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# FRANKFURTER'S CHAMPION: JUSTICE POWELL, *MONELL*, AND THE MEANING OF "COLOR OF LAW"

*David Jacks Achtenberg\**

## INTRODUCTION

The unpublished papers of United States Supreme Court Justices provide intriguing insights into the internal decision-making processes of the Court. Yet those papers are not easily accessible even to those who have the time and resources to travel to the various locations where the originals are stored. For the past several years, as a small step toward alleviating this problem, I have been compiling and posting on the internet a digital archive of the available unpublished papers of Supreme Court Justices dealing with various § 1983 civil rights cases.<sup>1</sup> This Article describes a tentative

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1. This Article relies heavily on documents from that archive that are available at the website [www.PetitionToDecision.com](http://www.PetitionToDecision.com). To simplify citation and retrieval of these documents, the following citation conventions will be used:

“Blackmun Papers” refers to documents on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers. All such papers can be accessed at <http://www1.law.umkc.edu/justicepapers/MonellDocs/BlackmunAsFound02.htm>, (the Blackmun Archive Page of the *Monell* section of the Petition to Decision website).

“Brennan Papers” refers to documents on file with the Library of Congress, Manuscript Division, William J. Brennan Papers. All such papers can be accessed at <http://www1.law.umkc.edu/justicepapers/MonellDocs/BrennanAsFound06.htm>, (the Brennan Archive Page of the *Monell* section of the Petition to Decision website).

“Marshall Papers” refers to documents on file with the Library of Congress, Manuscript Division, Thurgood Marshall Papers. All such papers can be accessed at <http://www1.law.umkc.edu/justicepapers/MonellDocs/MarshallAsFound01.htm>, (the Marshall Archive Page of the *Monell* section of the Petition to Decision website).

hypothesis based on the Justices' papers relating to *Monell v. Department of Social Services*,<sup>2</sup> the case that decided that cities could be sued under § 1983. That hypothesis deals with a puzzling aspect of the case: its conclusion that, while cities and other governmental entities are subject to § 1983 suits, they cannot be sued on a respondeat superior basis. This conclusion is puzzling because the opinion's arguments in favor of it are so unpersuasive as to raise the question of whether the real explanation lies somewhere else.

This Article suggests such an explanation: that *Monell*'s idiosyncratic restriction on municipal liability was the result of Justice Powell's beliefs about what might appear to be an unrelated issue—the proper meaning of the phrase “under color of law.” Justice Powell had become convinced, like Justice Frankfurter before him, that “under color of law” should be interpreted narrowly to restrict all § 1983 suits to situations in which the wrongdoer's conduct was actually authorized by state or local law. However, knowing that he would be unable to muster a majority to apply that restriction across the board, Powell settled for an opinion applying it to suits against municipalities. He was able to accomplish this goal because he was the crucial fifth vote that Justice Brennan needed to make it possible for cities to be sued at all. I call this explanation the “Frankfurter's Champion” hypothesis, because Justice Powell was seeking to resurrect the position Justice Frankfurter had taken in *Monroe v. Pape*.<sup>3</sup>

The Article will also discuss whether Justice Powell's position and the ultimate no-respondeat-superior ruling in *Monell* can instead be explained by the briefs of the parties or by arguments developed in chambers by the

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“Powell Papers,” “Powell Papers – Burrell,” and “Powell Papers – Civil Rights” all refer to documents on file with Washington & Lee University, the Lewis F. Powell, Jr. Archives, Lewis F. Powell, Jr. Papers. “Powell Papers” can be accessed at <http://www1.law.umkc.edu/justicepapers/MonellDocs/PowellAsFound01.htm>, (the Powell Archive Page of the *Monell* section of the Petition to Decision website). “Powell Papers – Burrell” can be accessed at <http://www1.law.umkc.edu/justicepapers/BurrellDocs/PowellDocs/PowellBurrellFilesPage.htm>. “Powell Papers – Civil Rights” can be accessed at <http://www1.law.umkc.edu/justicepapers/NCSFDocs/PowellDocs/PowellNCSFPage.htm>.

“Blackmun Papers,” “Brennan Papers,” “Marshall Papers,” and “Powell Papers” are all documents from the Justices' files on *Monell* or from the Justices' general files for the 1977–78 term. “Powell Papers – Burrell” are from Justice Powell's files on *Burrell v. McCray*. “Powell Papers – Civil Rights” are from various non-case-specific files Justice Powell maintained on civil rights matters, e.g., a notebook in which he compiled various memos and documents relating to the Civil Rights Acts.

Many of the documents cited in this Article are typed documents that have been annotated in hand by someone other than the document's author, e.g., a memo written by Justice Brennan with handwritten notes by Justice Powell. This Article will use underlining (as opposed to italics) to indicate hand underlining by someone other than the document's author. Typed underlining will be shown as italics unless otherwise indicated in the footnote.

2. 436 U.S. 658 (1978).

3. 365 U.S. 167 (1961).

clerks or Justices. After concluding that the briefs do not provide any such explanation, the Article will discuss a plausible alternative hypothesis: that Justice Powell may have become convinced that the legislative history of § 1983 restricted the ambit of the act to “actual wrongdoers,” i.e., to defendants who were “at fault.” The Article concludes that, although plausible, this explanation is less persuasive than the Frankfurter’s Champion hypothesis, since Powell abandoned the fault-based argument when it threatened his efforts to broker an opinion that limited municipal liability in a way consistent with Frankfurter’s narrow view of “under color of law.”

I recognize that “[f]ew speculations are more treacherous than diagnosis of the motives or genetic explanations of the position taken by Justices in Supreme Court decisions.”<sup>4</sup> The explanation presented in this Article is a tentative hypothesis—one that may be strengthened or weakened as further evidence is gathered from the recently released Potter Stewart Papers and from the forthcoming Byron White Papers—but one that, on the current evidence, seems more likely than the alternative explanations.

#### I. FROM *MONROE* TO *MONELL*: THE TRADITIONAL EXPLANATION

Any effort to explain *Monell* must begin with Justice Douglas’s opinion in *Monroe v. Pape*.<sup>5</sup> *Monroe* had two important holdings.<sup>6</sup> First, the Court held that state or local employees act “under color of” state law even if their actions are not authorized by—or even are forbidden by—state or local law.<sup>7</sup> In other words, “Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.”<sup>8</sup> This color of law holding evoked a lengthy and passionate dissent from Justice Frankfurter who argued that § 1983 was never intended to cover conduct committed under the mere “pretense of [state or local] authority.”<sup>9</sup>

*Monroe*’s second holding was less favorable to plaintiffs. The Court held that cities could never be sued under § 1983 because they were not suable “persons” within the meaning of the statute.<sup>10</sup> The Court arrived at this result based on its interpretation of the statute’s legislative history, particularly its conclusion that the 42nd Congress’s rejection of a proposal known as the Sherman Amendment showed that it opposed all forms of municipal liability.<sup>11</sup> This municipal non-liability holding was, at the time,

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4. Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 317 (1955).

5. 365 U.S. 167.

6. *Monroe*’s third holding—that § 1983 protected all constitutional rights rather than just those that were inherent in a citizen’s relationship to the federal government, *id.* at 170–71—is not pertinent to the discussion of *Monell*.

7. *Id.* at 171–87.

8. *Id.* at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

9. *Id.* at 238–39 (Frankfurter, J., dissenting).

10. *Id.* at 187–92 (majority opinion).

11. *Id.* at 188–91. In simple terms, the Sherman Amendment made cities (or, in an earlier version, city inhabitants) liable for damages caused by the depredations of the Ku Klux Klan or by similar mob violence. For a more detailed discussion of the three versions

far less controversial than the Court's color of law holding, and it elicited no dissents.

However, by the mid-1970s, *Monroe's* municipal non-liability holding was under considerable stress. Scholarly commentary was highly critical.<sup>12</sup> More significantly, *Monroe* and other cases holding that *cities* and *counties* could not be sued<sup>13</sup> seemed irreconcilable with a large number of cases—including well-known desegregation cases—that permitted § 1983 suits against school districts.<sup>14</sup> Meanwhile, the civil rights plaintiffs' bar began developing creative arguments to effectively circumvent municipal non-liability without explicitly overruling *Monroe*.<sup>15</sup>

*Monell v. Department of Social Services*<sup>16</sup> resolved this tension by overruling *Monroe's* categorical municipal non-liability holding while at the same time creating what can be called the *Monell* doctrine—a doctrine under which cities cannot be sued on a respondeat superior basis but instead are subject to suit only for acts which implemented or executed official city policy.<sup>17</sup> The Court's opinion justified the rejection of respondeat superior liability by reinterpreting the meaning of Congress's defeat of the Sherman Amendment,<sup>18</sup> i.e., by concluding that, since Congress refused to impose

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of the Sherman Amendment and for their full text, see *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 666–69, 702–04 (1978).

12. See, e.g., Don B. Kates, Jr. & J. Anthony Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972); *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1190, 1190–95 (1977).

13. See, e.g., *Aldinger v. Howard*, 427 U.S. 1 (1976); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. Cnty. of Alameda*, 411 U.S. 693 (1973).

14. See cases cited in *Monell*, 436 U.S. at 663 n.5. This conflict was exacerbated when the Court, in *City of Kenosha v. Bruno*, held that *Monroe's* municipal non-liability rule forbade equitable relief just as it forbade monetary damages. 412 U.S. 507 (1973).

15. For a detailed discussion of the theories that were being bruited about, see Michael H. Gottesman & Dennis D. Clark, *Federal Jurisdiction over Teachers' Fourteenth Amendment Claims in Light of City of Kenosha v. Bruno* 6–50 (undated [marked received Dec. 4, 1973]) (copy on file with the author). This unpublished memo was circulated widely among civil rights attorneys and laid out various alternatives including suits against school district officials in their official capacity, *id.* at 14–29, and suits brought directly against school districts asserting an implied cause of action under the Fourteenth Amendment similar to the cause of action recognized in *Bivens*, *id.* at 29–50. The former theory was used by the *Monell* plaintiffs. See *infra* text accompanying notes 97–103. Fear of adoption of the latter theory was one motive for Powell's desire to overturn the blanket municipal non-liability rule. See *Monell*, 436 U.S. at 712–13 (Powell, J., concurring); Memorandum from Nancy Bregstein to Justice Powell: Inferring a Damage Action from the Fourteenth Amendment (Aug. 25, 1977), in *Powell Papers – Civil Rights*, *supra* note 1, at Box 132: File [3] (extensive memo discussing the theory); Memorandum from Justice Powell to Conference 9 (Feb. 23, 1978), in *Powell Papers*, *supra* note 1, at Box 189: File 5 (warning that lawyers had “gotten the word” and were beginning to assert the theory); Memorandum from Justice Powell to Eugene Comey (June 28, 1977), in *Powell Papers – Civil Rights*, *supra* note 1, at Box 130B: File [1] (describing conference at which professors discussed the theory and assigning it to his clerks as a summer memo project).

16. 436 U.S. 658 (1978).

17. *Id.* at 690–91.

18. *Id.* at 693–94; see also *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478–79 & n.7 (1986) (stating that *Monell* was based primarily on legislative history, particularly inferences from the rejection of the Sherman Amendment). To a lesser extent, the Court relied on a dubious textual argument. *Monell*, 436 U.S. at 692.

one form of vicarious liability (the Sherman Amendment), it opposed all forms of vicarious liability, including respondeat superior. The majority opinion gave no hint that disagreement over the meaning of “color of” law played any part in the decision.<sup>19</sup>

There are serious problems with this view of the genesis of the *Monell* doctrine. As many scholars have argued, Congress’s rejection of the Sherman Amendment—a radical proposal to make cities liable for the depredations of private mobs—simply does not imply that Congress was hostile to traditional respondeat superior liability for the wrongs of a city’s own employees.<sup>20</sup> Despite Justice Brennan’s half-hearted footnote statement to the contrary,<sup>21</sup> opposition to a non-traditional, extreme form of vicarious liability does not imply opposition to a traditional, moderate form of vicarious liability. After all, the fact that a corporation is not ordinarily liable if a gang member assaults someone on its property does not imply that the corporation will not be liable if one of its own employees does so.

More significant than the scholarly consensus is the evidence that the Justices *knew* that the legislative history argument for the *Monell* doctrine made no sense. The respondent’s brief actually conceded that the rejected Sherman Amendment would have imposed a form of strict liability that was quite different from traditional respondeat superior:

We appreciate, as this Court has, the distinction between the type of strict liability which would have been imposed on municipalities by the amendment proposed by Senator Sherman, as well as its later proposed version and the situation where a municipality would be held liable on the basis of traditional principles of *respondeat superior*.<sup>22</sup>

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19. The only hint that “color of law” concerns might have played a role in the *Monell* decision is the statement in Justice Powell’s concurring opinion that “[n]o conduct of government comes more clearly within the ‘under color of’ state law language of § 1983” than actions that are “fully consistent with, and thus not remediable under, state law.” *Monell*, 436 U.S. at 707 (Powell, J., concurring).

20. See, e.g., David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 *FORDHAM L. REV.* 2183, 2196–2217 (2005); Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 *DEPAUL L. REV.* 627, 631–35, 643 (1999); Robert J. Kaczorowski, *Reflections on Monell’s Analysis of the Legislative History of § 1983*, 31 *URB. LAW.* 407, 430–34 (1999); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 *SUP. CT. REV.* 249, 259–261 (1987); Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 *N.C. L. REV.* 517, 537 (1987); Charles A. Rothfeld, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 *U. CHI. L. REV.* 935, 943–46 (1979); Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 *GEO. L.J.* 1753, 1755 n.13 (1989); see also *Board of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 431–33 (1997) (Breyer, J., dissenting); *Oklahoma City v. Tuttle*, 471 U.S. 808, 834 (1985) (Stevens, J., dissenting); *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011) (Posner, J.) (stating that scholars agree that the rejection of respondeat superior was based on “historical misreadings”).

