-step decrease?

"A. Yes. I could not understand, you know, with the same evaluation performance being similar, that—at one point the recommendation of a

to acquire a controversial rusting steel sculpture by Richard Serra. In his testimony he revealed the previously undisclosed fact that an earlier City administration had rejected an offer to acquire the same sculpture, and also explained that the erection of the sculpture would require the removal of structures on which the City had recently expended about $250,000.[4] This testimony offended top officials of the City

two-step increase—and this occurring shortly thereafter with a two-step decrease.

"Q. All right. What did Mr. Kindleberger say to you about that?

"A. At the time, it was that, 'The director, Mr. Spaid [Director, CDA, until April, 1981], is very down on you.' That was his exact words.

"Q. Did he tell you why he was down on you?

"A. He stated that I had lied before the Commission, the Civil Service Commission." Tr. 1–53—1–55.

"A. [Mr. Kindleberger to Ms. Ronzio] I guess I was somewhat irritated at the whole process at this point. And I thought that Mr. Praprotnik had gotten an adequate rating and that he was being dealt with fairly and that he was not being as cooperative as he might. I also thought, and still believe, that the process for appealing a rating was one that involved the Department of Personnel looking at the rating and participating in some kind of conciliatory procedures of the kind that were described earlier by Mr. Duffe [City Director of Personnel], whereby an attempt was made to get the individual that was unsatisfied and the supervisor together and get them talking to each other. And that after that, if there was still dissatisfaction, there was a process of going through the Civil Service Commission. And I thought it was inappropriate for Jim Praprotnik and his lawyer to get involved before it got over to the Department of Personnel and I told that to Mr. Brewster [Deputy Director, CDA]." Tr. 3–230—3–231.

"Q. [Mr. Oldham] Did Mr. Spaid say something to the effect that he was down on Praprotnik?

"A. [Mr. Kindleberger] That sounds right.

"Q. And that he felt he had not been honest, had not testified honestly at the Civil Service Commission, or words to that effect?

"A. I don't know if Mr. Spaid said it, but I know I felt it at the time." Tr. 3–237.

See also Tr. 1–57, 1–58, 1–60, 1–66, 2–94, 2–141.

[4] "Q. [Mr. Oldham] I want to direct your attention to a period which involved a discussion of the Serra sculpture. Does that refresh your memory or do you have a recollection of that incident?

"A. [Mr. Praprotnik] Yes, I do.

government, possibly including the Mayor, who supported the acquisition of the Serra sculpture, as well as respondent's agency superiors.[5] They made it perfectly clear that they

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"Q. What—could you tell me approximately when this incident occurred?

"A. This was immediately prior to the erection of the rusting steel sculpture which we have right out here on Market Street, the erection of that. And it was a meeting of the Heritage and Urban Design Commission of which I served as liaison from the Community Development Agency.

"Q. Were you requested to testify before the Commission?

"A. Yes, I was requested by the chairperson of that Commission.

. . . . .

"Q. And were you required to make some comment on the Serra sculpture and its appropriateness at that spot?

"A. That's correct. I was. And whether it conformed to the overall plan for the Gateway Mall, the center open space all the way down to the courthouse." Tr. 2–3—2–4.

"Q. [Mr. Oldham] Do you know anything about the time that Mr. Praprotnik appeared before the Commission in regard to testimony involving the Serra sculpture?

"A. [Ms. Buckley, Chairperson, HUD] Yes, I do because I asked him to attend that meeting of the Commission.

. . . . .

"Mr. Praprotnik appeared and this was the first time I had seen him in this capacity. This was at this committee meeting of the Commission. He stated that the City had been presented the Serra sculpture once before. The people who were presenting it said this was the first time it was being presented to the City.

. . . . .

"Q. Could you describe who was present in the hearing room and the amount of interest there was in regard to the Serra sculpture?

"A. There was a great deal of interest. The hearing room was always filled because there were so many applicants of people [sic] who had projects they wanted to bring. But whenever something came in—

"Q. Was the mayor's office in there, too?

"A. I don't know all the people in the mayor's office but, yes, I knew from the whispering around me and from some of the faces that were familiar that, yes, these were the mayor's people, or at least the City people who came in to watch." Tr. 2–88—2–90.

[5]"Q. [Mr. Oldham] All right. Now, after you testified before the Commission, did you have any conversation with Mr. Hamsher [Director, CDA, when respondent was transferred; elevated to Deputy Director of

believed that respondent had violated a duty of loyalty to the Mayor by expressing his personal opinion about the sculpture. Thus, defendant Hamsher testified:

Development, Mayor's Office, in June, 1982, and present at that position when respondent was laid off]?

"A. [Mr. Praprotnik] Yes. I was called into the office immediately after that meeting the following morning. And together with Mr. Hamsher and also Mr. Kindleberger, was told that certain information that I had stated at that Commission meeting that I should have 'muffed it.'

"Q. You shouldn't have—

"A. Meaning that I should have concealed it, you know, from their—from exposure to the Commission.

"Q. What information was Mr. Hamsher talking about?

