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1999

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#### Recommended Citation

Robert J. Kaczorowski, *Reflections on Monell's Analysis of the Legislative History of §1983* 31 407 (1999-Urban Lawyer)

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## Reflections on *Monell's* Analysis of the Legislative History of § 1983

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IN 1978, THE SUPREME COURT IN *Monell v. Department of Social Services*<sup>1</sup> reversed *Monroe v. Pape*,<sup>2</sup> decided only seventeen years earlier, “insofar as [*Monroe* held] that local governments are wholly immune from suit under § 1983.”<sup>3</sup> *Monell* purported to ground its reversal of *Monroe* on the legislative history of 42 U.S.C. § 1983. Section 1983 was originally enacted as § 1 of the Ku Klux Klan Act of 1871.<sup>4</sup> However, rather than the debates relating to § 1 of the Ku Klux Klan Act (“1871 Act”), *Monell* based its analysis of the legislative history of § 1983 on the issues relating to an amendment introduced very late in the debates by Senator John Sherman of Ohio, the so called Sherman Amendment.

*Monell* gave two reasons for focusing its legislative history discussion on the debates relating to the Sherman Amendment rather than the debates relating to section 1 of the 1871 Act itself. The *Monell* Court explained that “The sole basis for [*Monroe's*] conclusion was an inference drawn from Congress’ rejection of the ‘Sherman Amendment’ to the bill which became the Civil Rights Act of 1871, the precursor of § 1983.”<sup>5</sup> The second reason, which *Monell* repeated several times, is that “there is virtually no discussion of § 1 of the Civil Rights Act” in the debates.<sup>6</sup> After reviewing the legislative history, *Monell* concluded that “nothing said in debate on the Sherman Amendment would have prevented holding a municipality liable under § 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment.”<sup>7</sup> Indeed, *Monell* declared: “This debate shows conclusively that the constitutional

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1. *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

2. *Monroe v. Pape*, 365 U.S. 167 (1961).

3. 436 U.S. at 663.

4. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, § 1 (1871).

5. 436 U.S. at 664.

6. *Id.* at 692 n.57.

7. *Id.* at 683 (emphasis added).

objections raised against the Sherman amendment—on which our holding in *Monroe* was based, . . . would not have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights.”<sup>8</sup> Then, more affirmatively, *Monell* declared: “Our analysis of the legislative history of the Civil Rights Act of 1871 *compels* the conclusion that Congress did intend municipalities and other local government units to be included among those persons whom § 1983 applies.”<sup>9</sup> The Court also concluded that “the language of § 1983, read against the background of the same legislative history, *compels* the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.”<sup>10</sup> That is, Congress did not intend to impose liability on a municipality “solely because it employs a tortfeasor—in other words, a local government cannot be held liable under § 1983 on a respondeat superior theory.”<sup>11</sup>

After reviewing the same legislative history, I find that *Monell* made a number of factual and interpretive errors. First, there was abundant discussion of both the meaning and the constitutionality of section 1 of the 1871 Act. Second, during the Sherman Amendment debates, arguments were made that would “have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights.”<sup>12</sup> Third, the evidence supporting the conclusion that Congress intended municipal corporations to be sued under what is now § 1983 is far from compelling. Fourth, I find nothing in the debates to support the Court’s conclusion that Congress intended not to hold municipalities vicariously liable for the actions of their officials. To the contrary, the evidence suggests that, to the extent that municipalities were liable at all, they might also have been vicariously liable for the actions of their agents and employees.

### **I. The Sherman Amendment: Federal Liability for the Wrongs of Strangers**

Because both *Monroe* and *Monell* emphasized the Sherman Amendment, I will focus on its legislative history. Before I do, however, it is

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8. *Id.* at 669.

9. *Id.* at 690 (emphasis added). In the cite which I omitted here, the Court softened its assertion in the text, stating: “There is certainly no constitutional impediment to municipal liability.” *Id.* at n.54. It then declared that the Tenth and Eleventh Amendments were not impediments to municipal liability, citing twentieth century Supreme Court precedents as authority.

10. *Monell*, 436 U.S. at 691 (emphasis added).

11. *Id.* at 659.

12. *Id.* at 669.

necessary to point out that the 1871 Act represented Congress' attempt to provide federal protection against the terrorism and violence of the Ku Klux Klan.<sup>13</sup> The Klan during Reconstruction was not a unified organization under a centralized structure of command. Rather, the term referred to groups organized at the local level that shared common purposes and common tactics: subjugating Southern Blacks and driving out Southern white Republicans through the use of terrorism, violence, and other forms of intimidation and harassment. The Klan thus constituted a paramilitary wing of the Democratic Party and white supremacists in the South. These organizations were analogous to guerrilla forces fighting a rear-guard action, extending the Civil War beyond Appomattox.<sup>14</sup> The 1871 Act, like the other Reconstruction statutes and constitutional amendments, were Republican measures adopted to protect Southern Blacks and white Republicans from violence and intimidation committed by Democrats and white supremacists which reduced areas of the South to a state of anarchy and continuing civil war. The provisions of the 1871 statute were intended to provide criminal penalties and civil remedies against individuals who participated in this violence and intimidation.

A. *The Original Sherman Amendment: Imposing Strict Liability Directly on Local Property Owners*

The Sherman Amendment went through three versions. As originally proposed, it imposed liability on "the inhabitants of the county, city, or parish" in which property was damaged and personal injuries inflicted by mobs or riots.<sup>15</sup> It provided for the recovery of a judgment from the property of inhabitants, but it permitted the municipality to sue the perpetrators for "the full amount of such judgment, costs, and interest" paid by inhabitants.

It is significant that the predicate for liability under the original Sherman Amendment was mere residence in the community in which an

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13. The best history of the Ku Klux Klan during Reconstruction is ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971).

14. See ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* (1985).

15. CONG. GLOBE, 42d Cong., 1st Sess. 468 (1871). This provision also provided that the violators must have intended to deprive the victim of a "right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude." *Id.*

outrage occurred.<sup>16</sup> It did not impose liability on inhabitants for the injuries they inflicted. Rather, it imposed liability for injuries inflicted by others. Consequently, liability did not derive from tort principles of liability or from agency theories of vicarious liability. Moreover, inhabitants of the community were held strictly liable for any property damage and personal injuries that resulted from mob action. It mattered not whether they attempted to assist the victim or to prevent the violence. They were still liable as members of the community in which the violence occurred. Traditional tort principles of culpability or fault were not involved. Nor was liability imposed on inhabitants through an agency theory of vicarious liability, because their liability did not derive from the actions of anyone with whom they had any relationship. Liability was imposed merely because they owned property in the community in which riotous mobs violated someone's constitutional rights.

The Senate adopted the Sherman Amendment without debate, but the House rejected it, also without debate. According to Senator Sherman, the House rejected it because many Republicans feared that, because the execution of a judgment could "be served upon the property of any one," through selective execution, a judgment "might be made the means of oppression."<sup>17</sup> "The great moving cause in the House for rejecting the first proposition," Sherman elaborated, was that "a loyal man who was innocent entirely of the particular outrage might be selected" by Southern officials for execution of the judgment and thus be made "the victim."<sup>18</sup>

#### B. *The First Conference Substitute: Imposing Strict Liability Directly on Municipalities*

After the House rejected the original Sherman Amendment, a Committee of Conference drafted a substitute which provided that, instead of suing the inhabitants of the community, a plaintiff was to bring a civil action against the county, city, or parish in which the riot occurred, although the actual rioters and anyone who assisted them could also be sued in the same action.<sup>19</sup> Moreover, the judgment itself was made a lien "upon all moneys in the treasury of such county, city, or parish, as

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16. Note that it was possible that one could be an absentee property owner, not a resident, and still be liable for judgment under an assessment levied against the property within the municipality. Also, one might be a renter and a resident and not be directly liable for a property tax assessment. Nevertheless, the framers equated property ownership with residence in the community. For the purposes of this article, I will do the same.

17. CONG. GLOBE, 42d Cong., 1st Sess. 822 (1871) (Sen. Sherman).

18. *Id.*

19. *Id.* at 749.

upon the other property thereof." However, the municipality was subrogated to all of the plaintiff's rights under the judgment against the actual perpetrators of the crime. The substitute bill also authorized the municipal corporation to proceed against anyone who, in the municipality's judgment, was a party or accessory to the misconduct. The first conference substitute thus created all the means to redress and reimburse the county and to shift liability to the responsible parties.<sup>20</sup>

It is significant to note again that the first conference substitute, like the original Sherman Amendment, did not impose liability on municipalities for injuries caused by their own actions, or those of their employees and agents. Rather, municipalities were made strictly liable for the wrongs of strangers that were committed within their jurisdictions.<sup>21</sup> It is not surprising, therefore, that *Monell* concluded that "the constitutional objections raised against the Sherman Amendment . . . would not have prohibited congressional creation of a civil remedy against state municipal corporations" for their own infringements of federal rights.<sup>22</sup>

### C. *The Second Conference Substitute: Imposing Liability for Negligent or Willful Breach of a Federal Duty to Protect*

Most of the legislative debates relating to the Sherman Amendment focused on the first conference substitute. However, the House also rejected this alternative to the original amendment. The final version of the Sherman Amendment was adopted as section 6 of the 1871 Act.<sup>23</sup>

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20. *Id.* at 756 (Sen. Edmunds).