21. *Monell*, 436 U.S. at 692–93 n.57.

22. Brief for Respondent at 9–10, *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) (No. 75-1914), 1977 WL 187959, at \*9–10 (citations omitted). The influential amicus brief of the NEA and Lawyers’ Committee for Civil Rights also distinguished the two types of liability. Brief for National Education Association and Lawyers’ Committee for Civil Rights

Similarly, while the Court was considering *Monell*, Justice Powell received and reviewed a memo from his clerk, Nancy Bregstein, that clearly explained that Congress's rejection of the Sherman Amendment did not imply that municipalities should not be liable for the acts of municipal agents.<sup>23</sup> Quoting one of the leading articles critical of *Monroe*, Bregstein wrote, "Nothing in the rejection of the Sherman Amendment is inconsistent with the idea that municipalities should be liable for the torts of their *own* employees."<sup>24</sup> Powell underlined a similar passage later in the memo: "[T]he kind of liability contemplated by the Sherman amendment would have been quite different from imposing liability on municipalities for their own wrongful acts or those of their agents. Congress did not come close to expressing any opinion on the constitutionality of imposing the latter liability."<sup>25</sup> The full meaning of the debates may have been ambiguous, Bregstein wrote, but nothing in them suggested rejection of respondeat superior: "It is plain that whatever the meaning of the debates on the Sherman amendment, Congress has not spoken on the question of the 'necessity' or 'appropriateness' of a damage remedy against municipalities for [their] own or [their] agents' violation of constitutional rights."<sup>26</sup> Powell praised the Bregstein memo, recommended that one of his other clerks read it, and gave no indication that he disagreed with the passages quoted above.<sup>27</sup>

Even Justice Rehnquist, who favored *blanket* municipal non-liability, recognized that there was nothing in the defeat of the Sherman Amendment that justified rejection of municipal respondeat superior.<sup>28</sup> During the Court's November 4, 1977 post-argument conference, Justice Rehnquist insisted that, since municipal corporations could only act through their agents, it was impossible to "draw [the] line between policy making officials and subordinate officers."<sup>29</sup> In a subsequent detailed memo to the other Justices, he elaborated on this point:

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Under Law, as Amicus Curiae at 25–26 & App. 25a–26a, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (No. 75-1914), 1977 WL 187961, at \*24–26 & App. 25a–26a [hereinafter NEA Brief].

23. Bregstein, *supra* note 15, at 1 (handwritten annotation by Justice Powell indicating that he reviewed the memo on September 10–12, 1977 and describing it as a "splendid memo").

24. *Id.* at 35 (quoting Kates & Kouba, *supra* note 12, at 136).

25. *Id.* at 37.

26. *Id.* at 42–43; *see also id.* at 42 ("The Court [in *Monroe*] was not presented with the argument that the debates were not relevant to municipal liability for unconstitutional conduct of its own agents.").

27. *Id.* at 1 (handwritten annotation by Justice Powell describing it as a "splendid memo"); Memorandum from Samuel Estreicher to Justice Powell: *Procurier v. Navarette* 25 (Aug. 30, 1977), in Powell Papers – Civil Rights, *supra* note 1, at Box 132: File [2] (handwritten annotation by Justice Powell suggesting that, in connection with Estreicher's analysis of the legislative history of § 1983, he should "[s]ee Nancy's fine memo").

28. Ironically, the arguments Justice Rehnquist made within chambers on *Monell* are quite similar to the arguments Justice Stevens made—and Justice Rehnquist rejected—in *Tuttle*. Compare *infra* text accompanying notes 29–30, with *Oklahoma City v. Tuttle*, 471 U.S. 808, 834 (1985) (Stevens, J., dissenting).

29. Justice Brennan, Conference Notes 2 (Nov. 4, 1977), in Brennan Papers, *supra* note 1, at Box 430: File 8; *see also* Justice Blackmun, Conference Notes 2 (Nov. 4, 1977), in

[The legislative history of § 1983] affords no basis for saying that, although cities are “persons” within the Act, they are not liable on a *respondeat superior* basis for actions of their numerous employees. The Sherman Amendment was *not* an effort to impose vicarious liability on cities and counties for acts of their employees; it was a far more drastic measure, intended to impose liability . . . for mere failure to prevent private vandals from committing crimes against persons or property within the municipal jurisdiction. Just as Congress could quite consistently have rejected it and still intended that municipal corporations be “persons” within § 1983, Congress could have rejected the amendment and still intended that “persons” . . . are [to be held] liable for affirmative acts of their employees under a *respondeat superior* theory. In short, I think that once municipal corporations are included within the definition of “person” in § 1983, it is doctrinally very difficult to say that they are not liable on a *respondeat superior* [basis] because Congress rejected the Sherman Amendment.<sup>30</sup>

The weakness of the Court’s legislative history argument suggests to some that the result was simply an ad hoc political compromise—perhaps one motivated by concern about the perilous financial condition of some cities<sup>31</sup>—in which votes for an expansion of municipal civil rights liability were obtained in exchange for a rule that insured that cities would not have to pay damages every time a rogue police officer mistreated a suspect.<sup>32</sup> One could understand how the court could reach that outcome as a result of politics or even statesmanship but not as a principled effort at statutory construction.

But more than three decades later, with access to the unpublished papers of Justices Brennan, Blackmun, Marshall, and Powell, a more complete story of the case emerges. Those papers suggest that there may have been an odd logic behind *Monell*: one driven by the desire of a particular justice to use *Monell* to push the Court as far as practically possible toward an interpretation of § 1983 that reflected what he believed to be its proper meaning.

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Blackmun Papers, *supra* note 1, at Box 258: File 2 (paraphrasing Rehnquist as saying, “A municipal corporation acts only through individuals. Cannot draw the line.”).

30. Memorandum from Justice Rehnquist to Conference 9 (Mar. 6, 1978) in Powell Papers, *supra* note 1 at Box 189: File 6. Even Justice Brennan grudgingly acknowledged that defeat of the Sherman Amendment was not logically inconsistent with respondeat superior liability. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 692–93 n.57 (1978).

31. In the mid-to-late 1970s, New York City went through a period of widely publicized financial crisis, and the oral arguments show that the court was well aware of that situation. Transcript of Oral Argument at 12, 27, *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) (No. 75-1914), available at [http://www1.law.umkc.edu/justicepapers/MonellDocs/z Other Source pdfs Monell/Monell Oral Argument Transcript \(v2\).pdf](http://www1.law.umkc.edu/justicepapers/MonellDocs/z%20Other%20Source%20pdfs/Monell/Monell%20Oral%20Argument%20Transcript%20(v2).pdf). For a quick overview of the crisis, see, for example, Roger Dunstan, *Overview of New York City’s Fiscal Crisis*, CRB NOTE (Cal. Research Bureau, Cal. State Library), Mar. 1, 1995, available at <http://www.library.ca.gov/crb/95/notes/V3N1.pdf>.

32. Schuck, *supra* note 20, at 1755 n.13.



II. FROM *MONROE* TO *MONELL*: FRANKFURTER'S CHAMPION

Imagine a Justice with the following three characteristics: First, he believed that *Monroe*'s municipal non-liability holding was wrong and that Congress never intended to exempt cities from § 1983 suits. Second, he was seen as a crucial swing vote in *Monell*—a vote that Justice Brennan believed he needed in order to reverse *Monroe* and make cities liable under § 1983. Third, and most important, the Justice had become Felix Frankfurter's posthumous champion. He had decided that Frankfurter had been right and that § 1983 was intended to reach only those violations that were actually authorized by state or local law. Thus, just as he believed that Douglas was wrong to exempt cities from suits, he also believed that Douglas was wrong to reject Frankfurter's narrow view of color of law.

What would be the logical strategy for such a Justice? If he had the votes to do so, Frankfurter's champion would work toward a decision under which both cities and individuals could be sued under § 1983, but under which neither cities nor individuals would be liable unless the constitutional violation was actually authorized by state or local law. However, if he lacked the votes to overrule *Monroe*'s color of law holding, his optimal strategy would be to seek half a loaf: a decision under which cities were subjected to § 1983 suits, but only for violations that actually executed or implemented official city policy—in other words, the actual decision in *Monell*.

The Frankfurter-inspired Justice described above had a real life counterpart, Lewis Powell. He was convinced that cities should be suable under § 1983. He was seen as a pivotal vote in *Monell*—in fact, it appears that he carefully positioned himself to be the swing Justice in the case. And, firmly convinced that Frankfurter had been right in *Monroe*, he had become Frankfurter's champion.<sup>33</sup> Justice Powell seems to have sought the result one would expect a Frankfurter-inspired justice to seek: a decision permitting § 1983 suits against cities but only to the extent that doing so was consistent with Frankfurter's narrow view of color of law.

## A. "I am persuaded": Powell and Municipal Non-liability

Almost from the beginning, Powell appears to have been convinced that *Monroe*'s municipal non-liability rule was wrong. His clerk's pre-argument bench memo took the position that "*Monroe*'s exclusion of municipalities from the coverage of [§ 1983] is a judicial redefinition of the statute not supported by its text or legislative history,"<sup>34</sup> and it seems clear that Justice Powell agreed.<sup>35</sup> In a subsequent memo to the conference, Powell wrote,

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33. Justice Stewart, whose role is discussed *infra*, text accompanying notes 173–84, may have had the same goal. I hope to be able to discuss Stewart's strategy and motivation more thoroughly and with more confidence after reviewing his recently released unpublished papers.

34. Bench Memorandum from Samuel Estreicher to Justice Powell 1 (Oct. 18, 1977), in Powell Papers, *supra* note 1, at Box 189: File 2.

35. See, e.g., Justice Blackmun, Conference Notes, *supra* note 29, at 2 (paraphrasing Justice Powell as saying, "Not supported by legislative history"). While it is possible that

“As to the legislative history debate, I am persuaded that Bill Douglas’ reading of it in *Monroe* was wrong.”<sup>36</sup> And, of course, in his concurring opinion, he argued that *Monroe*’s municipal non-liability ruling was so clearly wrong and so indefensible based on the legislative record that it justified disregarding *stare decisis* concerns even under the strictest standard for doing so.<sup>37</sup>

This is not surprising. By the time of the post-argument conference, at least seven Justices believed that Douglas was wrong on the issue, although they were not all ready to reverse.<sup>38</sup> And, by the March 6 conference, even Justice Rehnquist was willing to “quite frankly concede that if at the time of [*Monroe*], the same thorough canvass of the legislative history had been made as we have done this Term, the Court should have concluded that the word ‘person’ in 1983 did not exclude municipal corporations.”<sup>39</sup> The Justices disagreed about how *certain* they were that Douglas’s position was wrong—Rehnquist writing that “the balance [was] about sixty-forty,”<sup>40</sup> while Justice Stevens arguing that it was “much more than sixty-forty”<sup>41</sup>—but, with the possible exception of Chief Justice Burger,<sup>42</sup> they all agreed that it *was* wrong.

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this phrase referred to *Monroe*’s color of law holding, in light of Powell’s subsequent statements, it seems somewhat more likely that Powell was speaking about the municipal non-liability holding. *See infra* notes 36–37 and accompanying text.

36. Memorandum from Justice Powell to Conference 1 (Feb. 23, 1978), in Powell Papers, *supra* note 1, at Box 189: File 5. In addition to believing that municipal non-liability was wrong as a matter of history, Powell believed that it should be eliminated for two practical reasons: First, in his view, it would have little effect in the real world because cities generally indemnified their employees. *Id.* at 2–3. Second, he feared that the absence of municipal § 1983 liability might lead to an unrestricted, judge-made remedy against municipalities similar to the remedy against federal employees recognized in *Bivens*. *Id.* at 9–10; *see also*, sources cited *supra*, note 15.

37. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 705 (1978) (Powell, J., concurring) (“[*Monroe*’s] reading, in light of today’s thorough canvass of the legislative history, clearly ‘misapprehended the meaning of the controlling provision.’” (quoting *Monroe v. Pape*, 365 U.S. 167, 192 (1961) (Harlan, J., concurring))).

38. *See infra* text accompanying notes 43–51.

39. Memorandum from Justice Rehnquist to Conference 1 (Mar. 6, 1978), in Powell Papers, *supra* note 1, at Box 189: File 6; Rough Draft Memorandum from Justice Rehnquist to Conference 1 (Mar. 6, 1978), in Powell Papers, *supra* note 1, at Box 189: File 6 (delivered to Justice Powell—and apparently not to the other Justices—on Mar. 5, 1978).

40. Memorandum from Justice Rehnquist to Conference 1 (Mar. 6, 1978), in Powell Papers, *supra* note 1, at Box 189: File 6.

41. Justice Brennan, Conference Notes [Second Conference] 1 (Mar. 6, 1978), in Brennan Papers, *supra* note 1, at Box 430: File 8 (paraphrasing Stevens as saying, “Error much more than 60/40 in *Monroe*”); *see also* Justice Blackmun, Conference Notes [Second Conference] 1 (Mar. 6, 1978), in Blackmun Papers, *supra* note 1, at Box 258: File 2 (paraphrasing Stevens as saying, “Odds greater than 60/40 on the error of *Monroe*”).

42. There appears to be nothing in the Blackmun, Brennan, Marshall, or Powell papers on *Monell* indicating that Burger ever wrote or said anything at all on the issue other than possibly saying that he saw “no basis for overruling *Monroe*.” Justice Brennan, Conference Notes [Second Conference], *supra* note 41, at 1.