"A. This was regarding the City's original expenditure of funds for that block amounting to an open space grant of approximately $250,000 to develop the block originally, and the City was going to remove all of that for erection of this rusting steel sculpture.

. . . . .

"Q. Did that discussion result—was that discussion one of the factors that was used in your service rating?

"A. Yes, it was." Tr. 2–3—2–6.

"Q. [Mr. Oldham] You did rate him on the Serra sculpture?

"A. [Mr. Karetski, Deputy City Planning Director, CDA] That was a factor, yes." Tr. 3–45.

"Q. [Ms. Ronzio] Let me make a break at this point and ask you about something that happened while Mr. Praprotnik was at the Community Development Agency. There's been some discussion of the Serra sculpture incident?

"A. [Mr. Hamsher] Yes.

"Q. Did you have occasion to reprimand Mr. Praprotnik for something he said concerning the Serra sculpture, the rusting steel sculpture as someone described it, downtown here?

"A. I don't know that reprimand is the right term. I did have a discussion about something that occurred on that sculpture, yes.

"Q. Did you indicate you were displeased with what he had done?

"A. Yes, I did.

"Q. Will you tell us what it was you had the discussion with him about and what you were upset about?

"A. Yes. I read in the newspaper one morning that Mr. Praprotnik was quoted, something about his personal opinion about the merit or lack of merit of the sculpture. And I was concerned about that because a decision

"I'm not fond of the sculpture and wasn't then. But the mayor was elected by the people and he made the decision. He was going to support the installation of the

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had been made by the City administration that we all worked for, that we wanted to recommend—that the City administration wanted to recommend the installation of the Serra sculpture. I happened to disagree with the decision myself. I'm not fond of the sculpture and wasn't then. But the mayor was elected by the people and he made the decision. He was going to support the installation of the sculpture. Therefore, it was my responsibility and the responsibility of others who worked for my agency to do so as well and not to express personal opinions in public forums about what that sculpture was going to be and what it would look like.

"Q. Did you take any disciplinary actions such as suspension or reduction in pay?

"A. No, I did not. I believe I sent Mr. Praprotnik a note about it to make him understand that I thought this was important, but that's all my recollection was and I had a discussion with him. But I didn't take any personnel action about it. Frankly, I didn't give any further thought to it." Tr. 3–179—3–181.

"Q. [Mr. Oldham] Did you know that Mr. Praprotnik had been requested to appear before the Heritage and Urban Design Committee?

"A. [Mr. Kindleberger] I think I did.

"Q. Is it an obligation of a City employee who is requested to testify before one of these commissions to enter [sic] honestly and truthfully?

"A. Well, I think the obligation for a senior management individual is to represent fairly the position of his boss which, in our case, happens to be the mayor. And I would—I just think that is something that is appropriate for senior management to do.

"Q. Now, when he was asked whether or not this had been presented to the City before and he said that it had—

"A. Well, obviously, any questions of fact, one should be truthful.

"Q. And if he's asked his professional opinion, what should he do?

"A. Well, if someone is asked their own personal, professional opinion, they should render it. But one has to be awfully careful that you don't somehow imply that is the staff's opinion or that is the agency's opinion. And I think it's a question of judgment, but that is one of the things that senior managers need to have is judgment.

"Q. The mayor was quite upset; wasn't he?

"A. I don't know that for a fact. He never spoke to me about it.

"Q. Isn't it true the Pulitzer family was very interested in this?

"A. The Serra sculpture?

sculpture. Therefore, it was my responsibility and the responsibility of others who worked for my agency to do so as well and not to express personal opinions in public forums about what that sculpture was going to be and what it would look like." Tr. 3–186.

Defendant Kindleberger made the same point in this language:

> "Well, I think the obligation for a senior management individual is to represent fairly the position of his boss which, in our case, happens to be the mayor. And I would—I just think that is something that is appropriate for senior management to do." Tr. 3–250.

After this testimony respondent was the recipient of a series of adverse personnel actions that culminated in his transfer from an important management level professional position to a rather menial assignment for which he was "grossly over-qualified," Tr. 1–80, and his eventual layoff.[6] In pre-

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"Q. Yes.

"A. Emily Pulitzer is a person who has long wanted that sculpture.

"Q. She is connected with the *Post-Dispatch*?

"A. I believe she is married to the publisher." Tr. 3–249—3–251.

[6] "Q. [Mr. Oldham] I'd like to direct your attention to March of 1982. Was that the period of time that there was a transfer?

"A. [Mr. Praprotnik] Yes. On March 23rd, I was called to the director's office, Mr. Frank Hamsher, and was told that I would be transferred to the Heritage and Urban Design Commission. And this was two weeks prior to the pending layoff recommendations at the agency."

. . . . .

"Q. Did [Mr. Jackson, Commissioner, HUD] make any statement to you as to whether he had sought your services?

"A. Yes. He stated that he didn't want me in the first place, that he had requested a historic preservation planner for the position, which was several grades below my management position level."

. . . . .

"Q. Prior to [the then unknown attempt to fire respondent, one year prior to his actual dismissal], did you receive a rating?

"A. Yes, I did, in October [1982].