21. Professor Jack M. Beermann makes a persuasive argument that the rejection of the Sherman Amendment is weak evidence that supporters of the Sherman Amendment rejected municipal vicarious liability. He perceptively observes that "the arguments made in Congress against the Sherman Amendment were not arguments against municipal liability generally but were, rather, arguments directed at particular perceived problems with the Sherman Amendment." The primary problems Beermann identifies were the "constitutional and federalism objections to imposing liability on municipalities for the conduct of third parties." The Sherman Amendment, and arguments made for and against it, did not address municipal liability for their, and their agents', own civil rights violations. Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, DEPAUL L. REV. at 8 (forthcoming) (draft on file with the author). As Beermann notes, the Sherman Amendment did not impose liability on municipalities for their own actions or actions of their employees. Rather, it imposed "liability for the actions of non-employees not acting on behalf of the municipality." *Id.* at 31. He correctly concludes that "Expecting a municipality to prevent its employees from violating federal rights is quite different from placing upon a municipality the obligation to prevent private citizens from engaging in riotous conduct." *Id.* at 30. Moreover, he also notes that the rejection of the Sherman Amendment "was not, as the Court has claimed, particularly resounding." *Id.* at 8.

22. *Monell*, 436 U.S. at 669.

23. Section 6 is presently codified as 42 U.S.C. § 1986.

This second conference substitute differed markedly from the first two drafts in two respects. This version imposed liability on any person or persons, not only townspeople, who could have prevented injury but failed to do so. In other words, it substituted liability on a tort principle of fault for strict liability, and it did not restrict liability to the municipality, or its residents, in which the wrongs were committed. It provided that any person or persons who knew of conspiracies to commit wrongs prohibited by section 2 of the 1871 Statute, and had the power to prevent or aid in preventing their commission, but failed to do so, shall be liable to the person injured for all damages caused by the wrongful acts, which the first-named person or persons could have prevented by reasonable diligence. Section 2, *inter alia*, imposed civil, as well as criminal, liability on anyone who conspired to injure, or who injured another's person or property pursuant to a conspiracy to deprive him of the equal protection of the law and of equal civil rights, or because of race.<sup>24</sup>

## II. Legislative Purposes of the Sherman Amendment

Although the Sherman Amendment went through three versions, its purpose remained the same. Supporters stated that they intended to coerce local property owners to stop the mob violence by shifting the cost of that violence from the victims to the property owners of the community in which the damage was inflicted. As Representative Kerr observed: "The practical effect of [these anti-riot statutes] was to make each citizen a conservator of the peace, a sort of bailiff, to aid the public authorities in maintaining the law."<sup>25</sup> *Monell* acknowledged this objective and asserted: "The first justification . . . for statutes like the Sherman Amendment . . . 'is to secure a more perfect police regulation.'"<sup>26</sup> The Court identified this as the only objective.

The proponent's purposes, however, included more than effective law enforcement. Senator Sherman and Republican leaders in the House and Senate expressed the belief that, if the costs of Klan violence were shifted from the victims to the property owners of the communities in which these crimes were committed, the local community leaders would sway public opinion against the violence.<sup>27</sup> As was charac-

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24. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, § 2 (1871). Section 2 is presently codified as 42 U.S.C. § 1985.

25. CONG. GLOBE, 42d Cong., 1st Sess. 788 (1871) (Rep. Kerr).

26. *Monell*, 436 U.S. at 693 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 777 (1871) (Sen. Frelinghuysen)).

27. Sherman declared: "Let the people of property in the southern States understand that if they will not make the hue and cry and take the necessary steps to put down

teristic of nineteenth century Americans, Sherman and his colleagues believed that the wealthier property owners of the community could stop the violence with their social leadership if they chose to do so. Republican supporters were trying to induce them to make this choice.<sup>28</sup> They expected to spur community leaders into action and to influence public opinion against the Ku Klux Klan.

Another objective was to compensate the victims of Klan violence. It should be noted that the 1871 bill already provided civil damages for the violation of constitutional rights. Section 1, of course, imposes civil liability on any person who, under color of law, "shall subject, or cause to be subjected" anyone to the deprivation of any right secured by the Constitution and laws of the United States.<sup>29</sup> Furthermore, section 2 imposed civil, as well as criminal, liability on anyone who conspired to, or who injured another's person or property pursuant to a conspiracy to deprive him of the equal protection of the law and of equal civil rights, or because of race.<sup>30</sup> Consequently, anyone who participated in these acts of violence, and any public official who contributed to the injuries either actively or through inaction, who could be sued under the Sherman Amendment, was already subject to suit under the first two sections of the Klan Bill. The Sherman Amendment was thus an additional and different provision that added the municipality's property owners as sources of compensation to the victims of Klan violence. The first conference substitute added the municipality itself to the inhabitants as an additional source of compensation. The third version, which Congress ultimately enacted into law, added anyone who had knowledge of conspiracies to violate the other provisions and had the power to prevent, or assist in preventing, their occurrence and failed to do so. In short, the Sherman Amendment, in all its permutations, dif-

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lawless violence in those States, their property will be holden responsible, and the effect will be most wholesome." CONG. GLOBE, 42d Cong., 1st Sess. 761 (1871) (Sen. Sherman).

28. If property holders will not do it; if, as in the southern States the property-holders will lay there quiet on their farms and see these outrages go on day by day; if property-holders will shut their doors when they hear the Ku Klux riding by to burn and slaughter; if they will not rise in their might, and, with the influence which property always gives in my community, put down these lawless fellows, I say let them be responsible.

*Id.* (Sen. Sherman). Representative Ben Butler of Massachusetts echoed these comments in the House: he declared that, when men of property understand "that their taxes will be increased by Ku Kluxism, that moment they will come forward and put down Ku Kluxism." *Id.* at 792 (Rep. Butler). See also *id.* at 822 (Sen. Sherman); *id.* at 756, 820, 821, 824 (Sen. Edmunds); *id.* at 751, 805 (Rep. Shellabarger); *id.* at 772 (Rep. Butler); *id.* at 804 (Rep. Poland).

29. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, § 1 (1871).

30. *Id.* § 2.



ferred from § 1983, and the other civil and criminal provisions of the 1871 Act which imposed liability on wrongdoers for the wrongs they committed, by imposing liability on persons who did not themselves violate civil rights on an implied duty to protect against rights violations committed by "strangers."<sup>31</sup>

The reasons proponents offered in support of the Sherman Amendment reveal its scope and its theory of liability, which were decidedly different from those of sections 1 and 2 of the 1871 Act. Representative Luke Poland of Vermont, a member of the Committee of Conference, explained that supporters of the Sherman Amendment believed that the criminal penalties and civil remedies provided in section 2 were unenforceable. The near impossibility of identifying the wrongdoers was one major obstacle to recovery and prosecution under section 2.<sup>32</sup> Problems of proof were another obstacle. A third hurdle was the jury's sympathy for defendants who might be sued under either sections 1 or 2.<sup>33</sup> Congressman Poland, along with Senators Sherman and Allen Thurman of Ohio, denigrated these provisions as futile. Consequently, proponents expressed the belief that the Sherman Amendment, in its original form and in the first conference substitute, eliminated these problems of identification and proof and largely neutralized the jury's sympathy for defendants. To recover, the plaintiff merely had to show injury and causation, that is, that the injury was the product of a "riotous assemblage." As Representative Butler put it, it was intended to be "a mutual insurance"<sup>34</sup> against the community.<sup>35</sup>

31. In an insightful analysis of 42 U.S.C. § 1986, the codified version of the second conference substitute, Professor Linda Fisher explains the origins of the duty to protect that this provision imposes and persuasively argues for the continuing need to apply it to combat racial hatred and discrimination. See Linda E. Fisher, *Anatomy of an Affirmative Duty to Protect: 42 U.S.C. § 1986*, 56 WASH. & LEE L. REV. (forthcoming 1999) (draft on file with the author).

32. "[I]t is said that these riots, these disorders, these injuries are committed by persons who are unknown; that the person injured does not know who it was that did the injury to him or to his property, and therefore it is impossible for him to maintain a suit against him, because he does not know him, or know them." CONG. GLOBE, 42d Cong., 1st Sess. 793 (1871) (Rep. Poland).