B. “*I am not at rest*”: Powell as the Critical Fifth Vote

That Justice Powell was convinced that *Monroe* had been wrong on the municipal non-liability issue did not mean that he was willing to overrule the case or that he was willing to telegraph that conviction to the other Justices. Instead, it appears that he carefully positioned himself to be the critical fifth vote that Brennan would need to have a majority.

Following its ordinary practice, the Court met in conference on November 4, 1978, to discuss and take an initial vote on the cases it had heard that week, including *Monell*. The Justices’ notes on that conference paint a somewhat confusing picture.<sup>43</sup> There appeared to be two Justices, Chief Justice Burger<sup>44</sup> and Justice Rehnquist,<sup>45</sup> who were firmly committed to affirming based on *Monroe*’s municipal non-liability rule. The remaining Justices all seemed to agree that the municipal non-liability rule was wrong,<sup>46</sup> but that did not mean that Justice Brennan had five votes to reverse. Justice Blackmun said he felt bound by stare decisis to affirm, particularly in light of congressional inaction on the issue.<sup>47</sup> Justice Stewart first voted to reverse but, before the end of the conference, changed his vote to a “pass.”<sup>48</sup> It appeared that Brennan could count on his own vote and

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43. Justice Blackmun, Conference Notes, *supra* note 29, at 1–2; Justice Brennan, Conference Notes, *supra* note 29, at 1–2; Justice Powell, Conference Notes 1–3 (Nov. 4, 1977), in Powell Papers, *supra* note 1, at Box 189: File 3.

44. As was often the case, Chief Justice Burger attempted to maintain control over opinion assignment by stating that he was passing even though he made it clear that he intended to vote to affirm. Justice Blackmun, Conference Notes, *supra* note 29, at 1 (Burger passing but stating that the district is not a person under *Monroe*); Justice Brennan, Conference Notes, *supra* note 29, at 1 (Burger stating that case should be dismissed because district is not a person under *Monroe*); Justice Powell, Conference Notes, *supra* note 43, at 1 (Burger affirming or passing but stating that *Monroe* will control); *see also* Memorandum from Justice Burger to Justice Brennan 1 (Nov. 12, 1977), in Marshall Papers, *supra* note 1, at Box 200: File 11 (indicating that he would vote to reverse although he passed in conference).

45. Justice Blackmun, Conference Notes, *supra* note 29, at 2 (Rehnquist votes to affirm); Justice Powell, Conference Notes, *supra* note 43, at 3 (same).

46. Justice Blackmun, Conference Notes, *supra* note 29, at 1–2; Justice Brennan, Conference Notes, *supra* note 29, at 1–2; Justice Powell, Conference Notes, *supra* note 43, at 1–3. In fact, even Justice Rehnquist may have indicated at the November 4 conference that he thought *Monroe*’s municipal non-liability was wrong as a matter of history but that he would uphold it based on stare decisis considerations. Justice Blackmun, Conference Notes, *supra* note 29, at 2 (paraphrasing Justice Rehnquist as saying that “*Monroe* [was] debatable as to police acting under color and as to construction of the Sherman Amendment”); Justice Powell, Conference Notes, *supra* note 43, at 3 (paraphrasing Rehnquist as saying, “*Monroe* was wrongly decided but it is firmly established”).

47. Justice Brennan, Conference Notes, *supra* note 29, at 2; Justice Powell, Conference Notes, *supra* note 43, at 2. While Blackmun eventually voted to reverse, he gave no indication that he would do so until four months later. Memorandum from Justice Blackmun to Conference 1 (Mar. 6, 1978), in Blackmun Papers, *supra* note 1, at Box 257: File 11.

48. Justice Blackmun, Conference Notes, *supra* note 29, at 1 (Stewart marked “Reverse” but then later marked as “Pass”); Justice Brennan, Conference Notes, *supra* note 29, at 1 (Stewart marked as “Will pass”); Justice Powell, Conference Notes, *supra* note 43, at 1 (Stewart marked “Reverse (tentative)” but that is crossed out and replaced with “Pass (on 2nd vote)”).

those of Justices Marshall, Stevens, and probably White,<sup>49</sup> which gave him four of the five he needed. And, at the end of the first conference, Brennan may have thought that Justice Powell would be the fifth vote to reverse. Powell's own conference notes counted him as a vote to reverse, although a tentative one.<sup>50</sup> Justice Brennan's notes indicated that he too thought Powell was a tentative vote to reverse.<sup>51</sup>

But shortly after the conference, Justice Powell withdrew that vote.<sup>52</sup> Stating that his initial position had been "about as tentative as a vote can be," he wrote the Chief that he was "not at rest, and wanted you—and [the] members of the Conference—to know this before assignments are made" since this meant that there was no longer a "Court," (i.e., a majority to reverse or to affirm).<sup>53</sup> "If any Justice is disposed to circulate a memorandum," he wrote, "I am sure I would find it helpful."<sup>54</sup> Thus, in a polite way, Powell announced that he was the swing Justice and told Justice Brennan that he would need to craft his proposed opinion in a way that would garner Powell's vote.

There is another factor that may have caused Justice Brennan to be particularly solicitous of Justice Powell's views. When deeply engrossed in the study of one case, it is easy to forget that the Justices deal with many cases at the same time and that particular Justices may have been more concerned about one of the other cases. It is likely that Justice Brennan considered *Regents of the University of California v. Bakke*<sup>55</sup> to be among the most important cases of the 1977 term and seems even more likely that he considered it to be substantially more significant than *Monell*. The two cases were argued less than a month apart and were discussed by the Court

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49. Justice Blackmun, Conference Notes, *supra* note 29, at 1–2; Justice Brennan, Conference Notes, *supra* note 29, at 1–2; Justice Powell, Conference Notes, *supra* note 43, at 1–3. Justice White's vote may have appeared tentative because, although he indicated willingness to reverse, he also indicated that he was very close to Potter Stewart's position and, as discussed later, Stewart eventually passed.

50. Justice Powell, Conference Notes, *supra* note 43, at 3 (showing his own vote as "Reverse (*tentative*)," and showing the total vote as five to reverse, two to affirm, and two passing). Justice Blackmun also marked Powell as a vote to reverse with a question mark. Justice Blackmun, Conference Notes, *supra* note 29, at 2.

51. Justice Brennan, Conference Notes, *supra* note 29, at 2.

52. Memorandum from Justice Powell to Chief Justice Burger 1 (Nov. 11, 1977), *in* Powell Papers, *supra* note 1, at Box 189: File 3.

53. *Id.*

54. *Id.* When there was "no court," the ordinary practice was for the Chief Justice to ask a member of each bloc to draft a memorandum rather than a proposed opinion. Memorandum from Chief Justice Burger to Conference 1 (Nov. 11, 1977), *in* Powell Papers, *supra* note 1, at Box 189: File 3. Such "no-court" memoranda may be somewhat less formal than draft opinions and are intended to persuade undecided Justices by setting forth the arguments in favor of each side's position. Major portions of such memoranda are frequently incorporated into the final opinion, but other portions—alternative arguments, fallback positions, or more extreme proposals that fail to muster a majority—may never see the light of day. For a discussion of Justice Brennan's "no-court" memorandum in *Monell*, see *infra* text accompanying notes 130–36.

55. 438 U.S. 265 (1978) (argued Oct. 12, 1977).

at the same “special conference” on March 6, 1978.<sup>56</sup> Given the importance of the affirmative action issue to Justice Brennan and the centrality of Justice Powell’s vote in *Bakke*, it is possible that Brennan was particularly eager to accommodate Powell’s views in *Monell*.<sup>57</sup>

C. “Frankfurter was right”: Powell’s Narrow View of Color of Law

By the end of the Court’s post-argument conference on *Monell*, Brennan seems to have had a pretty good idea what Powell’s views were. Brennan’s notes paraphrase Powell as saying that “Frankfurter was right in *Monroe v. Pape*. Never made sense to say those cops acted in ‘color of state action.’ Would go with idea that when policy of body violates constitution[,] that’s violation of 1983 by a ‘person.’”<sup>58</sup> Powell tied what became *Monell*’s “policy” requirement, not to legislative history or to text, but rather to the meaning of “under color of” law. For Powell, if the Court was going to overturn *Monroe*’s municipal non-liability rule, it would have to do so in a way that restricted—or at least did not extend—*Monroe*’s color of law holding. Powell’s own notes indicate that he told the conference, “I do not want to extend *Monroe*.”<sup>59</sup>

Powell’s adherence to the narrow view of “color of law” and his desire to restrict the impact of *Monroe*’s broader interpretation was not a new development. At least as early as 1975, Powell had become convinced that Frankfurter was right on the issue and that it was crucial to find a way to limit the effect of the *Monroe* majority’s opinion. At home in Richmond that summer, Powell wrote himself a memo titled “Limitations on § 1983”<sup>60</sup> to record his thoughts on the upcoming case of *Paul v. Davis*.<sup>61</sup> In the memo, he criticized the “trend of judicial authority” which gave § 1983 an expansive interpretation and stated that he “probably would have joined” Frankfurter’s “prophetic” *Monroe* dissent.<sup>62</sup> However, given that overruling *Monroe* appeared unlikely,<sup>63</sup> he went on to ask what options “*Monroe* le[ft] open” as ways to limit § 1983 suits for acts that were “unauthorized and contrary to state law.”<sup>64</sup> A few days later, he wrote a

56. Memorandum from Justice Burger to Conference 1 (Feb. 27, 1978), in Brennan Papers, *supra* note 1, at Box 434: File 3.

57. For a discussion of Brennan’s efforts to enlist Powell as an ally during the 1977–78 term, see SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 443–49, 451–55 (2010).

58. Justice Brennan, Conference Notes, *supra* note 29, at 2; see also Justice Blackmun, Conference Notes, *supra* note 29, at 2 (paraphrasing Powell as saying, “Felix Frankfurter [was] right in *Monroe*”); Justice Powell, Conference Notes, *supra* note 43, at 3 (paraphrasing himself as saying, “I think F.F. was right in *Monroe*”).

59. Justice Powell, Conference Notes, *supra* note 43, at 3 (paraphrasing himself as saying, “I do not want to extend *Monroe*. I could open it up for this type of case and tighten it with respect to the *Monroe v Pape* factual situation.”).

60. Justice Powell, Limitations on § 1983 (July 31, 1975), in Powell Papers – Burrell, *supra* note 1, at Box 178: File 1 [hereinafter Powell, Limitations].

61. 424 U.S. 693 (1976).

62. Powell, Limitations, *supra* note 60, at 1–2.

63. *Id.* at 2–3.

64. *Id.* at 3–5. In this memo, he concluded that requiring exhaustion of administrative remedies was “the most hopeful limitation.” *Id.* at 5.

second memorandum to himself in which he complained that, “[i]f the slate were clean, [*Paul v. Davis*] would hardly merit discussion,” but that *Monroe* made the case “difficult to resolve in any rational way.”<sup>65</sup> Around the same time, Powell’s handwritten notes on his law clerk’s summer project memo showed similar frustration.<sup>66</sup>

This frustration came to a head the following year as the Court considered *Burrell v. McCray*, a case that raised, but did not resolve, the question of whether prisoners should be required to exhaust administrative remedies before suing under § 1983.<sup>67</sup> The Court eventually dismissed certiorari as improvidently granted,<sup>68</sup> but not before Justice Powell made it clear to his colleagues that he firmly believed that *Monroe* was wrong on the color of law issue.<sup>69</sup> On the day of the oral argument, he wrote himself a memo that contained a section explaining why *Monroe* should be overruled.<sup>70</sup> “Had I been on the Court,” he wrote, “I would have joined Frankfurter’s dissent in *Monroe v. Pape*. Few cases in the history of the Court have distorted the purpose, and legislative history, of a statute more than Douglas’ opinion in *Monroe*.”<sup>71</sup>

The memo spelled out the action he planned to take if the Court rejected the exhaustion requirement. *Monroe* so severely imbalanced the structure of federalism that he would be willing to overrule it despite his normal concern for stare decisis.<sup>72</sup> “I am prepared at least to consider dissenting in

65. Memorandum from Justice Powell to Self: *Paul and McDaniel v. Davis* 4 (Aug. 4, 1975), in Powell Papers – Civil Rights, *supra* note 1, at Box 131: File [6].

66. Memorandum from J. Phillip Jordan to Justice Powell on Case Law Background 3 (undated [approx. July 31, 1975]), in Powell Papers – Civil Rights, *supra* note 1, at Box 131: File [5]. Powell underlined a passage that described *Monroe*’s color of law rule as “an interpretation of the section that may be true to its language but certainly is divorced from its purpose.” *Id.* at 3. He also annotated the memo’s description of *Monroe*’s color of law reasoning with notes such as “Douglas’ rewriting of the statute, its history and purpose,” *id.* at 12, and “Distortion of 1983 and its history.” *Id.* at 15.

67. 426 U.S. 471, 473 (1976) (Brennan, J., dissenting from dismissal of writ as improvidently granted). The issue was eventually resolved legislatively by the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997–1997j (2006), and the Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321–66 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.). Outside the prisoner litigation context, the Court has held, over a vigorous dissent by Justice Powell, that exhaustion of administrative remedies is not required. *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982); *id.* at 532–536 (Powell, J., dissenting).

68. *Burrell*, 426 U.S. at 471.