"Q. Let me hand you that rating, which is Plaintiff's Exhibit 92, and ask you to look at the second page thereof. In that rating, does it make

paring respondent's service ratings after the Serra sculpture incident, his superiors followed a "highly unusual" procedure that may have violated the City's personnel regulations.[7] Moreover, management officials who were involved in implementing the decision to transfer respondent to a menial as-

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any statement about your qualifications or your overqualifications for the position?

"A. Yes. It states in the paragraph related to 'Have the duties in the employee's position changed significantly during this rating period,' it states—Mr. Jackson places in this space: 'Mr. Praprotnik's former position was as a supervisor at CDA . . . which included administration of his unit and supervision of staff. In his new capacity here, there is no supervision of any professional staff and, in fact, the original vacancy was for an historic preservation planner I or II and which is intended to function as a junior staff position to existing staff and for which Mr. Praprotnik is grossly overqualified.'" Tr. 1–66—1–67, 1–71, 1–79—1–80.

"Q. [Mr. Oldham] Would you describe [Mr. Praprotnik's tasks at HUD] as menial?

"A. [Ms. Buckley] I would." Tr. 2–88.

[7] "Q. [Mr. Oldham] Is he entitled to know the basis on which the service rating is given?

"A. [Mr. Brewster] That is standard operating procedure, I think, in any management procedure. Certainly, at CDA it was.

"Q. So this [Mr. Kindleberger's telling Mr. Brewster not to discuss the rating with Mr. Praprotnik] was unusual?

"A. I would say highly unusual.

"Q. After you made a study of the evaluation, what determinations did you make as to whether or not it had been properly and fairly done?

"A. As I recall, I found several discrepancies for which I did write a memo of finding on—I don't have it.

"Q. Can you recall, Mr. Brewster? We have enough exhibits. If you can recall from your own memory?

"A. Well, the substance of it, as I recall, would be that the so-called standards that they were rating Mr. Praprotnik on were standards that could not even be measured, either quantifiably or qualifiably. So, therefore, there were not, in any actuality, they did not have any merit to them. . . . And, as I recall, the two, Karetski, who was rater number one, and Kindleberger, who was rater number two, actually collaborated in the rating prior to the rating being done, which, in my estimation, was completely in violation of the City rules and regulations which specifically state that rater number one is not supposed to be influenced in his rating by any person." Tr. 2–106—2–107, 2–109.

signment made it clear that "there was no reason" for the transfer—except, it would seem, for the possible connection with "the Serra sculpture incident."[8] It is equally clear that the City's asserted basis for respondent's ultimate layoff in 1983—a lack of funds—was pretextual.[9]

Thus, evidence in the record amply supports the conclusion that respondent was first transferred and then laid off, not for fiscal and administrative reasons, but in retaliation for his public testimony before the Civil Service Commission and the Heritage and Urban Design Commission.[10] It is undisputed

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[8] "Q. [Mr. Oldham] Did you ever discuss Mr. Praprotnik with Mr. Jackson as to whether they needed his services in the facility?

"A. [Ms. Buckley] I'll have to go back a minute to the Serra sculpture incident. After that meeting, the major meeting where the Serra sculpture was approved by the Commission, unfortunately, it must have been two or three weeks or a month or so later that Mr. Jackson called me and said that Mr. Praprotnik was going to come over to the Heritage office. He expressed, I guess I would say, disappointment and displeasure at this, saying there was no need. On a separate occasion shortly after that, Mr. Killen also called me and said Mr. Praprotnik was coming and there was no reason for him to come." Tr. 2–90.

[9] "Q. [Mr. Oldham] What's the total [HUD] budget for [1982] then?
"A. [Mr. Praprotnik] The total budget for the year was $144,339.
. . . .
"Q. And what is the total budget for [1984]?
"A. The total budget is a hundred and fifty thousand.
"Q. So there's an increase of approximately $6,000?
"A. Yes."
. . . .
"Q. What was the reason given for your layoff?
"A. Insufficient funds.
"Q. Is that the only reason that they gave in your notice?
"A. Yes." Tr. 1–83, 1–85.

[10] As respondent's counsel put it in responding to petitioner's motion for a directed verdict at the close of plaintiff's evidence:

"Plaintiff written reprimand contrary to thrust of the decision of the Civil Service Commission. That's in evidence. That's true. Required plaintiff to make secondary employment reports that weren't required of others. There's evidence to that effect. Reduced his staff from nine to three. There's evidence of that allegation. Given plaintiff a low service

that respondent's right to testify in support of his civil service appeal and his right to testify in opposition to the City's acquisition of the Serra sculpture were protected by the First Amendment to the Federal Constitution. Given the jury's verdict, the case is therefore one in which a municipal employee's federal constitutional rights were violated by officials of the City government. There is, however, a dispute over the identity of the persons who were responsible for that violation. At trial, respondent relied on alternate theories: Either his immediate superiors at the CDA (who were named as individual defendants) should be held accountable, or, if the decisions were made at a higher level of government, the City should be held responsible.