33. *Id.* at 821 (Sen. Sherman).

34. *Monell*, 436 U.S. at 695 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 792 (1871) (Rep. Butler)).

35. Note that there were additional advantages from a litigation perspective. The bill made filing a civil suit easier, and it made recovering a judgment not only easier but also more certain. It also transferred from the victim to the municipal corporation the enormous difficulty of identifying the actual rioters and the risk of recovering from them. The plaintiff's task of recovering a judgment thus was made infinitely easier. Senator Sherman thought it would be easier because a suit against a municipality would obviate the prejudice against plaintiffs that juries would feel in suits against individual defendants who participated in the offenses. CONG. GLOBE, 42d Cong., 1st Sess. 821 (1871) (Sen. Sherman). Instead of having to execute against the numerous individual

A. *Municipal Liability Under the First Conference Substitute: Direct and Absolute*

The first conference substitute, which imposed liability directly on the municipality, was modeled on English and state anti-riot statutes. The framers acknowledged that under the common law there was no obligation on cities, counties, and other municipal corporations to compensate the victims of injuries caused by mobs and riots. Rather, such liability was imposed "by arbitrary enactment of statutes, affirmatory law."<sup>36</sup> Nevertheless, English and state anti-riot statutes imposed liability on municipalities only if they breached their duty to protect. State anti-riot statutes referred to in the debates imposed liability on municipalities only if local authorities had notice of the riot, time enough to prevent it, the power to prevent it (either themselves or with the aid of local citizens), but failed to prevent it. In other words, model statutes limited municipal liability to principles of fault. In contrast, the first conference substitute imposed liability on the municipality merely on the fact that the proscribed injuries occurred within its jurisdiction, without regard to fault.

In their objections to the first conference substitute, opponents emphasized the injustice of making municipalities strictly liable for injuries caused by mobs over which they had no control. Opponents seized on the strict liability the first conference substitute imposed on municipalities in distinguishing it from English and state anti-riot statutes. Senator Thurman, the Senate Minority Leader, made the most compre-

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property owners of the community, plaintiff was able to execute against one party, the municipal corporation, if he was unable to recover from any of the other named defendants within two months of judgment. The task of recovering from the property owners was thus shifted to the municipality, which still could recover the judgment more easily than the plaintiff through tax assessments. In addition, putting the liability on individuals in the community through taxes met the House's concerns about this becoming a weapon of oppression.

36. CONG. GLOBE, 42d Cong., 1st Sess. 777 (1871) (Sen. Frelinghuysen). Representative Samuel Shellabarger of Ohio acknowledged the statutory basis of municipal liability in answer to Representative Charles Eldridge of Wisconsin who queried him, on his theory of municipal liability, why the federal government was "not liable for every act of outrage committed by the rebels during the entire war upon the Union people of the localities where those things took place?" Shellabarger responded:

[T]hese liabilities of communities or subdivisions of a State for destruction by a mob do not arise under the common law, but are completely and wholly statutory. And there being no statutes creating liability on the part of the government of the United States for wrongs done by a mob there exists no such liability. And the gentleman will find in the New York case which I have cited, in the arguments of counsel, . . . a complete list of authorities showing that the liability is a creature of statute merely, and cannot be extended beyond the statute.

*Id.* at 752 (1871) (Rep. Shellabarger). The case to which Shellabarger referred to is *Darlington v. New York*, 31 N.Y. 164 (1865).

hensive critique of the first conference substitute. He observed that English municipal liability statutes did not impose liability if the offender was discovered and arrested.<sup>37</sup> The Sherman Amendment, by contrast, imposed liability regardless of the good faith efforts the municipality and its inhabitants might have made to prevent the offenses, to bring the offenders to justice, or to succeed in prosecuting them.<sup>38</sup> In the House, Representative Poland also complained that the Sherman Amendment imposed “absolute liability” on municipalities, thus distinguishing it from the old English riot statutes on the grounds that “liability [imposed by English riot statutes] was only a contingent liability . . . . [T]here was no absolute liability fixed upon the community, upon the county, or any municipality.”<sup>39</sup>

Senator Thurman also contrasted the strict liability of the Sherman Amendment with the principles of municipal liability for riots found in state anti-riot statutes. State statutes, such as Maryland’s and New York’s, he noted, were based on the municipality’s breach of its duty to protect, whereas the Sherman Amendment imposed liability regardless of any breach of such duty. The states did not impose municipal liability unless the local authorities had notice of the riot, had time to prevent it, had the ability to prevent it themselves or with their citizens, and failed to prevent it.<sup>40</sup> Under the Sherman Amendment, proof of

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37. He also noted that they required the plaintiff to assert his claim to the municipality within seven days of the offense and, if necessary, to file his suit within three months. CONG. GLOBE, 42d Cong., 1st Sess. 770 (1871) (Sen. Thurman). *See also id.* at 788 (Rep. Kerr).

38. *Id.* at 770 (Sen. Thurman).

39. *Id.* at 794 (Rep. Poland). Representative Charles Willard of Vermont, another Republican, similarly complained: “We make, in fact, no provision whatever in this [first conference substitute] for proving in court that there has been any default, any denial, any neglect on the part of the county, city, town, or parish to give citizens the full protection of the laws.” *Id.* at 791.

40. CONG. GLOBE, 42d Cong., 1st Sess. 770 (1871) (Sen. Thurman). *See also id.* at 788 (Rep. Kerr); *id.* at 791 (Rep. Willard); *id.* at 792 (Rep. Butler); *id.* at 794 (Rep. Poland); *id.* at 794 (Rep. Kelley). By contrast, the second conference substitute encompassed tort principles of fault and negligence, thus making recovery more difficult. *See id.* at 804 (Rep. Poland); *id.* at 805 (Rep. Shellabarger); *id.* at 820, 821 (Sen. Sherman); *id.* at 821, 824 (Sen. Edmunds); *id.* at 822 (Sen. Thurman). Representative Michael Kerr of Indiana, and others, argued from a policy perspective that even with a notice provision a riot statute that imposed liability on counties would be unjust because of the sheer size and sparse population of the typical rural county. He argued that:

[S]ome counties of this country are almost as large as the whole of that island from which we get our common law, and that many of our counties are very sparsely settled; that the people are engaged in agricultural employments, and live remote from each other; that these combinations of two or three persons to commit crimes against one or more of the citizens of a county may be originated and executed without any possibility that one other human being in the county or parish shall know anything about the intent or the execution. There is, therefore, a total and absolute absence of notice, constructive or implied, within any decent limits of law

notice was not required in order to impose liability on the municipality. Thurman insisted that "the theory upon which a municipality or a county is to be made liable" under state anti-riot statutes "is that the county has been derelict in its duty in preserving the rights of person or of property" and for no other reason "it is punished by being made liable for damages."<sup>41</sup> There was no such theory in the first conference substitute, Thurman thundered:

No sir; the county may have performed its duty to the utmost; it may have the best offices in the world; it may have the most law abiding people in the world; it may have a population the most disposed of any in the world to protect every man in his rights; and yet it may be liable under this bill. Nay, more, it may have seized the men who committed the crime, may have confined them, may have put them in the penitentiary of the State for the crime, and yet it is to be liable for damages.<sup>42</sup>

Representative Michael Kerr of Indiana, House Minority Leader, similarly complained: "It is arbitrarily and defiantly assumed that they know it, and are, therefore, guilty."<sup>43</sup> Kerr insisted that this

monstrous and outrageous [provision] punishes the innocent for the guilty. It takes the property of one and gives it to another by mere force, without right, in the absence of guilt or knowledge, or the possibility of either. It violates all principles of law. It is in full keeping with the incurably vicious character of this entire measure.<sup>44</sup>

For Kerr and his Democratic colleagues, this was not law but sheer force. In light of this evidence, *Monell's* conclusion that the first conference substitute encompassed a fault theory of municipal liability is clearly erroneous.

*Monell* also concluded that, in rejecting the first conference substitute, the framers rejected a species of vicarious liability. It is on the basis of this conclusion that *Monell* held that the framers of § 1983 intended it not to impose vicarious liability on municipalities. However, this conclusion is also contradicted by the evidence. Like the original and final versions of the Sherman Amendment, the first conference substitute did not predicate municipal liability on a theory of vicarious

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or reason. And the bill itself is significantly silent on the subject of notice to these counties and parishes or cities. Under this section it is not required before liability shall attach . . . upon the municipality . . . . It is arbitrarily and defiantly assumed that they know it, and are, therefore, guilty. Considering the condition of our country, the habits and pursuits of the people, I say this is simply monstrous and outrageous. It punishes the innocent for the guilty. It takes the property of one and gives it to another by mere force, without any right, in the absence of guilt or knowledge, or the possibility of either. It is in full keeping with the incurably vicious character of this entire measure.

*Id.* at 788.