69. See *infra* notes 74–76 and accompanying text. Powell’s jaundiced view of *Monroe* appears to have been reinforced by a memo from his clerk who argued that the only feasible way to contain the damaging effects of *Monroe* was to overrule it. Memorandum from J. Phillip Jordan to Justice Powell: *Burrell v. McCray* 7–8 (Apr. 22, 1976), in Powell Papers – *Burrell*, *supra* note 1, at Box 178: File 2.

70. Memorandum from Justice Powell to Self: *Burrell v. McCray* (Apr. 27, 1976), in Powell Papers – *Burrell*, *supra* note 1, at Box 178: File 3.

71. *Id.* at 5. While this quote (and others) suggest that Justice Powell was attempting to be faithful to the legislative will of the 42nd Congress, there were also passages indicating that he was concerned, as a policy matter, about what he saw as *Monroe*’s distorting effect on federal-state relations. See, e.g., *id.* at 3–4 (discussing “powerful policy considerations militating against allowing 1983 suits being brought directly in federal courts . . . [and] strongly support[ing] overruling *Monroe v. Pape*”).

72. *Id.* at 6.

this case (I am sure no majority would agree with me) on the ground that *Monroe* should be overruled, and the Frankfurter rationale adopted as the only position consistent with principle and sound public policy.”<sup>73</sup>

In the Court’s post-argument conference on *Burrell*, Powell told the Justices that he intended to do so.<sup>74</sup> After the initial discussion, Powell counted seven votes to reject the position that exhaustion should be required;<sup>75</sup> and he informed the Justices that he was considering writing a dissent on the color of law issue.<sup>76</sup> Since the case was dismissed as improvidently granted, Powell wrote no dissent, but he had put the Justices on notice.

Powell’s *Monell* papers reinforce the conclusion that he saw the case as an opportunity to apply the narrow Frankfurter view of color of law to suits against municipalities. He repeatedly redrew the boundary of municipal liability to conform to the color of law line. For example, in his notes in preparation for the November 4 conference, he began by saying that *Monroe*’s municipal non-liability rule was too broad because Congress had not opposed all municipal liability, only vicarious liability.<sup>77</sup> But he then recast this as opposition to liability that exceeded the Frankfurter color of law rule: “[The Sherman Amendment] was rejected because Congress did not want to impose *vicarious liability* on local governments (e.g., for action violative of state or local law—as in the *Monroe* situation when conduct of [the] police was violative of Illinois law).”<sup>78</sup> He then reiterated that municipalities should be suable for action pursuant to official policy because such actions, unlike unauthorized actions, were within the proper meaning of “color of law”: “Congress gave no indication of intent to absolve municipalities for unconstitutional action taken by responsible officials in course of their duty pursuant to established policy: E.g., here Board of Education acted officially in adopting pregnancy policy. Thus there was ‘color of state’ law.”<sup>79</sup>

Similarly, when Powell described his desired version of the *Monell* doctrine, he regularly did so in phrases that were strikingly parallel to the ones he used to describe his view of the color of law requirement. Powell’s *Monell* memoranda argued that “[m]unicipal entities would be suable for constitutional wrongs [that were] authorized,”<sup>80</sup> but not for “tortious conduct of individual officials that was neither mandated nor specifically

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73. *Id.* at 5.

74. Justice Powell, Conference Notes on *Burrell v. McCray* 2 (Apr. 30, 1976), in Powell Papers – *Burrell*, *supra* note 1, at Box 178: File 3.

75. *Id.* at 1 (showing the vote as “Affirmed on Exhaustion 7-2”).

76. *Id.* at 2 (paraphrasing himself as saying, “I may write on ‘color of law’ issue”).

77. Justice Powell, Pre-Conference Notes 1 (Nov. 3, 1977), in Powell Papers, *supra* note 1, at Box 189: File 3.

78. *Id.*

79. *Id.* Although this portion of Powell’s notes is headed “Petitioner’s basic argument,” the argument regarding color of state law appears nowhere in any of the briefs.

80. Justice Powell, Notes 3 (Mar. 5, 1978), in Powell Papers, *supra* note 1, at Box 189: File 6.

authorized by, and indeed was violative of, state or local law.”<sup>81</sup> Powell’s *Burrell* memoranda used quite similar phrases to explain the Douglas-Frankfurter color of law debate. In one, Powell criticized the *Monroe* majority for holding “that § 1983 applies in an otherwise proper case even though the state action is unauthorized and contrary to state law.”<sup>82</sup> In another, he explained that actions should be held to be under color of law only if they were either “taken pursuant to statutory authority” or “taken within [the officer’s] permissible discretion and not in violation of any state law.”<sup>83</sup> Thus, Powell’s criteria were the same: he believed that the color of law requirement was not met if the official’s action was unauthorized or violated state law, and he wanted the *Monell* doctrine to exempt cities if the official’s conduct was unauthorized or violated state law.<sup>84</sup>

For Powell, one of the principal reasons to overturn *Monroe*’s blanket municipal non-liability rule was to bring the effective interpretation of § 1983 closer to the Frankfurter view. An unsent draft memorandum to Justice Stewart indicated that Powell was willing to overcome his reluctance to expand § 1983 liability because the existing non-liability rule denied relief “for the actions of local governmental units bearing a direct responsibility for constitutional deprivation, even though such actions are fully consistent with, indeed mandated by, state law,” and this turned the Frankfurter-Douglas color of law debate “on its head.”<sup>85</sup> Affirming the lower court’s decision would be anomalous, limiting § 1983 liability to “unauthorized state action, the very conduct that Felix Frankfurter argued was not encompassed by the ‘under color of’ wording of the statute.”<sup>86</sup> In his concurring opinion, he argued that the rule distorted the reach of the

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81. Memorandum from Justice Powell to Conference 7 (Feb. 23, 1978), in Powell Papers, *supra* note 1, at Box 189: File 5.

82. Powell, Limitations, *supra* note 60, at 2–3; *see also id.* at 2 (conduct in *Monroe* “not only was unauthorized but was contrary to Illinois law”).

83. Memorandum from Justice Powell to Self, *supra* note 70, at 5.

84. Powell was not the only Justice who defined the municipal liability boundary in a language that could equally describe Frankfurter’s concept of “color of law.” In the post-hearing conference, Justice White said cities should be liable only when “agents are doing precisely what [they are] authorized to do.” Justice Blackmun, Conference Notes, *supra* note 29, at 1; *see also* Justice Brennan, Conference Notes, *supra* note 29, at 1 (paraphrasing Justice White as saying, “Where agents do precisely what they’re authorized to do, body should be ‘person’ for purposes of liability”). Similarly, Justice Stewart later wrote Justice Brennan that a city should be liable only for “the affirmative, deliberate, knowing official action of its governing body.” Memorandum from Justice Stewart to Justice Brennan 1 (Apr. 26, 1978), in Marshall Papers, *supra* note 1, at Box 200: File 11.

85. Draft Memorandum from Justice Powell to Justice Stewart 1–2 (undated), in Powell Papers, *supra* note 1, at Box 189: File 9 (draft prepared by Samuel Estreicher approximately Feb. 19, 1978). The significance of this draft is somewhat difficult to evaluate. As far as can be determined from Justice Powell’s papers, it was not sent in this form to Justice Stewart or any other Justice. The two memoranda into which the draft was converted—and which were sent—did not contain the language quoted in the text. Memorandum from Justice Powell to Conference [draft hand-delivered to Justice Stewart only] (Feb. 21, 1978), in Powell Papers, *supra* note 1, at Box 189: File 4; Memorandum from Justice Powell to Conference, *supra* note 36. Nonetheless, it is likely that Powell’s clerk was reasonably accurate in reflecting the Justice’s thinking, even if Powell decided not to convey those thoughts in writing to his brethren.

86. Draft Memorandum from Justice Powell to Justice Stewart, *supra* note 85, at 2.



statute by denying recovery for violations that fit within even the narrowest definition of color of law:

The Court correctly rejects a view of the legislative history that would produce the anomalous result of immunizing local government units from monetary liability for action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not remediable under, state law. No conduct of government comes more clearly within the “under color of” state law language of § 1983. It is most unlikely that Congress intended public officials acting under the command or the specific authorization of the government employer to be exclusively liable for resulting constitutional injury.<sup>87</sup>

Thus, Justice Powell believed that *Monroe*'s municipal non-liability rule was wrong, but was willing to withhold his crucial vote on that issue until he saw Justice Brennan's opinion. At the same time, he clearly communicated his position that *Monroe*'s color of law ruling was also wrong and that he did not want to extend it as part of a recognition of municipal liability. Powell eventually gave Justice Brennan that crucial fifth vote, but only after Brennan circulated an opinion that accommodated Powell's position—an opinion that permitted suits against cities, but only for violations that were within Powell's (and Frankfurter's) narrower definition of color of law. And there is good reason to believe that this result was not coincidental: Powell was engaged in an ongoing project of trying to find ways to limit what he saw as the pernicious effects of *Monroe*'s color of law ruling. Accordingly, it seems likely that the odd outcome in *Monell* was the result of implicit bargaining by Justice Powell on behalf of the Frankfurter position on color of law.

### III. FROM *MONROE* TO *MONELL*: TWO ALTERNATIVE EXPLANATIONS

Of course, the fact that the Frankfurter's Champion hypothesis provides *an* explanation for Powell's position in *Monell* does not necessarily mean that it provides the *best* explanation. In this section, I will discuss the possibility that Powell's position (and the *Monell* doctrine itself) might have been the result of legislative history arguments raised by the parties in their briefs or by the clerks or Justices in chambers. First, I will examine the parties' briefs and arguments and show that they cannot explain the Court's adoption of the *Monell* doctrine or Powell's support for it. Then I will discuss a more plausible alternative, that Justice Powell became convinced that the legislative history of § 1983 restricted the ambit of the Act to “actual wrongdoers,” i.e., to defendants who were at fault. Finally, I will explain why this actual wrongdoer theory seems not to be a satisfactory explanation for Powell's support for the *Monell* doctrine.

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87. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 707 (1978) (Powell, J., concurring) (emphasis omitted).

A. “*The power that is theirs*”: *The Parties’ Briefs and Arguments*

After the opinion was handed down, *Monell* immediately became known as the case that overruled *Monroe*'s municipal non-liability holding; but that was not the way the case was briefed or argued. The petitioners and their amici National Education Association and Lawyers' Committee for Civil Rights Under Law (NEA) correctly anticipated that a proposal to flatly overrule *Monroe* would provoke substantial resistance within the Court on *stare decisis* grounds.<sup>88</sup> They also knew that much of the strength of their position resulted from the *stare decisis* effect of the line of cases that had permitted § 1983 suits against school boards.<sup>89</sup> As a result, they crafted their arguments to reconcile *Monroe* with the school board cases and carefully avoided arguing that cities should be subject to suit or that *Monroe* should be overruled. The petitioners explicitly stated, “Thus, the correctness of this Court’s prior holdings in *Moore* [sic] v. *County of Alameda* and *Monroe v. Pape* are not here at issue.”<sup>90</sup> Similarly, the NEA, while arguing that the municipal non-liability rule was completely inconsistent with the legislative history, nonetheless explicitly declined to ask the Court to overrule *Monroe* on the issue.<sup>91</sup>

Instead, the petitioners and the NEA argued that *Monroe* could be distinguished.<sup>92</sup> Before turning to the distinctions that the petitioners actually advocated, it is important to recognize one distinction that they did not advocate. They did not argue that *Monroe* should be distinguished on the basis that the liability in that case, unlike the liability claimed in *Monell*, was based on respondeat superior.<sup>93</sup> None of the briefs filed by the petitioners or the NEA even mentions the phrase.<sup>94</sup>

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88. See *supra* text accompanying notes 43–51 and *infra* text accompanying notes 112–28.

89. Brief for Petitioner at 7–8, 14–24, *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) (No. 75-1914), 1977 WL 187958, at \*7–8, \*13–24; NEA Brief, *supra* note 22, at 27–32; see also *supra* note 14 and accompanying text.

90. Reply Brief for Petitioner at 1, *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) (No. 75-1914), 1977 WL 187960, at \*1; see also Transcript of Oral Argument, *supra* note 31, at 5 (quoting petitioners’ counsel as stating that “we don’t think our case presents the Court with the necessity of reconsidering” the holding that cities were not suable persons under section 1983).

91. NEA Brief, *supra* note 22, at 26 (“We do not challenge here the holding of *Monroe v. Pape*. Soundly based or not, the decision there that municipalities are not ‘persons’ under Section 1983, twice relied upon in recent decisions, may well be entitled to *stare decisis* effect.”); *id.* at 31a–32a (“The holding in *Monroe* was erroneous. . . . But however erroneous, this holding may be deemed to be *stare decisis*.”).

92. The petitioners also asserted a fallback position suggesting that partial relief could be based on the district court’s power to issue preliminary injunctions. The petitioners argued that, since the district court had the power to issue a preliminary injunction ordering the board members to reinstate and pay employees until a decision was reached on the prayer for a permanent injunction, it also had the power to order the lesser relief of payment for the same period without reinstatement. Brief for Petitioner, *supra* note 89, at 11, 69–75. Obviously, this argument provided no support for the ultimate outcome in *Monell*, and was entirely unrelated to any distinctions between authorized and unauthorized wrongs or between respondeat superior and other bases for municipal liability.