The record contains a good deal of evidence of participation in the constitutional tort by respondent's superiors at CDA, by those directly under the Mayor, and perhaps by the Mayor himself.[11] Moreover, in closing argument, defense counsel

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rating on October 1st. There's evidence of that. Transferring him to a nonmanagement, nonsupervisory junior staff position. There's evidence to that. Failure to establish goals against which he could be measured. All of these things. Finally, we say laying plaintiff off from a position on December 30th for the pretextual reason of lack of funds and a furtherance of the conspiracy to remove plaintiff from the Civil Service Commission. There's evidence of that, that he was laid off, that the reason was pretextual." Tr. 3–26—3–27.

[11] "Q. [Mr. Oldham] There had to be a change in [HUD's] budget in order for you to be brought on board; is that correct?

"A. [Mr. Praprotnik] Yes.

"Q. Now, in order to get a change of budget, who had to be involved in that?

"A. That would involve the Board of Estimate and Apportionment, including the Mayor, the president of the Board of Aldermen, and the budget director—I'm sorry, the comptroller.

"Q. The comptroller. Those three people?

"A. Yes.

"Q. They're all high officials of the City.

"A. That's correct." Tr. 1–74—1–75.

"Q. [Ms. Ronzio] After you got transferred to Heritage and Urban Design in April or May of '82, are you claiming that Frank Hamsher did any-

attempted to exonerate the three individual defendants by referring to the actions of higher officials who were not named as defendants.[12]

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thing to injure or damage you thereafter once you were transferred out from under his supervision?

A. [Mr. Praprotnik] Yes, I am.

Q. All right. What would that be?

A. That would be the control through the mayor's office of the budget situation within the Community Development Agency and the recommendations of the staffing and the funding coming to the Heritage and Urban Design Commission.

Q. All right. Do you know what Mr. Hamsher's position was after you were transferred to Heritage? Did he remain director of CDA?

A. He was director of CDA, yes, for a period of time after that.

Q. For how long? Do you know?

A. He had implemented the layoff [of various CDA personnel at the time respondent was transferred to HUD].

Q. For how long? He implemented the layoff; that would have been in May. How long thereafter did he continue as director?

A. I don't know when he was switched to the mayor's office.

Q. Then he went to the mayor's office as an assistant; right?

A. That's correct.

Q. As an executive aide. You are claiming that from the mayor's office he controlled Heritage Department's budget?

A. Yes.

Q. And how did that affect you?

A. It affected me by I was laid off for lack of funds to that agency.

Q. So how did Mr. Hamsher do that?

A. By control through the Community Development Agency and recommendations that could be made to its, you know, director at this time.

Q. He was not director of Community Development Agency. Are you still maintaining that he controlled their budget?

A. I'm saying that he influenced their budget. The mayor's office played a very strong control within the influence of various City departments."

. . . .

"Q. What are you claiming, if anything, that Mr. Kindleberger did to damage you after you were out from under his supervision?

A. He had influenced the direction of the demise of duties, all the way up to that time, with the planner options that he had made available to Mr. Hamsher.

Thus, we have a case in which, after a full trial, a jury reasonably concluded that top officials in a City's administration, possibly including the Mayor, acting under color of law, took

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Q. I'm asking after you transferred.

A. After the transfer? Yes, he could still play a strong role because he was retained within the mayor's group and made recommendations to the Board of E&A that could have influenced the funding of our agency, the Heritage and Urban Design Commission.

Q. You're using the word 'could.' Do you know for a fact that he did any of these things?

A. Well, the budget had to go through the Community Development Agency, the approval. I'm saying he could have had that influence.

Q. All right. So you don't know for a fact that he did do anything?

A. I would say it was very likely that he would have had that influence."

. . . .

"Q. How about Deborah Patterson [Director, CDA], who is also a defendant? Now, she never supervised you at all; is that correct? You were never under her supervision?

A. She did not, that's correct.

Q. She became director of CDA after you had already left the agency?

A. That is correct.

Q. What, if anything, are you claiming that she did to damage you, to injure you?

A. There were meetings between my immediate supervisors at Heritage and Urban Design Commission and Deborah Patterson and CDA officials. So that influenced the budget going through and having to be approved by the Community Development Agency and also going through the mayor's office and the Board of E&A." Tr. 2–75—2–77, 2–81—2–82.

"Q. [Ms. Ronzio] Why do you think [Mr. Praprotnik] wasn't being treated fairly?

"A. [Mr. Zelsman, architect colleague of respondent at CDA] In my opinion, it was someone above him who did not want him in that position." Tr. 2–97—2–98.

[From deposition; read at trial] "Q. [Mr. Oldham] Were there meetings in the mayor's office which involved you and his advisors and the mayor concerning the function and purpose of CDA?

"A. [Mr. Hamsher] I have had countless such meetings."

. . . .

"Q. [Mr. Praprotnik] hadn't requested the transfer?

"A. No.

"Q. Had Mr. Jackson requested the transfer?

retaliatory action against a gifted but freethinking municipal employee for exercising rights protected by the First Amendment to the Federal Constitution. The legal question

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"A. No.

"Q. It was done on your initiative then?