41. *Id.* at 770 (Sen. Thurman).

42. CONG. GLOBE, 42d Cong., 1st Sess. 771 (1871) (Sen. Thurman).

43. *Id.* at 788 (Rep. Kerr).

44. *Id.*

liability in any form. There was no agency relationship between the wrongdoers and the municipality. Indeed, the municipality's liability was completely independent of any relationship or connection it might have had with the tortfeasors. Senator John Stevenson of Kentucky made this precise point in distinguishing the theory of liability in the first conference substitute with the rules of liability relating to corporations. Asserting that corporations, including municipal corporations, were liable for personal injuries in the same way that individuals were liable, he declared that:

[A]s a general rule a corporation is not responsible for the unauthorized and unlawful acts of its officers, although done under the color of their office; to render it liable it must appear that it expressly authorized the acts to be done by them, or that they were done in pursuance of a general authority to act for the corporation on the subject to which they relate.<sup>45</sup>

He complained that the Sherman Amendment, for the first time, created "a corporate liability for personal injury which no prudence or foresight could have prevented."<sup>46</sup> Stevenson thus objected to the provision because it departed from traditional corporate tort principles of liability based on fault and vicarious liability. This criticism is supported by the language of the Sherman Amendment, particularly when it is understood in the context of this legislative history.

Consequently, *Monell* was simply incorrect in suggesting that the framers refused to impose vicarious liability on municipalities because the first conference substitute contained elements of vicarious liability which Congress rejected.<sup>47</sup> The error the Court made here is that it

45. *Id.* at 762 (Sen. Stevenson).

46. *Id.* Curiously, the Court in *Monell* interpreted the Sherman Amendment as incorporating this principle of absolute liability as a theory of vicarious liability. 436 U.S. at 692 n.57. The Court declared that:

[W]hether intended or not, the amendment as drafted did impose a species of vicarious liability on municipalities since it could be construed to impose liability even if a municipality did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it. Indeed, the amendment held a municipality liable even it had done everything in its power to curb the riot.

*Id.*

47. *Monell*, 436 U.S. at 692 n.57. The Court opined that:

[I]t is plain from the text of the second conference substitute—which limited liability to those who, having the power to intervene against Ku Klux Klan violence, 'neglected or refuse[d] so to do,' . . . that Congress also rejected those elements of vicarious liability contained in the first conference substitute even while accepting the basic principle that the inhabitants of a community were bound to provide protection against the Ku Klux Klan. Strictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees. Nonetheless, when Congress' rejection of the only form of vicarious liability presented to it is combined with the absence of any language in § 1983 which can easily be construed to create respondeat

incorrectly characterized the municipality's liability as grounded on "the wrongs of a few private citizens" of the municipality and equated these wrongs to those that might have been committed by the municipality's employees. Clearly, under the Sherman Amendment, it was not that the wrongdoers were citizens of the municipality that gave rise to the municipality's liability and, ultimately, to that of its property owners. The wrongdoers need not have been residents or have had any relationship to the municipality. Rather, municipal liability was predicated on the mere fact that the wrongs were committed within the municipality.

It appears that the Court fatally erred in *Monroe*<sup>48</sup> and *Monell* when it based its interpretations of municipal liability under § 1983 on the debates relating to the Sherman Amendment. The nature of municipal liability under the Sherman Amendment was entirely different from that of § 1983. Section 1983 imposes liability on persons acting under color of law for *their own violations of civil rights*. In contrast, the Sherman Amendment, in all of its versions, imposed liability for *failing to protect individuals from civil rights violations committed by others*.<sup>49</sup> Unlike § 1983, the Sherman Amendment imposed an *affirmative duty to protect* individuals from the wrongdoing of others, whereas § 1983 imposes an *affirmative duty of care* not to violate the constitutional rights of individuals.

### III. Theories of Constitutional Authority to Enact the Sherman Amendment

Debates relating to Congress' authority to enact the 1871 Act, including the Sherman Amendment, reflect the differences between § 1983, on the one hand, and the Sherman Amendment on the other. Theories of

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superior liability, the inference that Congress did not intend to impose such liability is quite strong.

*Id.*

48. 365 U.S. 167 (1961).

49. *But see* *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), where the Court held that § 1983 does not impose an affirmative duty to protect. The Court's holding was based on its interpretation of the Fourteenth Amendment's Due Process Clause, which it declared does not require

the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.

*Id.* at 195.

constitutional authority advanced by the bill's supporters included the power to impose liability on municipalities for the violations of constitutional rights committed by *their own officials*. The bill's floor managers in both the House and the Senate interpreted the Fourteenth Amendment as conferring fundamental rights on all citizens and inhabitants of the United States, and concluded that these fundamental rights included the right to the due process of law and the right to the equal protection of their person and property by both the national and state governments. These Fourteenth Amendment rights imposed a corresponding duty on both the national and state governments to enforce these rights and to protect every person in their enjoyment of them. These constitutionally secured rights delegated to Congress the power to enforce them by appropriate legislation.<sup>50</sup> In addition, section 5 of the Fourteenth Amendment expressly delegated this enforcement power to Congress. Supporters of the 1871 Act in both Houses of Congress thus interpreted the Constitution as imposing a duty on the United States and on the individual states to protect the fundamental rights of their inhabitants.

Theories of Congress' power to enforce fundamental rights directly against the violators of these rights were expressed more in the debates relating to the first two sections of the 1871 bill than those relating to the Sherman Amendment, for obvious reasons.<sup>51</sup> These sections of the bill provided for the enforcement of civil rights and equal protection directly, by providing civil remedies and criminal penalties against those who violated an individual's fundamental rights. The Sherman Amendment, on the other hand, provided for the enforcement of fundamental rights indirectly, by providing civil remedies against local communities and private individuals who failed to protect an individual's fundamental rights from the violations of others. Consequently, the Sherman Amendment debates focused more on Congress' authority to impress the states and local communities into performing their constitutional duties to protect the personal safety and property of their inhabitants.

Proponents insisted that Congress could enforce Fourteenth Amendment rights in different ways. It could enforce them directly by impos-

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50. For constitutional arguments in support of §§ 1 and 2 of the 1871 bill, see CONG. GLOBE, 42d Cong., 1st Sess. App. 67-70 (1871) (Rep. Shellabarger); *id.* at 81-86 (Rep. Bingham); *id.* at 206-210 (Rep. James Blair of Missouri); CONG. GLOBE, 42d Cong., 1st Sess. 333 (Rep. Hoar); *id.* at 339 (Rep. Kelley); *id.* at 375-376 (Rep. Lowe); *id.* at 389-392 (Rep. Elliot); *id.* at 566-569, 578-579, 691-700 (Sen. Edmunds); *id.* at 576-578 (Sen. Carpenter); *id.* at 604-609 (Sen. Pool); *id.* at 650-651 (Sen. Sumner); *id.* at 653-656 (Sen. Osborn).

51. See the arguments cited *supra* note 48.

ing criminal sanctions and civil remedies against anyone, private individuals and public officials, who violated them, as Congress did in the first two sections of the 1871 bill. It is on this theory, in part, that Congress enacted these provisions.<sup>52</sup> Congress could also enforce these rights when a state failed to protect them, or if a state violated them in some way. According to proponents, if a state failed to perform its Fourteenth Amendment duty to secure its inhabitants in their constitutional rights, particularly the equal protection of the law, or if a state affirmatively violated these rights, Congress had two options. In such cases, the Fourteenth Amendment authorized the U.S. government to enforce the rights directly by going into the state and providing the protection that the state denied.<sup>53</sup> Alternatively, the Fourteenth Amendment authorized the United States to enforce the duty the Constitution imposed on the state to protect its inhabitants by requiring the state to perform its duty. So, Congress could enforce Fourteenth Amendment rights and discharge its duty to enforce them in two ways: directly, by providing the requisite protection, or indirectly, by requiring the states to perform their duty to protect.<sup>54</sup> Proponents thus interpreted the Fourteenth Amendment as requiring the United States and the states themselves to secure these rights and as delegating authority to Congress to protect substantive rights directly and indirectly, by requiring the states to perform their duty to protect substantive rights.

The House and Senate Floor Managers of the 1871 bill also argued that Congress had the authority to impress municipalities into protecting constitutional rights and to impose on them civil liability for the violation of constitutional rights by "riotous assemblages." However, they offered different theories of congressional authority. Congressman Samuel Shellabarger insisted that Congress had the same power to coerce municipalities to safeguard their inhabitants as it had to coerce individuals to ensure that federal laws are not flagrantly defied. He stated that Congress had the power to

coerce a county of a State, touching a subject-matter over which the United States has power to coerce every person in that county, to wit: touching there being or not being mobs in such county, kept up and perpetuated to defy the laws of the United States and destroy the rights secured by these laws.<sup>55</sup>

Shellabarger reasoned:

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52. CONG. GLOBE, 42d Cong., 1st Sess. 751 (1871) (Rep. Shellabarger); *id.* at 756 (Sen. Edmunds).