93. The Justices sharply disagreed on the question of whether *Monroe* could actually be distinguished on the basis that the sole claim of liability was respondeat superior. *Compare*

The petitioners' first argument was that school districts were different than cities and counties and therefore that *Monroe's* municipal non-liability rule should not apply to independent school districts at all.<sup>95</sup> This argument—which was the only one in which the petitioners suggested that a governmental entity itself should be liable—never so much as hinted that school districts should be exempt from respondeat superior liability or from liability for unauthorized actions of district officials. Instead, it claimed that *Monroe* simply did not apply to school districts and therefore that school districts were “persons” who could be sued like any other “person.”<sup>96</sup>

The petitioners' second argument did not seek to make governmental entities liable at all, so it seems an unlikely source for an explanation for *Monell's* restriction of such liability.<sup>97</sup> Nonetheless, it merits closer examination because it does draw a line—albeit a different line than that drawn by *Monell*—between certain constitutional violations for which monetary relief would be available and others for which it would not.

This argument was based on the fact that, unlike *Monroe*, *Monell* was not a damage suit against the city itself, but instead an equitable action brought

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*supra*, text accompanying notes 112–28, with Memorandum from Justice Stevens to Justice Brennan (Apr. 12, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 6 (arguing that *Monroe* cannot be distinguished). After substantial negotiation among the Justices, Justice Brennan's final opinion avoided taking a position on the issue. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 701 n.66 (1978).

94. Unlike the briefs of the petitioners and the NEA, the respondents' brief mentions respondeat superior in two passages. However, as one would expect, neither passage contends that *Monroe* should be interpreted as permitting governmental entity liability in the non-respondeat superior situation. Brief for Respondent, *supra* note 22, at 9–11 (recognizing that the liability imposed by the Sherman Amendment was different than “traditional principles of respondeat superior” but arguing that Congress thought it entirely lacked the power to make municipalities liable); *id.* at 32–34 (stating that, for egregious violations of constitutional rights, “an argument could be made for the imposition of respondeat superior liability” under § 1983, but taking the position that the Court should adopt a blanket immunity rule applicable both to innocent and egregious violations). The respondents' brief also mentioned “vicarious liability” but only in the context of arguing that the petitioners were not asserting vicarious liability, but were instead asserting a harsh form of strict liability. *Id.* at 11 n.\*.

Finally, there is one reference to “respondeat superior” in the oral argument. Transcript of Oral Argument, *supra* note 31, at 11–12. In response to a question, petitioners' counsel agreed that his argument for suits against officials in their official capacity did not depend on respondeat superior since such suits were against the actual wrongdoing official. This was clearly not an argument that there was anything about the text or history of § 1983 that would bar respondeat superior liability.

95. Brief for Petitioner, *supra* note 89; see also NEA Brief, *supra* note 22, at 27–32 (amici's second argument). While this argument was subject to some questioning during oral argument, it seems to have been virtually ignored by the Justices with the exception of Justice Marshall, who expressed some passing interest. Memorandum from Phillip Spector to Justice Marshall (Nov. 3, 1977), in Marshall Papers, *supra* note 1, at Box 195: File 10.

96. Brief for Petitioner, *supra* note 89, at 24–31; see also NEA Brief, *supra* note 22, at 32.

97. Since the petitioners' second argument did not attempt to make the city itself liable, it did not and could not depend on respondeat superior. Transcript of Oral Argument, *supra* note 31, at 11–12.

against particular officials in their official capacity asking them to use their existing power to undo the wrong they had committed<sup>98</sup>:

As to the defendant officials, petitioners would have the Court note that they do not assert that New York City is liable for all violations of its employees, but only that officials who have used their powers to violate the Constitution can be compelled to use those same powers to remedy the violation.<sup>99</sup>

This argument did recognize a limit on the remedial power of the court, but not the limit created by the *Monell* doctrine, i.e., it did not restrict liability to situations in which the wrong was committed by someone whose acts could fairly be described as official policy. The court's power did not depend on whether the wrongdoer was authorized to commit the wrong, but instead depended on whether the wrongdoer had the power to undo the wrong.<sup>100</sup> Under this "power that is theirs" restriction, officials who had committed a particular wrong could be required to repair that wrong using public resources only if the state had granted them the power to do so.<sup>101</sup> The question was not whether the wrong was authorized but rather whether the defendant wrongdoer had the authority to grant the remedy. As NEA's brief stated the argument:

The theory is applicable only where the wrongdoing officials hold positions of responsibility empowering them to provide the relief sought. Not every act of misconduct by every municipal employee can lead to an order against him in his official capacity impacting upon the public treasury. The courts can do no more than order wrongdoing officials to exercise "the power that is theirs" to right the wrongs which they have committed through their offices. Although a court may have jurisdiction over a public official, it cannot instill him with powers to undo his wrong which he does not possess by virtue of his office.<sup>102</sup>

If the relief sought was money to be paid from the city or school district treasury, the availability of relief would depend on whether the wrongdoer had the power of the purse—not whether he or she had authority to commit the wrong.<sup>103</sup>

98. Brief for Petitioner, *supra* note 89, at 3.

99. *Id.* at 8–9.

100. *Id.* at 37 ("Where, as here, it is within the authority of the defendants to provide the plaintiffs with the back pay required to fully remedy the unlawful conduct, the district court can compel them 'to exercise the power that is theirs.'"); *see also* Transcript of Oral Argument, *supra* note 31, at 9.

101. Brief for Petitioner, *supra* note 89, at 8–9, 32–35; Transcript of Oral Argument, *supra* note 31, at 9–10 (petitioner's counsel stating that the individual defendants in their official capacities could only be required to pay any judgment by using the funds over which the state had granted them power).

102. NEA Brief, *supra* note 22, at 7 n.3 (internal citations omitted). The same point was made in oral argument. Transcript of Oral Argument, *supra* note 31, at 11 (stating that the plaintiff in *Monroe* could not have sued the mayor because he was not the wrongdoer and could not have sued the police officer to compel him to pay money from the city treasury because the officer had "no authority to dispense public funds to make whole injured plaintiffs").

103. Brief for Petitioner, *supra* note 89, at 33–34 (stating that monetary relief would only be available if the wrongdoer was a high ranking official with authority to direct

The distinction between the plaintiffs' "power that is theirs" restriction and the *Monell* doctrine can be illustrated by the situation in *Pembaur v. City of Cincinnati*.<sup>104</sup> In *Pembaur*, the Court determined that the Hamilton County Prosecuting Attorney had the authority to make county policy with regard to searches and seizures by county sheriffs.<sup>105</sup> Under *Monell*, that made the county liable for damages resulting from an illegal search that the prosecutor authorized.<sup>106</sup> But under Ohio law, the prosecutor does not have authority to appropriate county funds or to approve or pay settlements with such funds.<sup>107</sup> As a result, although Hamilton County was liable under the position adopted by the *Monell* Court, it would not have been liable if the Court had adopted the "power that is theirs" restriction advanced by the plaintiffs and their amici. Under that restriction, the Court could not have ordered the prosecutor to pay county funds because it could not give him a power that he did not have under state law.<sup>108</sup>

This "power that is theirs" restriction on official capacity suits was not compelled or even suggested by the language or legislative history of § 1983, and the petitioners made no argument that it was.<sup>109</sup> Instead the restriction was seen as an inherent limit on the remedial power of the federal courts in official capacity suits, a limit that resulted from the fact that any such suit—regardless of its statutory basis—could only order a defendant to exercise whatever authority he or she possessed.<sup>110</sup> But once the Court eliminated the need for official capacity suits by overruling *Monroe* and permitting direct suits against the governmental entity itself, the basis for the "power that is theirs" restriction simply disappeared.

Thus, the petitioners' second argument simply cannot explain Justice Powell's willingness to support the *Monell* doctrine. The *Monell* doctrine eliminates liability unless the wrongdoer acted pursuant to state or local

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expenditures). The brief does predict that the "primary application [of the "power that is theirs" argument] will be in instances where, as here, the highest officials of a city or county adopt or effect an official policy directing, in violation of the constitution that money be taken or withheld from the aggrieved plaintiffs," but makes it clear that the propriety of such a suit results from the fact that such officials have "official power to restore funds unlawfully withheld." *Id.* at 34–35 (emphasis added).

104. 475 U.S. 469 (1986).

105. *Id.* at 484–85.

106. *Id.*

107. That power is vested in the County Commissioners. OHIO REV. CODE ANN. § 307.55 (LexisNexis 2003).

108. NEA Brief, *supra* note 22, at 7 n.3.

109. The petitioners did make a plain language argument, but it was an argument that the language permits suits against officials in their official capacity rather than an argument in favor of the "power that is theirs" restriction on such suits. Brief for Petitioner, *supra* note 89, at 46–49.

110. Official capacity suits are, by definition, suits seeking to require defendants to exercise power that they possess by reason of the office that they hold. They seek to bind whatever official holds the particular office, and (if they involve monetary relief) to require the official to order the expenditure of public funds rather than to pay any judgment from his personal assets. *Kentucky v. Graham*, 473 U.S. 159, 165–66 & n.11 (1985). If the official leaves office during the pendency of the suit, his or her successor in office is automatically substituted since the suit seeks to require the defendant to exercise the power held by reason of his or her official position. *See* FED. R. CIV. P. 25(d).

authority; the “power that is theirs” restriction would have eliminated liability unless the wrongdoer had the power to correct the wrong. The *Monell* doctrine was justified by arguments about § 1983’s legislative history; the “power that is theirs” restriction was based on the inherent nature of official capacity suits. The *Monell* doctrine is a limit on § 1983 damage suits against municipalities; the “power that is theirs” restriction assumes that such suits will not be permitted.

*B. “When it bears some blame or fault”: The Actual Wrongdoer Theory*

Unlike the parties’ briefs and oral arguments, the internal papers of the Justices do present a plausible alternative explanation for Justice Powell’s position—the possibility that Justice Powell had become convinced that Congress intended to limit § 1983 liability to “actual wrongdoers,”<sup>111</sup> i.e., to defendants who were at fault. There is no question that Justice Powell (and his clerk, Samuel Estreicher) advocated the actual wrongdoer theory as a basis for limiting municipal liability. However, Justice Powell’s ultimate abandonment of that advocacy casts doubt on the theory as an explanation for *Monell*.

To understand the genesis of the “actual wrongdoer” theory, it is helpful to look in a little more detail at Justice Brennan’s difficult position after the *Monell* post-argument conference. While he appeared to have four votes to reverse, even some of those were contingent. Justice Stevens was willing to vote to reverse since he thought that *Monroe* was probably wrong<sup>112</sup> and that “the Court would look ridiculous to say [that a] school board [was] not a person.”<sup>113</sup> But Stevens wanted to qualify or distinguish *Monroe* on some basis rather than overrule it.<sup>114</sup> Justice Marshall wanted to reverse, but his position was unclear. He wanted the court to be “as gentle as possible with *Monroe v. Pape*—leav[ing] it there and not extend[ing] it here.”<sup>115</sup> Justice

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111. Memorandum from Justice Powell to Conference 2 (Feb. 23, 1978), in Powell Papers, *supra* note 1, at Box 189: File 5.

112. Justice Powell, Conference Notes, *supra* note 43, at 3; Justice Brennan, Conference Notes, *supra* note 29, at 2 (paraphrasing Stevens as saying that he had “doubts about *Monroe*”).

113. Justice Brennan, Conference Notes, *supra* note 29, at 2; *see also* Justice Blackmun, Conference Notes, *supra* note 29, at 2 (paraphrasing Stevens as saying, “Court would look bad to say [a] School Board [was] not a person”); Justice Brennan, First Circulated Draft Memorandum (Jan 30, 1978), in Blackmun Papers, *supra* note 1, at Box 258: File 2 (paraphrasing Stevens as saying a ruling that school districts were not suable would make the Justices “look like fools”).

114. Justice Blackmun, Conference Notes, *supra* note 29, at 2 (paraphrasing Stevens as saying that *Monroe* should be limited based on the type of activity involved); Justice Brennan, Conference Notes, *supra* note 29, at 2 (paraphrasing Stevens as saying that *Monroe* should be limited to cases involving police officers); Justice Powell, Conference Notes, *supra* note 43, at 3 (paraphrasing Stevens as saying that the Court “should qualify or distinguish” *Monroe*). Stevens’s position would change and he would ultimately become the one Justice who most forcefully argued that it was impossible to distinguish *Monroe* yet still hold municipalities liable. *See* Memorandum from Justice Stevens to Justice Brennan, *supra* note 93.

115. Justice Brennan, Conference Notes, *supra* note 29, at 1. Justice Powell’s notes indicate that Justice Marshall said he was “somewhere between Byron [White] and Potter

White was willing to reverse because he thought that *Monroe* was probably wrong and should not be extended.<sup>116</sup> However, he did not see the need to decide how far *Monroe* “should be cut back,” since at the very least, “[w]here agents do precisely what they’re authorized to do,” the governmental entity should be liable.<sup>117</sup>

When Brennan considered the critical swing Justices, the situation must have become even more complicated. Potter Stewart, who spoke immediately after Brennan, seemed to be arguing for a way to reconcile *Monroe* and the school desegregation cases without overruling either.<sup>118</sup> On the one hand, he saw *Monroe* as barring respondeat superior liability.<sup>119</sup> On the other, he saw the school desegregation cases as permitting suits against school boards (and, by implication, suits against cities) for “direct violations by the board” itself.<sup>120</sup> Nonetheless, his position was not firm, and he asked to be marked as passing.<sup>121</sup>

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[Stewart]” but that he (Justice Powell) did not understand what Marshall meant. Justice Powell, Conference Notes, *supra* note 43, at 2.

Justice Marshall seemed to have been the Justice most concerned about the downside risk in *Monell*—the risk that the Court would affirm in a way that would seriously undercut the desegregation cases. See, e.g., Bench Memorandum from Phillip L. Spector to Justice Marshall 1–2 (Sept. 21, 1977), in Marshall Papers, *supra* note 1, at Box 195: File 1.