"A. It was done upon approval by the mayor of the transfer. It was done by me, Mr. Jackson, and Mr. Nash [City Director of the Department of Public Safety], all of whom assigned the appropriate paperwork to transfer Mr. Praprotnik.

"Q. Did Mr. Nash request the transfer?

"A. No, but he approved it.

"Q. So nobody from Heritage and Urban Design requested the transfer?

"A. That's correct.

"Q. And it was a decision that was made in the mayor's office and carried out by you; is that correct?

"A. It was a recommendation I made to the mayor, and the mayor concurred with it, and Mr. Nash and Mr. Jackson and myself carried it out." Tr. 2–174, 2–177—2–178.

[From deposition; read at trial] "Q. [Mr. Oldham] Who would have the authority to take functions out of one appointing authority and move them over to another appointing authority? Who would have that authority?

"A. [Mr. Duffe] Well, it depends on the situation. The Board of Estimate and Apportionment in some cases; in other cases it would be the mayor to the best of my knowledge." Tr. 2–180.

[From deposition; read at trial] "Q. [Mr. Oldham] Anybody else other than Mr. Hamsher, and yourself, and the mayor, who had the final decisions on these matters [transfer of functions between agencies]?

"A. [Mr. Edwards, City Executive Director of Development] Well, particularly I guess, the mayor had the final decision. As I recall the recommendations of Mr. Hamsher were adopted, you know, pretty generally. I don't remember any major divergence from his recommendation." Tr. 2–185—2–186.

"Q. [Ms. Ronzio] What do you do, Mr. Hamsher? What is your occupation?

A. [Mr. Hamsher] I am the counsel for development in the mayor's office, City of Saint Louis.

. . . .

[Discussion of CDA's 1982 layoffs] "Q. Did you voice your concerns to the mayor?

"A. Oh, yes.

is whether the City itself is liable for such conduct under § 1983.

II

In the trial court there was little, if any, dispute over the governing rules of law. In advance of trial, the City filed a motion for summary judgment that the District Court ulti-

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"Q. What was his reaction to your concerns?

"A. He listened. He and I discussed it back and forth. And he was elected by the people so he made the decision.

"Q. He said 'Go ahead and lay off'?

"A. Yes." Tr. 3–134, 3–167.

"Q. [Mr. Oldham] You indicated that you work for the mayor; is that correct?

"A. [Mr. Hamsher] Yes.

"Q. And doesn't the mayor keep a pretty tight rein on operations within the City?

"A. Sure."

. . . .

"Q. Isn't it fair to say, Mr. Hamsher, that you initiated the [transfer], that you had sort of recommended it through the mayor's office, sort of pushed to get it done?

"A. I wouldn't say I pushed to get it done. I recommended it to the mayor. The mayor made a decision. And when the mayor makes a decision, all of us who work for him try to carry it out." Tr. 3–184—3–185, 3–200.

[2] "Now, another thing I would seriously like you to consider is, who is not a defendant in this matter. Who is not a defendant? Donald Spaid is not a defendant. Donald Spaid is the guy who laid that first suspension on or who was the one—not laid the suspension on, but set up that secondary employment policy. He is the man who allegedly, according to Mr. Praprotnik, got so angry that he would go to any lengths to retaliate, directed his subordinates to retaliate. Don Spaid is not a defendant in this case. Okay? Who laid Jim Praprotnik off? Who really laid him off? Who signed off on the form? Rob Killen signed the form. At the time Mr. Praprotnik was at Heritage and Urban Design and got laid off, Rob Killen was his appointing authority. It was his decision. He's the one who prepared that budget that went to Deborah Patterson. Who else is not a defendant? Rob Killen's boss, Tom Nash. Tom Nash allegedly approved it and went along with Rob Killen. Do you see him here? Nope. *Let's hang it on these guys.*" Tr. 4–50—4–51 (emphasis added).

mately denied because the record contained an affidavit stating that respondent "was transferred due to 'connivance' of the mayor, the mayor's chief of staff, and the city's personnel director." Rec. I–130. No one appears to have questioned the proposition that if such facts could be proved at trial, the City could be held liable.[13]

After respondent's evidence had been presented at trial, the City made a motion for a directed verdict, again advancing the argument that there was insufficient evidence in the record to support a judgment against the City. The argument on that motion does not indicate that the parties had any dispute about the applicable rules of law. For counsel for the City argued:

> "I understand that you can be liable—a municipality can be held liable if its high ranking officials are allowed to violate someone's constitutional rights. I fail to see how you can find any evidence that the City of St. Louis did that." Tr. 3–28.

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[13] Petitioner points to the following argument made in support of its motion for summary judgment:

"In the instant case, Plaintiff has failed to even allege the existence of any such [municipal] policy. In fact, Plaintiff refers to City 'policy' only in one instance in his complaint—at paragraph 29(c), wherein he claims the City's layoff policy . . . was *not* followed. In the absence of allegations of impermissible policy, or of facts indicative that such policy exists, the City, itself, may not be held liable." Memorandum in Support of Motion for Summary Judgment or, in the Alternative, for Judgment on the Pleadings 16 (emphasis in original); Reply Brief for Petitioner 5.