53. *Id.* (Rep. Shellabarger)

54. *Id.* at 751, 756 (Rep. Shellabarger and Sen. Edmunds).

55. CONG. GLOBE, 42d Cong., 1st Sess. 751 (1871) (Rep. Shellabarger).



[I]f the United States may impose on a body of the people the obligation to see to it that the United States laws are not riotously defied to the damage of the people in a particular district, and may make the inhabitants of such prescribed district liable if they neglect said duty, then, as a matter of convenience, the United States may just as well designate the district and inhabitants so made liable by the name of a county as by any other method of designation or description, and having made them, as such liable to have a valid judgment against them by their corporate name, and they being, under well-recognized United States law, a person in the courts, it is perfectly competent to enforce a judgment for such a liability in the same manner as could any other judgment be enforced against the same legal person or corporation.<sup>56</sup>

Shellabarger seemed to disregard the corporate nature of a municipality as a distinct entity and insisted that Congress' power to act on a municipal corporation derived from its constitutional power to act directly on the people who comprise the municipality.

In addition, Shellabarger cited to Supreme Court decisions that established the jurisdiction of the federal courts over corporations generally, and municipal corporations specifically, and the power of federal courts to execute judgments against municipalities under the same process as that provided in the Sherman Amendment.<sup>57</sup> Shellabarger asserted that under Article III, § 2, which defines the judicial power of the United States,

counties, cities, and corporations of all sorts, after years of judicial conflict, have become thoroughly established to be an individual or person or entity of the personal existence, of which, as a citizen, individual, or inhabitant, the United States Constitution does take note and endow with faculty to sue and be sued in the courts of the United States.<sup>58</sup>

Shellabarger then insisted that Congress has the same authority "to authorize a judgment for a tort to be rendered under Federal law against any municipal corporation," as it has to authorize a civil action in tort against an individual.<sup>59</sup>

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56. *Id.* at 752

57. The cases Rep. Shellabarger cited were *Knox County v. Aspinwall*, 65 U.S. (24 How.) 376 (1860), and *Louisville, Cincinnati, and Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844). He also referred to Contract Clause cases that had recently been decided which asserted federal jurisdiction over and judicial authority to execute judgments against municipalities. Monell referred to Shellabarger's citation to these cases in support of his argument that the United States could impose on municipalities an obligation to keep the peace. *Monell*, 436 U.S. at 673 n.8. However, the Court did not explain Shellabarger's theory of constitutional authority in its holding. *See id.* at 673, 688 n.50.

58. CONG. GLOBE, 42d Cong., 1st Sess. 752 (1871) (Rep. Shellabarger). *Monell* also quoted this statement to establish that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis;" that this principle was extended to municipal corporations; that "municipal corporations were routinely sued in the federal courts and this fact was well known to Members of Congress." *Monell*, 436 U.S. at 687-688 (citations omitted).

59. CONG. GLOBE, 42d Cong., 1st Sess. 752 (1871) (Rep. Shellabarger).

Senator George Edmunds offered a different theory of congressional authority over municipalities. He emphasized the duty the Fourteenth Amendment imposes on the states to provide to all of their inhabitants the equal protection of the laws. This duty devolves to every city, county, and parish in the country, as subdivisions of the states, Senator Edmunds reasoned, because the states entrusted these local governments with the local administration of justice and with the preservation of the peace. Since the Fourteenth Amendment duty to secure to persons the equal protection of the law requires the states to preserve individuals from riot and tumult, this duty flows through to the municipality. Congress may enforce this duty against municipalities by imposing civil liability on them when they fail to protect. Senator Edmunds concluded: “[When,] therefore, they [the municipality] fail to perform the duty of protection, which the theory of this law implies that they are bound to perform, against tumult and riot, then the Constitution has declared that Congress, by appropriate legislation, may apply to them the duty of making reimbursement.”<sup>60</sup>

#### IV. Constitutional Theories of Opponents of the Sherman Amendment

Although opposition to the Sherman Amendment was fierce, *Monell* concluded that “This debate shows conclusively that the constitutional objections raised against the Sherman amendment—on which our holding in *Monroe* was based, . . . would not have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights.”<sup>61</sup> *Monell* asserted that those who opposed the Sherman Amendment did so because municipalities “were not obligated to keep the peace at state law”<sup>62</sup> and “the Federal government could not constitutionally require local governments to create police forces, whether this requirement was levied directly, or indirectly by imposing damages for breach of the peace on municipalities.”<sup>63</sup> In an astonishing recognition of extraordinary congressional civil rights enforcement authority, the Court asserted that even opponents did not doubt “that the Federal Government could impose on the States the obligation imposed by the Sherman amendment, and presumably [they]

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60. *Id.* at 756 (Sen. Edmunds). Representative Horace Smith of New York argued essentially the same theory of congressional power. *Id.* at 799 (Rep. Smith of New York).

61. *Monell*, 436 U.S. at 669.

62. *Id.* at 673.

63. *Id.*

would have enforced the amendment against a municipal corporation to which the peacekeeping obligation had been delegated" by the state.<sup>64</sup> *Monell* appears to attribute to the opposition a theory of constitutional authority to impose civil liability on municipalities for failing to perform their constitutional duty to protect that was actually asserted by some proponents!

There are several problems with *Monell's* interpretation of the opposition's argument. First, the Court treats the opposition as if its position was monolithic, that is, that opponents expressed one view or theory of Congress' legislative authority.<sup>65</sup> Actually, there were several opposition theories. Second, *Monell* identified only five representatives who allegedly made the argument the Court identifies as the opposition argument, all of whom were Republicans and all but one of whom supported all of the other provisions of the 1871 bill.<sup>66</sup> The Court completely ignored other constitutional objections raised by the "real" opponents of the 1871 Act, House and Senate Democrats.

It appears that *Monell* misinterpreted the objections voiced by the five House Republican opponents the Court discussed. Only one, possibly two, of these representatives espoused the theory *Monell* attributed to the opposition.<sup>67</sup> The other three Republican opponents objected

64. *Id.* at 673 n.30. The Court's interpretation of the opposition is astonishing in light of its subsequent decision in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), where it held that the Fourteenth Amendment did not impose a duty to protect on the states. The specific holding in *DeShaney* is that the Due Process Clause of the Fourteenth Amendment did not impose a duty on child welfare workers to protect a four year old boy from his father's physical abuse, some of which abuse the social workers were aware. *See supra* note 47.

65. The Court did identify differences in nuance. For example, it noted that although Representative Willard shared the House opposition view, he "also took a somewhat different position," namely, that the Constitution did "not allow the Federal Government to dictate the manner in which a State fulfilled its obligation of protection." *Monell*, 436 U.S. at 673 n.30. It also noted that Willard did not doubt that Congress could enforce the duty to protect against a municipality to which the state had delegated the peacekeeping obligation. *Id.* The Court also noted that Senate opponents shared the House opposition view, but that "Senate opponents focused not on the [Sherman] amendment's attempt to obligate municipalities to keep the peace, but on the lien created by the amendment, which ran against all money and property of a defendant municipality." *Id.* However, the Court dismissed the Senate opposition as "not relevant to an analysis of the constitutionality of [§ 1983] since any judgment under that section, as in any civil suit in the federal courts in 1871, would have been enforced pursuant to state laws under the Process Acts of 1792 and 1828." *Id.*

66. *Monell* relies on the arguments of Representatives Austin Blair of Michigan, Charles Willard of Vermont, Luke Poland of Vermont, Horatio Burchard of Illinois, and John Farnsworth of Illinois, all of whom were Republicans who voted for the 1871 bill before the Sherman Amendment was added, and who, with the exception of Farnsworth, voted for the bill as amended by the second conference substitute. CONG. GLOBE, 42d Cong., 1st Sess. 522 (1871); *id.* at 808. *See Monell*, 436 U.S. at 673 n.30.