116. Justice Blackmun, Conference Notes, *supra* note 29, at 1; Justice Powell, Conference Notes, *supra* note 43, at 2.

117. Justice Brennan, Conference Notes, *supra* note 29, at 1; see also Justice Blackmun, Conference Notes, *supra* note 29, at 1 (paraphrasing Justice White as saying that § 1983 was “intended to impose liability when agents are doing precisely what [they are] authorized to do”). The available papers paint an unclear picture of Justice White’s thinking on municipal liability. In the post-argument conference, he described a line that was very close to the one eventually drawn by the Court and, like a number of the Justices, he expressed a preference for not overruling *Monroe*. Memorandum from Justice White to Justice Brennan 1 (Feb. 25, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 6. On the other hand, he seemed dubious about the conclusion that cities should be exempt from respondeat superior liability. Memorandum from Justice White to Justice Brennan 3 (Apr. 12, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 6 (stating that White understood that Brennan was convinced of that conclusion but that White would be interested in whether others disagreed).

118. Justice Blackmun, Conference Notes, *supra* note 29, at 1 (paraphrasing Stewart as saying that barring respondeat superior while permitting suits for violations committed by the city itself, “reconciles [*Monroe*] with all school desegregation cases”).

119. *Id.* (paraphrasing Stewart as saying, “City can not be sued on Respondeat Superior – this *Monroe*”); *id.* (paraphrasing Stewart as saying, “Not on Respondeat Superior or Sherman Amendment theory”); Justice Brennan, Conference Notes, *supra* note 29, at 1 (paraphrasing Stewart as saying, “I think *Monroe v. Pape* bars suits against city on respondeat superior”); Justice Powell, Conference Notes, *supra* note 43, at 1 (paraphrasing Stewart as saying, “Have concluded tentatively that a city can’t be sued under theory of respondeat superior”).

120. Justice Blackmun, Conference Notes, *supra* note 29, at 1 (paraphrasing Stewart as saying, “Entity can be sued for direct violations *by itself*. This reconciles with all school desegregation cases.”); Justice Brennan, Conference Notes, *supra* note 29, at 1 (paraphrasing Stewart as saying, “But school deseg cases make clear school board can be sued for direct violations by the board as here. But even city ought be held to own direct acts.”); Justice Powell, Conference Notes, *supra* note 43, at 1 (paraphrasing Stewart as saying, “Our school board cases make clear that a school board may be sued itself for its *own* policies that are invalid”).

121. Justice Blackmun, Conference Notes, *supra* note 29, at 1 (paraphrasing Stewart as saying that his position was “[s]ufficiently doubtful [that he should be] mark[ed] as Pass”); Justice Brennan, Conference Notes, *supra* note 29, at 1 (“Will pass”); Justice Powell,

As previously discussed,<sup>122</sup> Justice Powell used the post-argument conference in *Monell* to reiterate his belief that Frankfurter's *Monroe* dissent had been right and that it "never made sense to say those cops acted in 'color of state action.'"<sup>123</sup> However, he was tentatively willing to "go with the idea that when policy of [a governmental] body violates [the] constitution," the entity could be held liable under § 1983.<sup>124</sup> As a result, he was "inclined to try to work this out along lines stated by Potter [Stewart]."<sup>125</sup>

Justice Powell was not alone in finding Stewart's approach attractive. Justice White indicated that he was "[q]uite close to [Potter Stewart]—but not with him all [the] way,"<sup>126</sup> and Justice Marshall cryptically said that he was "[s]omewhere in between Byron and Potter."<sup>127</sup> On the other hand, Justice Stevens stated that his own position was not consistent with Stewart's.<sup>128</sup>

As a result, Justice Brennan faced a daunting task. Although the Chief Justice asked him to write a memorandum "along the lines expressed by you, Byron, Thurgood, and John,"<sup>129</sup> Brennan could muster five votes only if his memorandum reconciled the not entirely consistent views of those four Justices *and* attracted at least one vote from Justices Stewart, Powell,

Conference Notes, *supra* note 43, at 1 (paraphrasing Stewart as saying his conclusions were tentative).

122. See *supra* text accompanying notes 58–71.

123. Justice Brennan, Conference Notes, *supra* note 29, at 2 (paraphrasing Justice Powell); see also Justice Blackmun, Conference Notes, *supra* note 29, at 2 (paraphrasing Powell as saying, "[F]elix Frankfurter right in *Monroe*"); Justice Powell, Conference Notes, *supra* note 43, at 3 (paraphrasing himself as saying, "I think F.F. was right in *Monroe*").

124. Justice Brennan, Conference Notes, *supra* note 29, at 2 (paraphrasing Justice Powell). Justice Brennan indicated that Powell's position was "tentative," *id.*, and Justice Powell himself stated that he was "not at rest" and that he would "have to see how this writes" before firming up a final position, Justice Powell, Conference Notes, *supra* note 43, at 3 (paraphrasing himself). As discussed, *supra*, text accompanying notes 50–54, Powell quickly informed the Justices in writing that he was undecided and wanted to see competing memoranda before taking a final position.

125. Justice Blackmun, Conference Notes, *supra* note 29, at 2 (paraphrasing Powell as saying that he was "[l]eaning to [Potter Stewart] view"); Justice Brennan, Conference Notes, *supra* note 29, at 2 (paraphrasing Justice Powell as saying that he "lean[ed] toward PS views"); Justice Powell, Conference Notes, *supra* note 43, at 3 (paraphrasing himself).

126. Justice Powell, Conference Notes, *supra* note 43, at 2 (paraphrasing White); see also Justice Blackmun, Conference Notes, *supra* note 29, at 1 (paraphrasing White as saying, "Am not sure how I differ from Potter Stewart").

127. Justice Powell, Conference Notes, *supra* note 43, at 2.

128. Justice Blackmun, Conference Notes, *supra* note 29, at 2 (paraphrasing Stevens as saying that his basis for distinguishing *Monroe* was "different from Potter Stewart"). Justice Stevens eventually came to believe that *Monroe* could not be distinguished based on a non-respondeat superior rule since the *Monroe* plaintiffs had alleged a non-respondeat superior custom and usage theory claiming that the police were following standard department procedure. Memorandum from Justice Stevens to Justice Brennan 1 (Apr. 12, 1978), in Blackmun Papers, *supra* note 1, at Box 257: File 11. As demonstrated by his dissent in *Oklahoma City v. Tuttle*, Justice Stevens also believed that the no respondeat superior rule was not supported by the legislative history of the statute. 471 U.S. 808, 835–41 (1985) (Stevens, J., dissenting).

129. Memorandum from Justice Burger to Justice Brennan (Nov. 12, 1977), in Marshall Papers, *supra* note 1, at Box 200: File 11.



or possibly Blackmun. To create a majority, it appeared that he might need to craft an argument that reconciled *Monroe* and the desegregation cases on the basis that the former involved respondeat superior liability while the latter involved liability for conduct that was, in some sense, more directly attributable to the governmental entity's governing body.

The difficulty was not to state the distinction but to explain a reason why the distinction should make a difference. Once a persuasive argument had been made that cities were "persons" and should be subject to suit, Brennan needed to develop a rationale for saying that they should not be subject to suit on the traditional basis normally applied to corporations and other entities—respondeat superior. And, unlike Powell, he was hardly likely to endorse any justification that explicitly undermined *Monroe*'s color of law ruling.

The rationale Brennan chose was the "actual wrongdoer" theory, the argument that a governmental entity should be liable only if it was at fault. In setting the boundaries of municipal liability, he argued, the Court should "fashion a doctrine of municipal 'fault' as required by history, reason, and the purpose of § 1983."<sup>130</sup> In this way, the Court could effectuate Congress's intent that municipal liability should exist only if the municipal entity "as such" had violated the plaintiff's rights.<sup>131</sup> He summarized the actual wrongdoer theory as follows:

The cornerstone of this approach is that a municipal or quasi-municipal body may be directly sued under § 1983 for any relief necessary to redress a constitutional deprivation when it bears some blame or fault for the constitutional infringement. Conversely, where the body bears no significant responsibility for the harm suffered by a § 1983 plaintiff, it should not be vicariously liable to suit under the doctrine of respondeat superior: for such liability without fault is precisely analogous to the liability imposed by the Sherman amendment, which the 1871 Congress refused to impose.<sup>132</sup>

It is important to understand the logic of Justice Brennan's position. Justice Brennan was not arguing that respondeat superior liability should be rejected because it was liability for acts that the city had not *authorized*, but rather because it was one example of liability for actions for which the city could not be blamed. For Justice Brennan, respondeat superior liability was, by definition, limited to liability without employer fault,<sup>133</sup> and it was

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130. Justice Brennan, First Circulated Draft Memorandum, *supra* note 113, at 8; *see also*, e.g., *id.* at 46 (municipality subject to suit only if it "bears a significant degree of responsibility for a constitutional deprivation"); Justice Brennan, Second Opinion Draft 33 (Apr. 21, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 6 ("In sum, a local government may be sued for monetary, declaratory, or injunctive relief under § 1983 when it is at fault, but not for the fault purely of its employees or agents.").

131. Justice Brennan, First Circulated Draft Memorandum, *supra* note 113, at 8; *see also id.* at 29 (a municipality should be held liable "for its own violations").

132. *Id.* at 46–47 (citations omitted).

133. Justice Brennan, First Opinion Draft 32 (Apr. 4, 1978), in Marshall Papers, *supra* note 1, at Box 200: File 12 (defining respondeat superior as meaning "liability imposed on employers without regard to their fault or blame"). This is why Brennan took the position

this lack of fault that made respondeat superior analogous to the liability that would have been imposed by the rejected versions of the Sherman Amendment. Congress had rejected the first two versions, both of which would have made defendants liable even if they “did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it . . . [and] even if [they] had done everything in [their] power to curb the riot.”<sup>134</sup> But Congress then adopted the third version (the “second conference substitute”) which imposed liability on defendants “who, having the power to intervene against the Ku Klux violence,” failed to do so.<sup>135</sup> Both the rejected and the adopted versions imposed liability on defendants for conduct they had not authorized; the difference, Brennan argued, was that the rejected versions—like respondeat superior—imposed liability without fault, while the adopted version did not.<sup>136</sup>

Justice Brennan’s enunciation of this fault-based, actual wrongdoer theory was certainly not a surprise to Justice Powell. His clerk, Samuel Estreicher, had suggested the same theory in a bench memo, stating that the legislative history supported suing officials in their official capacity since “there was no intention to shield the ‘wrongdoer’ from liability, even if the ‘wrongdoing’ in question is simply a public official’s execution of a statute or policy authorized by local law.”<sup>137</sup>

In addition, shortly before the Court’s post-argument conference, Estreicher had written Justice Powell, spelling out the actual wrongdoer approach in greater detail.<sup>138</sup> He explained that, in his view, Congress’s rejection of the Sherman Amendment was not an effort to protect municipal treasuries and did not indicate doubt about its power to make municipalities

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that municipal liability would be perfectly appropriate if there was municipal “fault in hiring, training, or direction” of employees. *Id.* at 34 n.61.

134. Justice Brennan, Second Opinion Draft, *supra* note 130, at 31, 32 n.56.

135. *Id.* at 32 n.56.

136. *Id.* The explanation of the logic of this argument, is not meant to suggest that the argument is persuasive. *See supra*, text accompanying notes 23–30. The argument rests on the unexamined assumption that a governmental entity—which can, of course, only act through employees or agents—is only at fault if its “policy making” officials are personally at fault. Brennan suggests no reason to accept that assumption or to disregard the obvious counterexamples. In tort litigation, the fault of line employees is regularly attributed to corporate entities to establish negligence and even, in most states, the higher level of fault necessary for punitive damages. 2 DAN B. DOBBS, *THE LAW OF TORTS* 905 & n.1 (2001) (respondeat superior the norm); Achtenberg, *supra* note 20, at 2193 & n.56 (punitive damages). As Justice Rehnquist pointed out, if cities are to be liable at all, it must be for the actions of some person, and there is no logical reason to distinguish between policy-making officials and subordinate officers. Memorandum from Justice Rehnquist to Conference, *supra* note 30, at 9; *see also supra* note 29.

137. Estreicher, *supra* note 34, at 18; *see also id.* at 19 (explaining that official capacity suits to recover moneys withheld pursuant to official authority would be consistent with rejection of respondeat superior and “would not involve the unfairness of imposing liability on municipalities who were without legal authority to prevent the unconstitutional conduct”). Both of these statements were in a section of the memo devoted to discussing the petitioners’ argument that the Court could permit suits against wrongdoing officials in their official capacity and that it could do so without overruling *Monroe*.

138. Memorandum from Samuel Estreicher to Justice Powell 1 (Nov. 4, 1977), in Powell Papers, *supra* note 1, at Box 189: File 3.

liable.<sup>139</sup> Instead, it was rejected because “it imposed vicarious, indeed strict, liability [on municipalities] for the conduct of private individuals” even when the municipality did not have the ability to prevent that conduct.<sup>140</sup> As a result, he continued, “The legislative history can best be understood as a [sic] limiting the statutory ambit to actual wrongdoers, *i.e.*, a rejection of *respondeat superior* or other principle of vicarious liability.”<sup>141</sup>

Estreicher then turned to the question of when a governmental entity should be treated as the wrongdoer. He recognized that a good argument could be made that wrongs of employees should be attributed to the entity whenever the employee acted under color of law, but discarded that argument because it had been “rejected in *Monroe*.”<sup>142</sup> He then reformulated the actual wrongdoer test in a way that would exclude municipal liability whenever the conduct fell outside the narrow definition of color of law: a governmental entity should not be treated as the wrongdoer if the conduct “was not mandated or specifically authorized, and indeed may be violative of state or local law.”<sup>143</sup>

Powell must have been pleased with an approach that seemed to dovetail so nicely with his desire to resuscitate Frankfurter’s color of law position, particularly since it appears that his chambers may have been peddling that approach to some of the other Justices.<sup>144</sup> And, when Justice Brennan’s January 30 memorandum adopted the actual wrongdoer approach, Powell jumped on board. On February 23, after reviewing competing memoranda from Justices Brennan and Rehnquist,<sup>145</sup> Powell informed the conference that he had decided to reverse and that he agreed with the actual wrongdoer reading of the legislative history.<sup>146</sup> In his view, he wrote, “The legislative

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 2.