This argument, like all of petitioner's contentions in the trial court on the subject of municipal liability, was addressed to the sufficiency of respondent's factual support for binding the City, not to any legal issue regarding who could and who could not bind the City. The District Court, indeed, initially granted summary judgment for the City on the ground that "the Court is unable to discern any suggestion that defendants' allegedly wrongful actions were in accordance with city policy." Rec. I–126. But after receiving respondent's motion for reconsideration, accompanied by his affidavit, discussed in the text, *supra*, the District Court reversed itself and denied the City's motion.

The jury obviously disagreed with this assessment of the evidence. Moreover, the judge denied that motion, initially and at the close of all evidence, as well as the City's motion for a judgment notwithstanding the verdict.

Finally, the ultimate instruction to the jury on the issue of municipal liability was in fact proposed by the City's attorney, as the Court acknowledges, see *ante*, at 6; Brief for Respondent 48; Reply Brief for Petitioner 6:

> "As a general principle, a municipality is not liable under 42 U. S. C. § 1983 for the actions of its employees. However, a municipality may be held liable under 42 U. S. C. § 1983 if the allegedly unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision." (Instruction No. 15; Joint Appendix (J. A.) 113).[14]

In my opinion it is far too late for the City to contend that the jury instructions on municipal liability were insufficient or erroneous.[15] In *Oklahoma City* v. *Tuttle*, 471 U. S. 808

[14] Proposing this instruction made good sense as litigation strategy, for respondent had sued not only the City but also three individual City officials, Frank Hamsher, Charles Kindleberger, and Deborah Patterson. Presumably the City's attorney, who was representing both the City and the officials, hoped that the jury would focus on the individual defendants, exonerate them, and, having focused on these defendants, hold the City innocent as well by concluding that higher-ups were not implicated. As we know from the verdict—judgment for the individual defendants but against the City—this strategy partially failed. Although petitioner argues that the verdicts were inconsistent, they actually make perfect sense in light of the evidence that officials in the Mayor's office, possibly including the Mayor himself, and various agency heads participated in a deliberate plan to deprive respondent of his job in violation of his First Amendment rights.

[15] Federal Rule of Civil Procedure 51 is quite clear about a litigant's method of preserving objections to instructions:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court

(1985), we permitted an objection to an instruction by defendant for the first time on appeal only because plaintiff failed to raise the contemporaneous objection argument until its brief on the merits in this Court. We stated that such arguments "should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari." *Id.*, at 816 (emphasis in original). In this case, respondent properly pointed out in his response to the petition for a writ of certiorari that petitioner had failed to object to the relevant jury instruction. Brief in Opposition 10–11.[16]

Apparently acknowledging that this case cannot be decided on the basis of any possible error in any of the jury instructions, the Court views petitioner's motions for summary judgment and a directed verdict as raising and preserving a legal question concerning the standard for determining municipal liability. *Ante*, at 7. But these motions did not raise any legal issue that was disputed. It is most unfair to permit a defeated litigant in a civil case tried to a verdict before a jury to advance legal arguments that were not made in the District Court, especially when that litigant *agrees*, both in its motions and proposed instructions, with its opponent's

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shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. *No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict*, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury." (Emphasis added.)

[16] In the Court of Appeals the City had argued that the trial court should have accepted the following instruction regarding municipal liability:

"An isolated incident of illegal conduct on the part of a municipality's agents, servants or employees is not sufficient to establish a governmental custom, usage or official policy such as would give rise to liability on the part of a municipality pursuant to 42 U. S. C. § 1983." (Instruction No. A; J. A. 127)

The Court of Appeals properly upheld the trial court's rejection of this instruction, see *Pembaur* v. *City of Cincinnati*, 106 S. Ct. 1292 (1986), and petitioner does not take issue with this holding.

view of the law. Although, as the Court points out, the question presented in the certiorari petition "was manifestly framed in light of the holding of the Court of Appeals," *ante*, at 5, the legal issue of municipal liability had never been raised in the District Court.

Given the procedural history, it is not only unfair to respondent, but also poor judicial practice, to use this case as a bulldozer to reshape "a legal landscape whose contours are in a state of evolving definition and uncertainty." *Ante*, at 7 (internal quotation omitted). It would be far wiser in the long run simply to resolve the issues that have been properly framed by the litigants and preserved for review. Nevertheless, in view of the fact that the Court has "set out again to clarify the issue that we last addressed in *Pembaur*," *ante*, at 10, it is appropriate to explain my view of how our precedents in this area apply to this case.

III

In *Monell* v. *New York City Department of Social Services*, 436 U. S. 658 (1978), we held that municipal corporations are "persons" within the meaning of 42 U. S. C. § 1983. Since a corporation is incapable of doing anything except through the agency of human beings, that holding necessarily gave rise to the question of what human activity undertaken by agents of the corporation may create municipal liability in § 1983 litigation.[17]

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[17] The "theme" of *Monell*—"that some basis for government liability other than vicarious liability for the acts of individuals must be found"—has proven to be a "difficult" one largely because "there is no obvious way to distinguish the acts of a municipality from the acts of the individuals whom it employs." Whitman, 85 Mich. L. Rev., at 236. In other words, every time a municipality is held liable in tort, even in a case like *Monell*, actions of its human agents are necessarily involved. Accordingly, our task is not to draw a line between the actions of the City and the actions of its employees, but rather to develop a principle for determining *which* human acts should bind a municipality.