67. The Court identified Representative Austin Blair as having made "[t]he most complete statement of this position." *Monell*, 436 U.S. at 673. It was not only the most

that, inasmuch as municipalities derived their existence and powers from the state, the federal government had "no power either to create or destroy [municipalities], and no power or control over [municipalities] whatever."<sup>68</sup> Representative Charles Willard of Vermont, asserting that he was not addressing Congress' constitutional powers but was merely discussing the "justice" of making municipalities liable for failing to protect their inhabitants, maintained that the Constitution has not imposed upon municipalities the duty "to provide protection for the people, to give them equal rights, privileges, and immunities." Rather, "[t]he Constitution has declared that to be the duty of the State . . . and *I understand . . . that [duty] applies only to the States, so far as political or municipal action is concerned.*"<sup>69</sup> Like Willard, Representative Luke Poland, also from Vermont, based his theory of opposition on the fact that

[c]ounties and towns are subdivisions of the State government, and exercise in a limited sphere and extent, the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State, and are subject only to such duties and liabilities as State laws impose upon them."<sup>70</sup>

Poland insisted, therefore, that Congress had no constitutional power over municipalities. Representative John Farnsworth of Illinois went even further and adopted the Democrats' constitutional position, insisting that Congress did not have any authority over state officials, let alone municipal officers and municipalities.<sup>71</sup> He broke ranks with fellow Republicans and denied that Congress had constitutional authority to enact any of the provisions of the 1871 Act, because the Fourteenth Amendment only authorized Congress "to correct unequal and partial legislation of a State."<sup>72</sup> Moreover, other House and Senate Republicans

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complete statement of this position, it was the only unambiguous statement of this position. However, statements of Representative Horatio Burchard reasonably can be construed as adopting Blair's position.

68. CONG. GLOBE, 42d Cong., 1st Sess. 794 (1871) (Rep. Poland).

69. *Id.* at 791 (Rep. Willard) (emphasis added).

70. *Id.* at 794 (Rep. Poland).

71. *Id.* at 799 (Rep. Farnsworth).

72. Farnsworth stated:

It is claimed that the concluding clause of the Fourteenth Amendment, which says that "Congress shall have power to enforce the provisions of the amendment by appropriate legislation," gives authority for this bill. I deny it, sir. The first section of the amendment requires no legislation; "it is a law unto itself;" and the courts can execute it. If it requires "enforcing" legislation, what kind does it require?

. . . [T]he only "legislation" we can do is to "enforce" the provisions of the Constitution upon the laws of the State.

CONG. GLOBE, 42d Cong., 1st Sess. App. 117 (1871) (Rep. Farnsworth). Farnsworth clarified what he meant by this in an exchange with Representative Bingham. Farnsworth insisted that Congress only has "the power to correct unequal and partial legislation of a State." *Id.* at 86 (Rep. Farnsworth). This was the constitutional position that Democrats asserted in both Houses of Congress.

who opposed the Sherman Amendment did so because they believed Congress lacked the constitutional authority to impose civil liability on municipalities.<sup>73</sup>

*Monell's* discussion of the constitutional position of the opposition is fatally flawed because it completely ignored the constitutional objections of the House Democrats. Indeed, *Monell* incorrectly attributed to them and to Senate Democrats its erroneous conception of the views of House Republican opponents of the Sherman Amendment. Contrary to the Court's assertion that opponents did not doubt that the federal government could impose on the states the duty to protect, and those municipalities to which states had delegated this duty, Democrats denied that Congress had any power to act against the states or their subdivisions in any manner, including the attempted imposition of civil liability on municipalities for failure to perform police functions. Representative Michael Kerr, the House Minority Leader, led the opposition with this argument, basing it on a theory of dual sovereignty that conceives of the national and state governments as separate, distinct, and mutually autonomous sovereignties, whose powers are mutually exclusive.<sup>74</sup> Kerr opined that Congress could not interfere with the states'

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73. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 798 (1871) (Rep. Bingham); *id.* at 777 (Sen. Frelinghuysen) (emphasis added).

74. *Monell* asserted that "the doctrine of dual sovereignty apparently put no limit on the power of federal courts to enforce the Constitution against municipalities that violated it." See *Monell*, 436 U.S. at 680. The Court reasoned that so long as federal courts "were vindicating the Federal Constitution, they were providing the 'positive' government action required to protect federal constitutional rights [sic] and no question was raised of enlisting the States in 'positive action.'" It noted that the Supreme Court "vigorously enforced the Contract Clause against municipalities" on the very day it decided *Collector v. Day*, U.S. (11 Wall.) 113 (1871). Opponents of the Sherman Amendment distinguished this case from the first conference substitute on the grounds that the Court in the Contract Clause cases was merely enforcing a contractual duty the state authorized the municipality to incur, and in freely entering the contract the municipality was consenting to be sued. The Court insisted that imposing civil liability for a constitutional tort was an unconstitutional invasion of state sovereignty. The analog to the Contract Clause cases, however, would be a suit based on state tort law that could be filed in federal court under diversity jurisdiction. The Contract Clause analog to the first conference substitute would be a federal statute requiring a municipality to honor its contract obligations and conferring a cause of action in the federal courts to enforce the contract against the municipality should it fail to do so. From the perspective of the Democratic opponents of the first conference substitute, *Monell*, in my view, is simply wrong in asserting that:

Since § 1 of the Civil Rights Act [of 1871] simply conferred jurisdiction on the federal courts to enforce § 1 of the Fourteenth Amendment—a situation precisely analogous to the grant of diversity jurisdiction under which the Contract Clause was enforced against municipalities [—] is no reason to suppose that opponents of the Sherman amendment would have found any constitutional barrier to § 1 suits against municipalities.

436 U.S. at 681–82.

police powers because these powers are within the exclusive jurisdiction of the states.<sup>75</sup> He declared:

I hold that the constitutional power of the Federal Government to punish the citizens of the United States for any offenses punishable by it at all may be exercised and exhausted against the individual offender and his property; but when you go one inch beyond that you are compelled, by the very necessities which surround you, to invade powers which are secured to the States, which are a necessary and most essential part of the autonomy of the State governments, without which there can logically be no State government. For it must be remembered that if you can impose these penalties at all upon the counties, parishes, or cities, and can invade their treasuries or control their ministerial officers to any extent whatever, your power is unlimited, it may go to any extent you please, it may take the entire control of all these officers of the State governments, and thus practically and substantially break down those governments, putting everything and everybody under the sovereign will and pleasure of the Congress of the United States.<sup>76</sup>

With a touch of irony, Kerr cited the great national supremacist, Chief Justice John Marshall, as the source of his constitutional theory and insisted that any means or any instrumentalities that Congress elects to carry out its delegated powers "become the exclusive instruments of the Federal Government; that the power of the Federal Government over them is above all other control."<sup>77</sup> That is why, in Kerr's view: "The power of the Federal Government must be exclusive. The power of the State government within its limits, and as to the reserved powers of the States, must be exclusive, and in an important sense sovereign." This was the very basis for Kerr's opposition to the Sherman Amendment substitute. It invaded the state's police powers, "which are a necessary and most essential part of the autonomy of State governments, without which there can logically be no State government."<sup>78</sup> In the Democrats' view, the Sherman Amendment, indeed the entire 1871 bill, threatened the very survival of American federalism.

In addition to insisting that Congress could not enforce constitutional rights against the states, Democrats also insisted that the Fourteenth Amendment did not delegate legislative authority to Congress to enforce the Fourteenth Amendment's § 1 at all. The clauses of the Fourteenth Amendment's first section, Representative Kerr asserted, were "simply declaratory of the preexisting law of the country, the preexisting, fundamental, constitutional law declared by all the courts and tri-

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75. CONG. GLOBE, 42d Cong., 1st Sess. 788 (1871) (Rep. Kerr).

76. *Id.* This argument was the obverse of Justice Joseph Story's reasoning in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), explaining why the states did not have the constitutional power to enforce the right of slave holders under the Fugitive Slave Clause: the power to enforce the right was the power to impede its exercise and even to destroy the right.

77. *Id.*

78. *Id.*

bunals of the entire country.”<sup>79</sup> They did not require enforcement through legislation. If any state should violate their provisions, the “sufficient remedy” is placed where it has always been found, “in the judiciary of the States and of the Union.”<sup>80</sup>

### V. Policy Objections to the Sherman Amendment

In addition to the constitutional objections to the Sherman Amendment, there were also a number of objections based on policy grounds. Legislators objected to imposing strict liability on inhabitants and municipalities for the wrongful actions of strangers.<sup>81</sup> Some objected that it was unjust to impose liability on municipalities when Congress did not have authority to empower them to perform the duty to protect for which the Sherman Amendment made them liable.<sup>82</sup> Others thought that it was foolish to shift the cost of riots to municipalities to induce them to oppose mob violence and then to authorize them to recover those costs from the wrongdoers, thus removing the intended incentive.<sup>83</sup> Representative Poland identified another weakness in the bill.

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79. CONG. GLOBE, 42d Cong., 1st Sess. App. 47–48 (1871) (Rep. Kerr). *Accord id.* at 87 (Rep. Storm).