143. *Id.*

144. *Id.* at 1 (stating that Estreicher had “heard through the ‘grapevine’ that some of the other Justices may be receptive” to the approach which he had previously discussed with Brennan). Justice Powell may also have been attracted to the actual wrongdoer approach because it supported his position that municipalities should be given qualified immunity. See Memorandum from Justice Powell to Justice Brennan 1 (Apr. 11, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 6 (“[T]he emphasis in your [first draft] opinion on the ‘fault’ principle and your recognition of the 42nd Congress’ rejection of the justifications for vicarious liability argue against the imposition of liability for innocent failure to predict the often uncertain course of constitutional adjudication.”).

145. Justice Brennan, First Circulated Draft Memorandum, *supra* note 113; Justice Rehnquist, Second Draft Memorandum (Jan. 31, 1978), in Blackmun Papers, *supra* note 1, at Box 258: File 1. Although Rehnquist’s memo was titled “Second Draft,” it appears to have been the first draft circulated to the conference as a whole and is the first draft found in the extant papers of Justices Blackmun, Brennan, Marshall, or Powell. Based on the fact that each of the two circulated memoranda refers to the arguments made in the other, it seems likely that Justices Brennan and Rehnquist had each prepared at least one earlier draft of their respective memoranda, which they had exchanged prior to the preparation of the generally circulated versions. This is also suggested by the fact that the word “Circulated” in the title of Brennan’s January 30 memo was added by hand.

146. Memorandum from Justice Powell to Conference, *supra* note 111, at 1.

history can best be understood as limiting the statutory ambit to actual wrongdoers, i.e., a rejection of *respondeat superior* or any other principle of vicarious liability.”<sup>147</sup>

Justices Brennan’s and Rehnquist’s competing memoranda<sup>148</sup> had framed the debate between those who wanted to replace *Monroe*’s blanket municipal non-liability rule and those who wanted to reaffirm it in all respects. After an additional flurry of memos<sup>149</sup> (including Powell’s endorsing the actual wrongdoer theory), the case was set for a second conference on March 6.<sup>150</sup>

Powell’s continued adherence to the actual wrongdoer theory is evidenced by his response to a draft memo he received from Justice Rehnquist the day before that second conference.<sup>151</sup> Rehnquist’s draft memo argued that if *Monroe*’s blanket municipal non-liability rule was not retained, there was no logical way to avoid recognizing respondeat superior liability.<sup>152</sup> Powell’s clerk prepared a memorandum to help the Justice respond to that argument if it arose during the upcoming conference.<sup>153</sup> Powell underlined in red a passage that argued that the rejection of respondeat superior was justified because “Congress was concerned with imposing liability on ‘wrongdoers.’ Absent authorization or the kind of recklessness from which one may infer authorization, [a city] could not be held at fault for the tortious excess of its employees.”<sup>154</sup> In the margin,

147. *Id.* at 2. This quote is, of course, essentially identical to the language in Samuel Estreicher’s pre-conference memo and to language in the final opinion. Compare *id.*, with Estreicher, *supra* note 138, at 1, and *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 707 (1977) (Powell, J., concurring).

148. Justice Rehnquist, Second Draft Memorandum, *supra* note 145.

149. Memorandum from Justice Brennan to Justice Powell 1–2 (Feb. 23, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 6 (stating that he would happily limit *Monroe* to its facts, rather than overruling it, but that he thought the municipal immunity issue should be deferred); Memorandum from Justice Burger to Justice Rehnquist (Feb. 13, 1978), in Blackmun Papers, *supra* note 1, at Box 257: File 11 (announcing that he agreed with Rehnquist); Memorandum from Justice Powell to Conference, *supra* note 36, at 8–9 (announcing that he would reverse but suggesting that the opinion explicitly limit *Monroe* to its facts rather than overruling it and also requesting that the opinion recognize municipal qualified immunity); Memorandum from Justice Stevens to Conference (Feb. 23, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 6 (stating that he was no longer sure how he would vote and suggesting further discussion on the merits, but disagreeing with the suggestion to recommend municipal qualified immunity); Memorandum from Justice White to Justice Brennan (Feb. 25, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 6 (agreeing that school boards should be subject to suit, expressing preference to avoid overruling *Monroe*, and stating that he would prefer to defer the immunity issue).

150. Memorandum from Justice Burger to Conference (Feb. 27, 1978), in Brennan Papers, *supra* note 1, at Box 434: File 3.

151. Rough Draft Memorandum from Justice Rehnquist to Conference (Mar. 6, 1978) (marked received 4:30 PM Mar. 5, 1978), in Powell Papers, *supra* note 1, at Box 189: File 6. Rehnquist distributed a revised form of the memo to the other Justices just before the conference. Memorandum from Justice Rehnquist to Conference (Mar. 6, 1978), in Powell Papers, *supra* note 1, at Box 189: File 6.

152. See *supra* text accompanying notes 29–30.

153. Memorandum from Samuel Estreicher to Justice Powell (Mar. 5, 1978), in Powell Papers, *supra* note 1, at Box 189: File 6.

154. *Id.* at 3–4.

Justice Powell himself wrote, “1983 debates made clear Congress was concerned with ‘wrongdoers.’”<sup>155</sup>

During the first round of discussion at the March 6 conference itself, six Justices (Brennan, White, Marshall, Blackmun, Powell and Stevens) agreed that the case should be reversed; and, in the second round, Justice Stewart became the seventh.<sup>156</sup> There was some disagreement about subsidiary issues—Justices Stevens and Blackmun preferred to flatly overrule *Monroe* rather than limit it to its facts,<sup>157</sup> and Justices Powell and Stewart wanted to grant cities qualified immunity immediately rather than defer the issue to be decided in a future case<sup>158</sup>—but it appeared that Brennan had put together a solid majority behind a decision that would permit suits against municipalities while restricting that liability to situations in which the city could be described as at fault, i.e., as the actual wrongdoer.

On April 4, Brennan circulated a first draft opinion rejecting *Monroe*’s blanket municipal non-liability rule.<sup>159</sup> The portion of the draft that described the limits on such liability was replete with references to fault or blame as the standard for municipal liability under the actual wrongdoer theory.<sup>160</sup> Justice Powell objected to other aspects of the draft,<sup>161</sup> but his

155. *Id.* at 3.

156. Justice Blackmun, Conference Notes [Second Conference], *supra* note 41; Justice Brennan, Conference Notes [Second Conference], *supra* note 41; Justice Powell, Conference Notes [Second Conference] (Mar. 6, 1978), in Powell Papers, *supra* note 1, at Box 189: File 6.

157. Justice Blackmun, Conference Notes [Second Conference], *supra* note 41 (paraphrasing Stevens as saying, “Overrule Monroe squarely – [Not doing so] would not be faithful to allegations of its complaint”); Memorandum from Justice Blackmun to Conference (Mar. 6, 1978), in Blackmun Papers, *supra* note 1 (“My inclination is to overrule [*Monroe*], but perhaps I could be persuaded, as are others, not to overrule it but to ‘confine it to its facts,’ even though that device is so often a euphemism for overruling.”); Justice Brennan, Conference Notes [Second Conference], *supra* note 41 (paraphrasing Stevens as saying, “Must overrule Monroe squarely along with other cases”); Justice Powell, Conference Notes [Second Conference] (Mar. 6, 1978), in Powell Papers, *supra* note 1, at Box 189: File 6 (paraphrasing Stevens as saying, “Should overrule *Monroe* and all that followed it”).

158. Justice Blackmun, Conference Notes [Second Conference], *supra* note 41 (paraphrasing Stewart as saying, “Entitled to know whether they have a *Wood v. Strickland* defense” and paraphrasing Powell as saying, “Could not impose liability on a body that reasonably thought it was not violating law. Will have to see what is written.”); Justice Brennan, Conference Notes [Second Conference], *supra* note 41 (paraphrasing Powell as saying that cities “should have immunity unless constitutional doctrine has been settled, as it was not here” and paraphrasing Stewart as saying, “[M]unicipality could be held as ‘person’ for its own deliberate actions with a *Wood v. Strickland* defense – Would decide it & not leave [it] undecided.”).

159. Justice Brennan, First Opinion Draft (Apr. 4, 1978), in Marshall Papers, *supra* note 1, at Box 200: File 12.

160. *See, e.g., id.* at 29 (touchstone of municipal liability is allegation that “official policy or official action is to blame for” the violation); *id.* at 29 n.55 (for municipal liability, official action “must be sufficient to support a conclusion that a local government itself is to blame or is at fault”); *id.* (arguing that the court had earlier recognized that “fault is a crucial factor in determining whether relief may run against a party”); *id.* at 32 (defining respondeat superior as meaning “liability imposed on employers without regard to their fault or blame—for the torts of their employees”); *id.* at 34 (describing vicarious liability as liability “for the torts of an employee when the employer is not at fault for negligent hiring, improper

reaction to the actual wrongdoer arguments was entirely positive. His notes on Justice Brennan's first draft opinion indicated that he was pleased with that argument. For example, he underlined a passage stating that municipal liability should exist only if the conduct is "sufficient to support a conclusion that a local government itself is to blame or is at fault."<sup>162</sup> He handwrote "Yes" in the margin next to that passage, and also next to a statement that the Court had previously "recognized that fault is a crucial factor in determining whether relief may run against a party for its alleged participation in a constitutional tort."<sup>163</sup> With one possible minor exception, he gave no indication that he had any problem with the numerous other passages reflecting the actual wrongdoer approach.<sup>164</sup>

After receiving Justice Powell's response (as well as responses from Justices Stevens<sup>165</sup> and White<sup>166</sup> and a draft dissent from Justice

training, or inadequate control or direction of his employees"); *id.* at 34 n.61 (stating that, when an employer is at fault in various respects, "that fault is the basis for liability" and the liability is not vicarious).

161. For example, Powell objected to Brennan's claim that § 1983 was an attempt by Congress to exercise its full power to enforce the Fourteenth Amendment and insisted that it be removed. Memorandum from Justice Powell to Justice Brennan 2-3 (Apr. 11, 1978), *in* Powell Papers, *supra* note 1, at Box 189: File 7.

162. Justice Brennan, First Opinion Draft [with handwritten notes by Justice Powell and Samuel Estreicher] 29 n.55 (Apr. 4, 1978 [Powell's notes dated Apr. 7, 1978]), *in* Powell Papers, *supra* note 1, at Box 189: File 12 [hereinafter Justice Brennan First Draft with Justice Powell Notes].

163. *Id.* (underlining by Justice Powell); *see also id.* at 32 (not objecting to definition of respondeat superior as a theory which imposes liability "on employers without regard to their fault or blame" and writing "Yes" next to a passage stating that "Congress did not intend municipalities to be held vicariously liable on such a theory") (underlining by Justice Powell).

164. *See supra* note 160. The possible exception involves the deletion of the words "at least" from a sentence in which Justice Brennan had written that local governmental bodies could be sued, "at least in those situations where as here the action of the municipality . . . implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Justice Brennan, First Opinion Draft, *supra* note 159, at 29. Although not mentioned in Powell's April 11 memorandum to Brennan, Powell may have been responsible for deletion of the phrase which he had marked for deletion on his copy of Brennan's draft. Justice Brennan First Draft with Justice Powell Notes, *supra* note 162, at 29. Perhaps it was one of the unidentified language problems that Powell said could "be worked out among the law clerks." Memorandum from Justice Powell to Justice Brennan, *supra* note 161, at 1. In any event, the reason for the deletion is not apparent other than to narrow the statement of the holding. Justice Brennan First Draft with Justice Powell Notes, *supra* note 162, at unnumbered page after 41 (Powell stating that, on page 29, the "[h]olding is too broadly expressed").

165. Memorandum from Justice Stevens to Justice Brennan (Apr. 10, 1978), *in* Brennan Papers, *supra* note 1, at Box 437: File 6 (noting that he would join the opinion but not the full power argument or the portions rejecting respondeat superior).