The first case dealing with this question was, of course, *Monell*, in which female employees of the Department of Social Services and the Board of Education of the City of New York challenged the constitutionality of a city-wide policy concerning pregnancy leave. Once it was decided that the city was a "person," it obviously followed that the city had to assume responsibility for that policy. Even if some departments had followed a lawful policy, I have no doubt that the city would nevertheless have been responsible for the decisions made by either of the two major departments that were directly involved in the litigation.

In *Owen* v. *City of Independence*, 445 U. S. 622 (1980), the Court held that municipalities are not entitled to qualified immunity based on the good faith of their officials. As a premise to this decision, we agreed with the Court of Appeals that the City "was responsible for the deprivation of petitioner's constitutional rights." *Id.*, at 633; see also *id.*, at 655, n. 39. Petitioner had been fired as City Chief of Police without a notice of reasons and without a hearing, after the City Council and the City Manager had publicly reprimanded him for his administration of the Police Department property room. This isolated personnel action was clearly *not* taken pursuant to a rule of general applicability; nonetheless, we had no problem with the Court of Appeals' conclusion that the action of the City Council and City Manager was binding on the City.[18]

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[18] Since *Owen*, Members of the Court have offered varying explanations for that conclusion: "The release of the information was an official action—that is, a policy or custom—of the city" (*Oklahoma City* v. *Tuttle*, 471 U. S. 808, 832 (1985) (BRENNAN, J., concurring in the judgment)); "A municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy" (*Pembaur* v. *City of Cincinnati*, 106 S. Ct. 1292, 1298 (1986) (BRENNAN, J.)); "Formal procedures that involve, for example, voting by elected officials, prepared reports, extended deliberation or official records

In the next municipal liability case, the Court held that an isolated unconstitutional seizure by a sole police officer did not bind the municipality. *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985).[19] Thus, that holding rejected the common law doctrine of *respondeat superior* as the standard for measuring municipal liability under § 1983. It did not, of course, reject the possibility that liability might be predicated on the conduct of management level personnel with policymaking authority.

Finally, in *Pembaur* v. *City of Cincinnati*, 106 S. Ct. 1292, 1294 (1986), we definitively held that a "decision by municipal policymakers on a single occasion" was sufficient to support an award of damages against the City. In *Pembaur*, a County Prosecutor had advised county sheriffs at the doorstep of a recalcitrant doctor to "go in and get [the witnesses]" to alleged charges of fraud by the doctor. *Id.*, at 1295. This advice was unconstitutional, see *Steagald* v. *United States*, 451 U. S. 204 (1981), and the question was whether the County Prosecutor's isolated act could subject the county to damages under § 1983. In the part of his opinion that commanded a majority of the Court, JUSTICE BRENNAN wrote:

> "A government frequently chooses a course of action tailored to a particular situation and not intended to control

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indicate that the resulting decisions taken 'may fairly be said to represent official policy' " (*Id.*, at 1309 (POWELL, J., dissenting).

[19] Although no one opinion commanded a majority of the Court, the narrowest reason for the holding was stated by JUSTICE BRENNAN. The jury had been instructed that it could infer *from the seizure alone* that the City had an unconstitutional policy of inadequate police training. Such an inference, according to JUSTICE BRENNAN, would be little more than *respondeat superior* in disguise. Whether independent proof of inadequate police training could result in municipal liability was a question that would have to wait for another day. See *City of Springfield* v. *Kibbe*, 107 S. Ct. 1114 (1987) (dismissing as improvidently granted a writ of certiorari in a case raising this issue). Central to our holding in *Tuttle* was the fact that no high official was found to have been involved in the unconstitutional act.

> decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." 106 S. Ct., at 1299 (footnote omitted).

Since the County Prosecutor was authorized to establish law enforcement policy, his decision in that area could be attributed to the City for purposes of § 1983 liability. As Justice Powell correctly pointed out in his dissent, "the Court . . . focus[ed] almost exclusively on the status of the decisionmaker." *Id.*, at 1308.

Thus, the Court has permitted a municipality to be held liable for the unconstitutional actions of its agents when those agents: enforced a rule of general applicability (*Monell*); were of sufficiently high stature and acted through a formal process (*Owen*); or were authorized to establish policy in the particular area of city government in which the tort was committed (*Pembaur*). Under these precedents, the City of St. Louis should be held liable in this case.

Both *Pembaur* and the majority opinion today acknowledge that a high official who has ultimate control over a certain area of city government can bind the City through his unconstitutional actions even though those actions are not in the form of formal rules or regulations. See 106 S. Ct., at 1298–1299; *ante*, at 9–10. Although the Court has explained its holdings by reference to the word "policy," it plainly has not embraced the standard understanding of that word as covering a rule of general applicability. Instead it has used that term to include isolated acts not intended to be binding over a class of situations. But when one remembers that the real question in cases such as this is not "what constitutes City policy?" but rather "when should a City be liable for the

acts of its agents?", the inclusion of single acts by high officials makes sense, for those acts bind a municipality in a way that the misdeeds of low officials do not.