80. *Id.* at 48 (Rep. Kerr). Representative Washington Whitthorne of Tennessee, a member of the House committee that reported the 1871 bill, insisted that § 5 of the Fourteenth Amendment, which delegated power to Congress to enforce the provisions of the amendment, “applies not to the first section, but to the second, third, and fourth sections.” CONG. GLOBE, 42d Cong., 1st Sess. 338 (1871) (Rep. Whitthorne). Democrats also raised other objections to § 1 and the other sections of the 1871 Act and Congress’ power to enact them. For example, Senator J. W. Johnston of Virginia argued that § 1 was unconstitutional because Congress is limited to the jurisdiction the Constitution confers on federal courts as defined by Article III of the Constitution. He insisted that § 1 of the 1871 Act “proposes to allow citizens of the same State, or of the same county, to sue one another in the courts of the United States. I hold that to be plainly unconstitutional.” CONG. GLOBE, 42d Cong., 1st Sess. App. 215 (1871) (Sen. Johnston of Virginia). Senator John Stockton of New Jersey insisted that there was no constitutional power to enact the 1871 Act, for the power to pass this bill would encompass the power to interfere with the Bill of Rights. CONG. GLOBE, 42d Cong., 1st Sess. 572 (1871).

81. *See supra* notes 37–43 and the accompanying text.

82. CONG. GLOBE, 42d Cong., 1st Sess. 791 (1871) (Rep. Willard).

83. Representative Poland insisted this disincentive was among many substantial weaknesses in the first conference substitute. He observed that, on the one hand, the measure was intended to insure that municipalities would prevent mob action and injuries resulting from them by shifting the cost of these injuries onto the municipalities and their inhabitants. On the other hand, to meet objections made in the House, the Conference Committee amended the original Sherman Amendment to protect municipalities from absorbing these costs by giving them an action over against the wrongdoers to make them whole. This contradiction between the theory of the first conference substitute and what it actually provided, Poland insisted, “detracts very largely from the spirit of restraining grace, as I term it.” He characterized this provision as “foolish, absurd, and of no utility.” *Id.* at 793 (Rep. Poland).

He noted that the reason for imposing liability on the municipality was that the victim of these outrages could not identify the persons who committed them, so that it was impossible to maintain a suit against the wrongdoers. To maintain a suit at all, however, the claimant must prove that the act was committed with the intent to deprive him of a constitutional right. Poland queried how the claimant could provide proof of this intent if he did not know who committed the outrage. He further asked how the victim could bring a suit against the municipality if he could not bring a suit against the wrongdoers themselves. Poland, therefore, thought that the substitute was useless.<sup>84</sup>

These policy objections offered sufficient reasons, independent of any constitutional considerations, for opposing the first conference substitute, which alone imposed municipal liability. Voting patterns suggest that House Republican opposition to the first conference substitute was based on reasons other than constitutional grounds. House Republicans overwhelmingly opposed the original Sherman Amendment, which imposed strict liability on a municipality's inhabitants for rights violations inflicted by others.<sup>85</sup> However, a substantial majority of House Republicans voted for the first conference substitute.<sup>86</sup> Moreover, only six House Republicans voted against the bill as amended with the second conference substitute.<sup>87</sup> The amended bill differed from the original Sherman Amendment in changing the standard of liability to fault. Consequently, the strict liability of the first two versions seems to have been a significant factor in the Republicans' opposition to them.

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84. *Id.* at 793 (Rep. Poland).

85. House Republicans overwhelmingly supported the 1871 bill before the Sherman Amendment: 117 yea, 5 nay, 12 absent, 2 not voting. House Republicans rejected Sherman's original amendment by the overwhelming vote of 42 yea, 60 nay, 34 absent. A substantial majority of House Republicans actually voted for the first conference substitute: 74 yea, 34 nay, 28 absent. Although House Republicans voted overwhelmingly in favor of the Bill as amended with the second conference substitute (92 yea, 6 nay, 38 absent), support was not nearly as great as it was before it was amended. Voting patterns in the Senate were similar. The 1871 bill before it was amended was approved: 44 yea, 18 nay, 6 absent. The bill with the *first conference substitute* was approved: 32 yea, 16 nay, 21 absent. The Senate approved the bill as amended by the second conference substitute: 36 yea, 13 nay, 21 absent.

86. Professor Beermann argues for related reasons that the rejection of the Sherman Amendment is "not . . . strong evidence for rejecting municipal liability generally and vicarious municipal liability in particular." Beermann, *supra* note 21, at 8. He notes that the Amendment's rejection "was not, as the [Monell] Court has claimed, particularly resounding. In fact, two versions of the Amendment passed in the Senate, and at least one was agreed to by a conference committee, indicating some support for it even in the House. Thus, no broad conclusions regarding municipal liability should be drawn from the rejection of the Sherman Amendment." *Id.* at 8-9.

87. Thirty-six House Republicans were absent from the vote.



## VI. The Sherman Amendment Debates and Municipal Liability

Although *Monell's* analysis of the Sherman Amendment debates is flawed, the Court's conclusion that these debates do not preclude municipal liability under § 1983 is essentially sound. Unlike § 1983, the Sherman Amendment did not involve municipal liability for its own violations of constitutional rights. Rather, it purported to impose civil liability on municipalities for their failure to protect against certain rights violations committed by others. Rejecting municipal liability for the failure to protect is not the equivalent to rejecting municipal liability for its own rights violations.<sup>88</sup> Consequently, the Sherman Amendment debates do not provide conclusive evidence whether the supporters of the Sherman Amendment intended to impose municipal liability under § 1983. No one addressed the question of municipal liability in the debates relating to section 1 of the 1871 Act, the precursor of § 1983. No inference can be made from these debates on either side of the issue. Consequently, the legislative history of § 1983 does not resolve the question of whether the framers intended it to make municipalities liable for their own violations of constitutional rights.

## VII. The Sherman Amendment Debates and Municipal Vicarious Liability

*Monell's* holding, "that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort,"<sup>89</sup> is untenable. Both *Monell* and *Monroe* acknowledged that supporters of § 1983 intended to provide broad remedies to redress rights violations resulting from the failure to enforce the law, or the inaction of public officials, as well as from actions pursuant to official rules and policies. The conditions in the South that Congress was attempting to remedy confirm this view.<sup>90</sup> It was not racially discriminatory laws and policies that presented the greatest concern to Congress in 1871. Rather, it was the inaction of law enforcement officers, the complicity of public officials in criminal wrongdoing, and the failure of the states' civil and criminal justice systems to protect against and to redress rights violations that Congress was attempting to address. In other words, Congress was attempting to

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88. See, e.g., Beermann, *supra* note 21; Fisher, *supra* note 31.

89. *Monell*, 436 U.S. at 691.

90. See TRELEASE, *supra* note 13. This history evinces the pervasive failure of local authorities to protect Americans in the South from Klan violence.

remedy rights violations where local authorities failed to protect civil rights, as well as violations resulting from actions taken by public officials in violation of official regulations, policies, and laws.

The record of debates relating to section 1 of the 1871 bill, the actual precursor of § 1983, which *Monell* overlooked or ignored, is replete with evidence showing that its supporters intended to redress rights violations resulting from public officers acting, or failing to act, in violation of state law and official policies and regulations, as well as pursuant to them. Representative William Stoughton of Michigan emphasized the condition of lawlessness in the South, declaring that: "There is no security for life, person, or property. The State authorities and local courts are unable or unwilling to check the evil or punish the criminals."<sup>91</sup> Representative Austin Blair, also of Michigan, noted that: "In many instances [the criminals] are the State authorities." Representative David Lowe of Kansas was more graphic in describing the need for federal legislation:

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective . . . . If there is no remedy for this, if the rights of citizenship may be denied without redress, if the Constitution may not be enforced, if life and liberty may not be effectively protected, then, indeed, is our civil Government a failure.<sup>92</sup>

The supporters of § 1983 clearly intended it to apply to public officers who infringed constitutional rights in violation of official regulations, policies, and laws. They understood the need for congressional protection of constitutional rights as stemming from such rights violations, more than from violations committed by actions pursuant to official regulations, policies, and laws. Representative James Garfield of Ohio, for example, stated that

the chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section [of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection.<sup>93</sup>

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91. CONG. GLOBE, 42d Cong., 1st Sess. 320 (1871) (Rep. Stoughton).

92. *Id.* at 374 (Rep. Lowe). See also *id.* at 332 (Rep. George F. Hoar); *id.* at 369 (Rep. Monroe); CONG. GLOBE, 42d Cong., 1st Sess. App. 78 (1871) (Rep. Perry).

93. CONG. GLOBE, 42d Cong., 1st Sess. App. 153 (1871) (Rep. Garfield). *Monell* quoted Garfield's statement, in part. *Monell*, 436 U.S. at 686 n.45. The Court, however, failed to include that portion of Garfield's statement that asserted that § 1 of the 1871 Act applied even when the laws are just and equal rights are violated, which implied Garfield's belief that § 1 was intended to apply to officials even when they were not acting pursuant to official policies, regulations, and ordinances.