166. Memorandum from Justice White to Justice Brennan (Apr. 12, 1978), *in* Brennan Papers, *supra* note 1, at Box 437: File 6 (describing his understanding of Brennan's standard for municipal liability). White's role in the internal discussion of *Monell* is fascinating. He was uncertain whether there was any basis for rejecting respondeat superior, *id.* at 2-3, and he recognized that "[t]he line between official policy for which the cities may be sued and vicarious responsibility for the sins of others is not immediately obvious," *id.* at 1. At the same time, he seems to have consistently advocated a very restricted scope for municipal liability and taken positions entirely consistent with the Frankfurter's Champion theory. *See, e.g., id.* at 1-3 (describing various situations in which a city would not be liable);

Rehnquist<sup>167</sup>), Brennan circulated a second draft opinion.<sup>168</sup> Although substantially reorganized and modified in other respects, it continued to use the fault-based, actual wrongdoer principle to define the boundary of municipal liability and retained almost all of the earlier draft's relevant language.<sup>169</sup> In addition, it substantially clarified, revised, and strengthened the principal legislative history argument for the fault-based standard.<sup>170</sup> Finally, it pithily summarized the actual wrongdoer theory in a single sentence: "In sum, a local government may be sued for monetary, declaratory, or injunctive relief under § 1983 when it is at fault, but not for the fault purely of its employees or agents."<sup>171</sup> Powell appropriately labeled that sentence the "Bottom Line."<sup>172</sup>

But that sentence, together with a related footnote, provoked a vehement memo from Justice Stewart<sup>173</sup>:

[F]ootnote 57 on page 32 [indicating that the rejection of vicarious liability was not inconsistent with suits based on "fault in hiring, training, or direction"<sup>174</sup>] seems to me to be a veritable time bomb, particularly when it is read in light of the ["bottom line" sentence] on page 33. Although we have never decided that there can ever be a § 1983 action based on *negligence* alone, it seems to me that this footnote and sentence of text amount to a virtual invitation to not so ingenious lawyers to sue municipalities upon the ground that the municipalities were at fault with respect to hiring, training, or directing their erring policemen or other agents.<sup>175</sup>

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Memorandum from Justice White to Justice Brennan (Apr. 29, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 7 (stating in handwritten notes that "a city would not be liable for 'deliberate indifference' or 'negligence,' even if its officials were, unless it was the official policy of the city to be indifferent or negligent. That would seem a difficult matter to establish."); Justice Brennan, Conference Notes, *supra* note 29, at 1 (municipal liability "[w]here agents do precisely what they're authorized to do"). It will be interesting what light, if any, is cast by his papers when they become available in 2012.

167. Justice Rehnquist, First Draft Dissent (Apr. 14, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 6.

168. See *supra* note 130.

169. The second draft does eliminate some of the previous references but does so for reasons other than opposition to a fault-based standard. For example, in the first draft's discussion of how *Monroe* could be distinguished, Brennan stated and adopted *Monroe*'s definition of respondeat superior as employer liability without employer fault. Justice Brennan, First Opinion Draft, *supra* note 159, at 32. That passage was necessarily eliminated in the second draft because the Court—to avoid having to deal with Justice Stevens's argument that the *Monroe* complaint was not based solely on respondeat superior—eliminated the entire effort to distinguish *Monroe*, replacing it with a short statement that there was no reason to decide whether *Monroe* was right on its facts. Justice Brennan, Second Opinion Draft, *supra* note 130, at 40 n.68.

170. Compare Justice Brennan, First Opinion Draft, *supra* note 159, at 33 n.60, with Justice Brennan, Second Opinion Draft, *supra* note 130, at 31 n.56. For an explanation of the argument, see *supra* text accompanying notes 133–36.

171. Justice Brennan, Second Opinion Draft, *supra* note 130, at 33.

172. Justice Brennan First Draft with Justice Powell Notes, *supra* note 162, at 33.

173. Memorandum from Justice Stewart to Justice Brennan (Apr. 24, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 7.

174. Justice Brennan, Second Opinion Draft, *supra* note 130 at 32 n.57.

175. Memorandum from Justice Stewart to Justice Brennan, *supra* note 173.

Justice Brennan responded the next day. He was surprised at Stewart's reaction to note 57 since "it stated a well-settled principle of common law" and was included to insure that "people understood the limited nature of the terms 'vicarious liability' and 'respondeat superior.'"<sup>176</sup> He indicated that in the interests of clarity, he preferred to keep the footnote, but would be willing to add a sentence explicitly leaving open the question of "[w]hether fault or negligence in hiring, training, or direction" was sufficient to state a § 1983 cause of action.<sup>177</sup>

If Brennan expected this to mollify Stewart, he was mistaken. The following day, Stewart responded sharply, writing, "[O]ur differences are deeper than I had been willing to acknowledge, even to myself."<sup>178</sup> Stewart made it clear that any opinion that recognized the fault-based, actual wrongdoer principle as the basis for municipal liability was unacceptable.<sup>179</sup> For Stewart, the standard had to be based on *authorization* rather than fault:

I would hold that a municipal corporation *is* within [§ 1983's] ambit in an action at law or suit in equity, when, through the affirmative, deliberate, knowing official action of its governing body, it is alleged to have deprived any person of any rights, privileges, or immunities secured by the Constitution or federal law. . . .

I would *not* imply, even by way of discussion that leaves the matter open, that a municipal corporation could ever be liable under § 1983 for indifference, inaction, or through the actions of its agents when not carrying out affirmatively authorized municipal policy. I would not get into a discussion of the law of *respondeat superior* or the law of torts. I would certainly not make use of the word "fault" which in the law of many states and in admiralty law is no more than a loose synonym for negligence.<sup>180</sup>

Stewart's memorandum threatened to unravel Brennan's majority. At the end of that memo, Stewart stated that he would not join Part II of Brennan's opinion, the portion defining the limits of municipal liability.<sup>181</sup> Justice Stevens had already written that he would not join Part II,<sup>182</sup> and the next day, Justice Blackmun announced that he agreed with Stewart and Stevens.<sup>183</sup> Given the fact that the Chief Justice and Justice Rehnquist

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176. Memorandum from Justice Brennan to Justice Stewart 1 (Apr. 25, 1978), *in* Brennan Papers, *supra* note 1, at Box 437: File 7.

177. *Id.*

178. Memorandum from Justice Stewart to Justice Brennan 1 (Apr. 26, 1978), *in* Brennan Papers, *supra* note 1, at Box 437: File 7.

179. *Id.* at 1–2.

180. *Id.*

181. *Id.* at 2.

182. Memorandum from Justice Stevens to Justice Brennan (Apr. 26, 1978), *in* Brennan Papers, *supra* note 1, at Box 437: File 7. It is unclear whether Stewart understood that he and Stevens fundamentally disagreed on the appropriate scope of municipal § 1983 liability: Stewart wanted it defined more narrowly than Brennan while Stevens wanted it defined more broadly.

183. Memorandum from Justice Blackmun to Justice Brennan (Apr. 27, 1978), *in* Brennan Papers, *supra* note 1, at Box 437: File 7 (stating that Blackmun was "about where



would dissent in toto, the Justices must have recognized that Brennan risked losing his majority unless Stewart could be mollified.<sup>184</sup>

Justice Powell's reaction to this risk would test the nature and depth of his commitment to the fault-based, actual wrongdoer theory of municipal § 1983 liability. Did he believe that adherence to the theory was demanded because it most faithfully represented the legislative intent? (That was the position his clerk urged, reminding Powell that "The 'fault' principle emerges from a careful reading of the legislative history.")<sup>185</sup> If so, one would expect Powell to have objected to Stewart's position and to have tried to persuade Brennan and his wavering colleagues to rally behind the actual wrongdoer standard.

On the other hand, perhaps Powell considered the actual wrongdoer theory simply a convenient lawyerly argument, developed by an exceptionally bright clerk, which Powell had used as a plausible justification for Powell's real goal—an opinion restricting municipal liability to conduct that fell roughly within his (and Frankfurter's) narrow definition of color of law. In that case, one would expect Powell to have endorsed Justice Stewart's demand for a shift to an authorization standard, particularly since that standard even more closely conformed to that definition.

Powell's actual response to Stewart's memorandum adopted the latter course. It effectively abandoned the actual wrongdoer approach in favor of a standard based on authorization rather than fault. On May 1, Powell wrote to Justice Brennan endorsing virtually all of Stewart's proposed modifications of Brennan's second draft.<sup>186</sup> He described the correct rule as one stating that "§ 1983 does not impose liability on government entities for the unauthorized misconduct of employees."<sup>187</sup> He suggested that municipal liability for conduct pursuant to municipal custom should be limited to situations in which "the custom is unmistakably sanctioned by the municipality."<sup>188</sup> He agreed with Stewart that passages that referred to "fault" or even left open the possibility of municipal liability for deliberate indifference were unnecessary and could be deleted.<sup>189</sup> The extent of Powell's retreat from the actual wrongdoer theory is also indicated by what Powell omitted from this memo: a passage from an earlier draft

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Potter [Stewart] and John [Stevens] [were] in their respective letters of April 26," but that he was "interested in what [Justice Powell] comes up with").

184. Brennan explicitly acknowledged that risk a week later. Memorandum from Justice Brennan to Justice Powell 2 (May 2, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 7.

185. Memorandum from Justice Stewart to Justice Brennan 3 (Apr. 26, 1978), in Powell Papers, *supra* note 1, at Box 189: File 8 (handwritten notes by Samuel Estreicher dated Apr. 27, 1978).

186. Memorandum from Justice Powell to Justice Brennan 2 (May 1, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 7.

187. *Id.* at 1 (describing Part II of the opinion as "a helpful—and I think correct—explanation of why § 1983 does not impose liability on government entities for the unauthorized misconduct of employees").

188. *Id.* at 2.

189. *Id.*

recognizing that the rejection of respondeat superior was based on the “‘fault’ principle.”<sup>190</sup>

Brennan acceded to Powell’s and Stewart’s proposed changes.<sup>191</sup> Brennan’s third draft replaced the second draft’s fault-based, “bottom line” sentence with the neutral: “We conclude, therefore, that a local government may not be sued for an injury inflicted solely by its employees or agents.”<sup>192</sup> Brennan carefully eliminated every mention of the word “fault” from the text of the opinion, keeping the word only in two historical footnotes.<sup>193</sup> The third draft, at Powell’s and Stewart’s urging, eliminated fault as the underlying justification for municipal liability and replaced it with authorization. Powell, Stewart, and Blackmun rejoined the fold;<sup>194</sup> and, with only one minor substantive change,<sup>195</sup> the third draft became the final opinion.

Ironically, the sole remnant of the “actual wrongdoer” theory in the three published opinions is contained in Justice Powell’s concurrence. That opinion used language which reflected Powell’s belief that municipal liability should be limited by Frankfurter’s narrow definition of color of law.<sup>196</sup> But in one passage, it described Brennan’s majority opinion as having interpreted the rejection of the Sherman Amendment “as a limitation

190. Compare Memorandum from Justice Powell to Justice Brennan 1 (Apr. 25, 1978), in Powell Papers, *supra* note 1, at Box 189: File 8 (draft marked “Not Sent”) (referring to “the ‘fault’ principle you recognize in *Monell*, with respect to respondeat superior liability of municipalities”), with Memorandum from Justice Powell to Justice Brennan, *supra* note 186 (omitting the sentence containing the quoted language).

191. Memorandum from Justice Brennan to Justice Powell (May 2, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 7.

192. *Id.* at 1; Justice Brennan, Third Opinion Draft 34 (May 4, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 7.

193. Memorandum from Justice Brennan to Justice Powell, *supra* note 191, at 1; Justice Brennan, Third Opinion Draft, *supra* note 192, at 21 n.40 & 32 n.57. Ironically, the second of these footnotes is the principal legislative history argument for the *Monell* doctrine and makes no sense except as an argument for a fault-based standard for municipal liability. See *supra* text accompanying notes 133–36.

194. Memorandum from Justice Blackmun to Justice Brennan (May 17, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 7; Memorandum from Justice Powell to Justice Brennan (May 5, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 7 (“As your 3rd draft substantially accommodates my concerns (for which I thank you), I am glad to join you.”); Memorandum from Justice Stewart to Justice Brennan (May 15, 1978), in Brennan Papers, *supra* note 1, at Box 437: File 8.

195. At Powell’s last-minute request, Brennan deleted the italicized phrase from a sentence that originally read, “Equally important, creation of a federal law of respondeat superior, where state law did not impose such an obligation, would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional.” Memorandum from Justice Powell to Justice Brennan, *supra* note 194 (typed note appended to Justice Brennan’s copy but not to the other Justices’ copies of the memo) (subsequently deleted language in italics). Powell requested that the phrase be deleted to avoid the implication that § 1983 respondeat superior liability might exist if state law recognized municipal respondeat superior. *Id.*

196. *Monell v Dep’t of Soc. Servs.*, 436 U.S. 658, 707 (1978) (Powell, J., concurring) (Court is correct to deny immunity for “constitutional deprivation, even though such actions may be fully consistent with, and thus not remediable under, state law. No conduct of government comes more clearly within the ‘under color of’ state law language of § 1983.”).

of the statutory ambit to actual wrongdoers.”<sup>197</sup> By the time the final opinions were handed down, that passage described a majority opinion that no longer existed—a draft opinion that had relied on the actual wrongdoer theory but had been replaced by a final opinion that did not. And that final opinion effectively limited municipal § 1983 liability to those cases in which Frankfurter would have agreed that the constitutional violation was committed under color of law. As to municipalities, Frankfurter’s views—and those of his champion—had prevailed.

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197. *Id.* Powell’s clerk drafted the concurring opinion on or before May 1, i.e., the day before Justice Brennan’s capitulation to Stewart’s and Powell’s objections to the fault-based theory and at least three days before Brennan circulated the draft majority opinion that reflected that capitulation. Memorandum from Justice Powell to Samuel Estreicher 1 (May 8, 1978), in Powell Papers, *supra* note 1, at Box 189: File 9 (describing Estreicher’s May 1 draft). No copy of the May 1 draft of Powell’s concurrence has been found, but there is nothing to suggest that Powell’s “actual wrongdoer” language was added after Brennan’s memo abandoning the “actual wrongdoer” argument. The final concurrence’s language was essentially identical to language used in Estreicher’s earlier memoranda as well as Powell’s initial memorandum adopting the actual wrongdoer approach. *See supra* note 147 and accompanying text. Thus it seems likely that Powell’s final concurring opinion’s attribution of that argument to the majority was simply an oversight resulting from the last minute rush to announce the opinion.