Every act of a high official within his area of responsibility constitutes a kind of "statement" about how decisions in that area will be carried out; the assumption is that the same decision would have been made, and would again be made, across a class of cases. Lower officials do not control others in the same way. Since their actions do not dictate the responses of various subordinates, those actions lack the potential of controlling governmental decisionmaking; they are not perceived as the actions of the City itself. If a county police officer had broken down Dr. Pembaur's door on the officer's own initiative, this would have been seen as the action of an overanxious officer, and would not have sent a message to other officers that similar actions would be countenanced. One reason for this is that the County Prosecutor himself could step forward and say "that was wrong"; when the County Prosecutor authorized the action himself, only a self-correction would accomplish the same task, and until such time his action would have county-wide ramifications. Here, the Mayor, those working for him, and the agency heads are high-ranking officials; accordingly, we must assume that their actions have City-wide ramifications, both through their similar response to a like class of situations, and through the response of subordinates who follow their lead.[20]

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[20] That high officials may bind a municipality in ways that low officials may not should not surprise, for the pyramidal structure of authority pervades the law. For instance, the law of agency distinguishes between a general agent and a special agent; the former is "authorized to conduct a series of transactions involving a continuity of service," while the latter is "authorized to conduct a single transaction or a series of transactions not involving continuity of service." Restatement (Second) of Agency § 3 (1957). The distinction matters because only a general agent "subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably

Just as the actions of high-ranking and low-ranking municipal employees differ in nature, so do constitutional torts differ. An illegal search (*Pembaur*) or seizure (*Tuttle*) is quite different from a firing without due process (*Owen*); a third category is a retaliatory personnel action. But one thing that the torts in *Pembaur*, *Tuttle*, and *Owen* had in common is that they occurred "in the open"; in each of these cases, the ultimate judgment of unconstitutionality was based on whether undisputed events (the breaking-in in *Pembaur*, the shooting in *Tuttle*, the firing in *Owen*) comported with accepted constitutional norms. But the typical retaliatory personnel action claim pits one story against another; although everyone admits that the transfer and discharge of respondent occurred, there is sharp, and ultimately central, dispute over the reasons—the motivation—behind the actions. *The very nature of the tort is to avoid a formal process. Owen*'s relevance should thus be clear. For if the Court is willing to recognize the existence of municipal policy in a non-rule case as long as high enough officials engaged in a formal enough process, it should not deny the existence of such a policy merely because those same officials act "underground," as it were. It would be a truly remarkable doctrine for this Court to recognize municipal liability in an employee discharge case

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believes that the agent is authorized to do them and has no notice that he is not so authorized." *Id.*, at § 161. A special agent, to the contrary, "has no power to bind his principal by contracts or conveyances which he is not authorized or apparently authorized to make," with some exceptions. *Id.*, at § 161A. A general agent thus binds his principal even through unauthorized acts precisely because those dealing with him perceive him as possessing broad authority to act on behalf of his principal. A special agent, possessing and known to possess only limited authority, cannot bind his principal for unauthorized acts because those dealing with him are on notice that his authority extends only so far. Likewise, a high municipal official can bind his principal (the city) for actions the city would not have wanted him to take because others—both lower officials and members of the public with whom he deals—perceive him as acting with broad authority and rely upon his actions in organizing their own behavior.

when high officials are foolish enough to act through a "formal process," but not when similarly high officials attempt to avoid liability by acting on the pretext of budgetary concerns, which is what this jury found based on the evidence presented at trial.

Thus, holding St. Louis liable in this case is supported by both *Pembaur* and *Owen*. We hold a municipality liable for the decisions of its high officials within their areas of authority in large part because those decisions, by definition, would be applied across a class of cases. Just as we assume in *Pembaur* that the County Prosecutor (or his subordinates) would issue the same break-down-the-door order in similar cases, and just as we assume in *Owen* that the City Council (or those following its lead) would fire an employee without notice of reasons or opportunity to be heard in similar cases, so too must we assume that whistleblowers like respondent would be dealt with in similar retaliatory fashion if they offend the Mayor, his staff, and relevant agency heads, or if they offend those lower-ranking officials who follow the example of their superiors. Furthermore, just as we hold a municipality liable for discharging an employee without due process when its City Council acts formally—for a due process violation is precisely the *type* of constitutional tort that a City Council might commit when it acts formally—so too must we hold a municipality liable for discharging an employee in retaliation against his public speech when similarly high officials act informally—for a first amendment retaliation tort is precisely the *type* of constitutional tort that high officials might commit when they act in concert and informally.

Whatever difficulties the Court may have with binding municipalities on the basis of the unconstitutional conduct of individuals, it should have no such difficulties binding a city when many of its high officials—including officials directly under the Mayor, agency heads, and possibly the Mayor him-

self—cooperate to retaliate against a whistleblower for the exercise of his First Amendment rights.

I would affirm the judgment of the Court of Appeals.