Representative Lowe made a similar argument, stating that if the guarantees of the Fourteenth Amendment were limited to the infringement of citizens's rights by state law and by acts pursuant to state laws, then

all rights may be subverted and denied, without color of law, and the Federal Government have no power to interfere. All you have to do, therefore, under this view, to drive every obnoxious man from a State, or slay him with impunity, is to have the law all right on the statute-book, but quietly permit rapine and violence to take their way, without the hinderance [sic] of local authorities. Such a position, Mr. Speaker, defeats itself by its own absurdities. The rights and privileges of citizens are not only not to be denied by a State, but *they are not to be deprived of them.*<sup>94</sup>

There is no principled way to interpret § 1983 as applying liability to public officers who infringed constitutional rights in violation of official regulations, policies, and laws, and still maintain that municipal liability under § 1983 was restricted only to rights infringements committed by actions pursuant to official regulations, policies, and laws. In my view, *Monell's* conclusion that supporters of § 1983 intended to hold municipalities liable, but rejected vicarious liability for municipalities, is untenable.

Republicans unquestionably expected section 1 liability to include state and local officials.<sup>95</sup> In addition to the framers' statements expressing this expectation, this conclusion is supported by the enactment in the preceding year, by many of the same legislators, of the Enforcement Act of May 31, 1870.<sup>96</sup> This legislation was enacted under a comparable constitutional theory of rights enforcement, which provided comparable remedies to the 1871 Act.<sup>97</sup> Section one of the 1870 Act declared that all U.S. citizens who were otherwise qualified to vote had a federal right to vote without distinction of race, color, or previous condition of servitude in any election in a "State, Territory, district, county, city, parish, township, school district municipality, or other territorial subdivision."<sup>98</sup> Section two imposed a federal duty on all "persons or officers" who are charged by the state with the performance of duties in furnishing to citizens an opportunity to perform any prerequisite or to satisfy any qualification for voting. The statute required these "persons or officers" to provide "the same and equal opportunity to perform such prerequisite, and to become qualified to vote without

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94. CONG. GLOBE, 42d Cong., 1st Sess. 375 (1871) (Rep. Lowe) (emphasis added).

95. The Supreme Court's decision in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), is thus contradicted by the evidence discussed here.

96. Act of May 31, 1870, ch. 114, 16 Stat. 140, § 1 (1870).

97. CONG. GLOBE, 42d Cong., 1st Sess. App. at 209 (1871) (comments of Rep. Blair of Missouri).

98. Act of May 31, 1870, ch. 114, 16 Stat. 140, § 1 (1870).

distinction of race, color, or previous condition of servitude.”<sup>99</sup> It gave anyone denied this equal opportunity to become qualified to vote a tort action for statutory damages of \$500 against the person or officer who refused or knowingly omitted to perform this state and federal duty. Section 3 provided that any otherwise qualified voter who was denied the opportunity to perform any prerequisite or qualification to vote was to be deemed qualified, and his vote was to be counted. It provided that “any judge, inspector, or other officer of election whose duty it is or shall be” to count and certify this vote and who wrongfully refused or omitted to receive and give effect to the vote of such person, shall be liable in tort for statutory damages of \$500 for each offense to the person aggrieved.<sup>100</sup>

These provisions, enacted to enforce the right secured under the Fifteenth Amendment, are equivalent to section 1 of the 1871 Act, enacted to secure the rights guaranteed by the Thirteenth and Fourteenth Amendments. The Enforcement Act of 1870 explicitly imposed a federal duty on state and local officers of election, and other “persons,” to perform the duties imposed on them by state law in state as well as federal elections. It also imposed liability on these public officials and persons for failing to perform these federal and state duties, and conferred on individuals who were “aggrieved” by the failure to perform these duties, a civil cause of action for statutory damages of \$500. No federal judge who considered the constitutionality of these provisions held that any of them unconstitutionally imposed federal duties and liability on state and local officials for failing to perform their duties under state law and the 1870 statute.<sup>101</sup>

It is reasonable to suppose that the supporters of section 1 of the 1871 Act contemplated its application to the same variety of public officials, because it was the Fourteenth Amendment analog to the 1870 Act. The evidence is overwhelming that the supporters of § 1983 intended to provide protection against and remedies for rights violations caused by the failure of public officers to perform their public duties, by the actions of public officers that violated official policies, regula-

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99. *Id.* § 2.

100. *Id.* § 3.

101. *See, e.g.,* United States v. Given, 25 F. Cas. 1324 (C.C. Del. 1873) (No. 15,210); United States v. Given, 25 F. Cas. 1328 (C.C. Del. 1873) (No. 15,211). The Supreme Court struck down §§ 3 and 4, but not because they imposed liability against state election officers for failing to perform their federal and state duties. The Court did not challenge this aspect of these provisions. Rather, the Court struck them down because they could have applied to private persons who interfered with a citizen's Fifteenth Amendment rights. The Court interpreted the Fifteenth Amendment as guaranteeing an immunity from racially motivated state infringements of otherwise qualified voters' right to vote. *See* United States v. Reese, 92 U.S. 214, 219–21 (1875).

tions, and laws, as well as the actions of public officers pursuant to official policies, regulations, and laws. If the framers also intended to hold municipal corporations liable for their own constitutional violations, as *Monell* held they did, then it is reasonable to assume that the framers intended municipal liability to apply to the same kinds of constitutional violations that they applied to state and municipal agents and officers, particularly since corporations can act only through their agents and officers. Consequently, municipal corporations would have been liable for constitutional violations resulting from the actions of their agents or officers who failed to enforce or violated official policies, regulations, and laws, in addition to actions pursuant to official policies, regulations, and laws.

There is no reason to suppose that the liability of municipalities and their municipal officers under section 1 of the 1870 Act was intended to be any different than it was under the law of municipal corporations at that time. Under this law, the state had the power by statute to impose liability on municipal corporations and their agents and officers where they were not liable under the common law.<sup>102</sup> Under the common law, municipalities probably were not liable for the kinds of rights violations Congress was attempting to remedy. Although they were often liable for the misfeasance of their agents or officers, municipalities were not liable for actions pursuant to their public functions or for the actions of their police officers and firefighters.<sup>103</sup> Nevertheless, if the framers of § 1983 intended to hold municipal corporations liable for their constitutional violations, as *Monell* decided they did, and if Congress imposed civil liability on state and municipal officers for their violations of constitutional rights when acting pursuant to official policies and laws as well as in violation of them, as § 1983 clearly does, then it would seem that nineteenth century rules of vicarious liability would have rendered the municipal corporations vicariously liable for the constitutional violations of their employees. Consequently, the legislative history of § 1983 not only does not preclude the imposition of vicarious liability on municipalities, as *Monell* concluded, it may actually support it.

### VIII. Conclusion

A careful review of the legislative history upon which the Supreme Court relied in *Monell* evinces the following conclusions. The Court

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102. JOHN F. DILLON, II *THE LAW OF MUNICIPAL CORPORATIONS* §§ 760-63 (1873).

103. *Id.* §§ 764-71, 773-74.

erred in assuming that the Sherman Amendment was the precursor of § 1983. Whereas § 1983 imposes liability on public officers and others acting under color of law for constitutional rights violations they might have committed themselves, the Sherman Amendment, in its various formulations, imposed liability on municipalities or others for rights violations committed by strangers. Because the Sherman Amendment did not involve municipal liability for the municipality's own violations, it is not surprising that the Court in *Monell* concluded that "nothing said in debate on the Sherman Amendment would have prevented holding a municipality liable under [§ 1983] for its own violations of the Fourteenth Amendment."<sup>104</sup> Nevertheless, the Court was also wrong in this conclusion. The record of debates demonstrates that Democrats uniformly, and some Republicans, expressed the view that Congress lacked the constitutional authority to act on municipalities in any way. Consequently, a closer examination of this record contradicts *Monell's* conclusion that the legislative history "compels the conclusion that Congress did intend municipalities and other local governments to be included among those persons whom § 1983 applies."<sup>105</sup> Although it does not compel this conclusion, the legislative history also does not *preclude* municipal liability under § 1983.

*Monell* also held that this legislative history "compels the conclusion" that Congress did not intend to impose liability on municipalities "under § 1983 on a respondeat superior theory."<sup>106</sup> Nothing in the debates evinces an intent to shield municipalities from vicarious liability for the constitutional violations of their employees. But then, nothing in the debates evinces an intent to hold municipalities vicariously liable for their agents' or officers' constitutional violations either. However, if *Monell* was correct in holding that § 1983 was intended to impose liability on municipalities for constitutional violations, and because § 1983 was intended to impose liability on municipal officers for constitutional violations resulting from their failure to perform and from their violations of official policies and laws, Congress exposed municipalities to vicarious liability for the constitutional violations of their agents and officers under rules of vicarious liability in force in 1871.

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104. 436 U.S. at 683.

105. *Id.* at 690

106. *Id.* at 659, 691.

