
David Jacks Achtenberg

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Cover Page Footnote
Associate Professor and Law Foundation Scholar, University of Missouri-Kansas City School of Law. J.D., 1973, University of Chicago School of Law; B.A., 1970, Harvard University. I thank Miriam Jacks Achtenberg, Mark Berger, Barbara Glesner-Fines, H. Alice Jacks, Nancy Levit, Colin Picker, and Allen Rostron for their intellectual and moral support and for their gracious and constructive comments on earlier drafts of this Article. I received invaluable research assistance from Summer Duke, Nicole Hanna, Angela Higgins, Monika Jenkins, Jin Liu, Jo Powers, and Jesse Sendejas. Librarians and staff members at the Leon E. Bloch Law Library and various libraries throughout the country provided assistance and access to sources without which this Article could not have been written. Research for this Article was supported by generous grants from the UMKC Law Foundation.

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David Jacks Achtenberg*

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The **Monell** doctrine—a series of cases exempting cities from 42 U.S.C. § 1983 respondeat superior liability, while subjecting cities to § 1983 liability in a narrowly defined set of situations. See infra Part I (explaining the doctrine).
Justices of the United States Supreme Court have called for reexamination of Monell's conclusion that cities are exempt from respondeat superior liability for their employees' unconstitutional conduct.\(^3\) Plaintiffs' civil rights lawyers wait only for the right case and a single change in the Court's personnel before urging the Court to overturn Monell.

This Article is intended to provide those lawyers—and those who will oppose them—with a comprehensive, accurate examination of the relevant historical background,\(^4\) and an equally comprehensive description of new historical arguments for overruling Monell\(^5\) and for reaffirming it.\(^6\) This new work is needed because Monell relies on an historical analysis that is simply wrong,\(^7\) while Monell's critics rely on an analysis that is so incomplete that it is grossly misleading.\(^8\) Each side relies on history, but neither side has its history right.\(^9\)

The following pages attempt to correct and complete the historical record. Part I describes the current standards for municipal § 1983 liability under Monell: the rejection of respondeat superior and the creation of four categories of conduct for which cities can be held liable. It then discusses the idiosyncratically narrow nature of those four categories.

Part II shows that Monell's historical arguments for rejecting municipal respondeat superior are wrong. It explains that Monell ignored the actual nineteenth-century rationales for respondeat superior and as a result misinterpreted the rejection of a proposal (known as the "Sherman Amendment") to make cities liable for injuries resulting from Ku Klux Klan depredations. It demonstrates that the rejection of that proposal not only was consistent with the nineteenth-century rationales for respondeat superior but also was compelled by those rationales.

Part III shows that Monell's opponents' current arguments are equally counter-historical. It explains that, while nineteenth-century common law did recognize municipal respondeat superior, the practical significance of that recognition was drastically diminished by

\(^3\) Bd. of County Cmtrs v. Brown, 520 U.S. 397, 430-37 (1997) (Breyer, J., dissenting) (joined by Stevens and Ginsburg, JJ.); id. at 416, 429-30 (Souter, J., dissenting) (joined by Stevens and Breyer, JJ.).

\(^4\) See infra Parts II-III.

\(^5\) See infra Part IV.B.

\(^6\) See infra Part IV.A.

\(^7\) See infra Part II.

\(^8\) See infra Part III.

\(^9\) Of course, history will not be all that the parties argue. They may assert that the statutory text supports their respective positions, and they will undoubtedly argue that their chosen interpretations will best serve the public interest. Monell's supporters will argue stare decisis. This Article focuses on history because historical arguments have been central to the defense and criticism of Monell and because an accurate understanding of history may make it more difficult to disguise policy arguments by dressing them in pseudo-historical clothes.
a doctrine that treated a large and crucial group of city-paid workers as employees of the state rather than the city. As a result, incorporation of nineteenth-century common law rules would not, as Monell's opponents suggest, lead to restoration of meaningful municipal respondeat superior.

Part IV attempts to reframe the arguments on sound historical foundations. Part IV.A suggests that the Court should treat § 1983 as implicitly incorporating substantive nineteenth-century common law doctrine. It then shows that the now-forgotten (but then well-known) “public officer” liability doctrine provides a solid historical foundation both for Monell’s rejection of respondeat superior and for its four theories of municipal liability. Section B attacks the foundation of that approach and suggests that the enacting Congress would have expected courts to treat the common law not as a set of ironclad rules, but instead as a flexible decision-making process in which unchanging fundamental principles—in this case, the rationales for respondeat superior—were applied to a changing world. It then shows that application of that process to current municipal employment relations would lead to reinstating respondeat superior.

I. THE CURRENT STANDARDS FOR MUNICIPAL LIABILITY UNDER MONELL

For more than forty years, the Supreme Court has struggled to decide whether and when municipalities should be liable under 42 U.S.C. § 1983 for constitutional wrongs committed by their officials and employees. The tale of the Court’s halting efforts to map this territory is well known: In its 1961 decision in Monroe v. Pape, the

10. Section 1983 provides:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.


11. For convenience and brevity, the terms “city” or “municipality” will be used in their broad sense to include all local governmental entities including cities, other municipal corporations, towns, counties, school districts, other special purpose districts, and boards. Narrower terms will be used when the characteristics of a particular type of entity are crucial.

Court concluded that cities could never be sued under § 1983 because they were not "persons" within the meaning of the statute.¹³ Seventeen years later, in Monell v. Department of Social Services,¹⁴ the Court reversed field, holding that cities were persons and could be sued under the statute.¹⁵ However, after holding that cities could be held liable, the Monell Court significantly restricted the scope of their liability. A city, the Court stated, should not be found liable merely because it employed the constitutional wrongdoer, that is, it should not be liable on a respondeat superior basis.¹⁶ Instead, a city was to be held responsible only if the employee's action implemented or executed "official municipal policy."¹⁷ Recognizing that the phrase "official municipal policy" provided more of a "sketch" than a map, the Monell Court did not attempt to define "the full contours of municipal liability under § 1983," leaving that effort for "another day."¹⁸ More than a quarter of a century later, those contours are still shifting and ill-defined.¹⁹

A. Monell's Four Routes to Municipal Liability

A detailed description of the boundaries of the "Monell doctrine," (that is, the theories of municipal liability established by Monell and its progeny)²⁰ is beyond the scope of this Article, but a brief, simplified description will be useful. In its current incarnation, the Monell doctrine has replaced respondeat superior with four distinct theories under which cities can be held liable: liability based on formal policy, liability based on governmental custom, liability based

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13. Id. at 191. Monroe was followed by a series of decisions that reaffirmed and extended that holding. See Aldinger v. Howard, 427 U.S. 1 (1976) (applying Monroe to counties); City of Kenosha v. Bruno, 412 U.S. 507 (1973) (holding that Monroe protected cities from § 1983 suits for injunctions as well as for damages); Moor v. County of Alameda, 411 U.S. 693 (1973) (applying Monroe to counties).


15. Id. at 690.

16. Id. at 691.

17. Id. (noting that cities are not liable unless the challenged action was taken "pursuant to official municipal policy of some nature"); id. at 690 (stating that cities are not liable unless the challenged action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"); id. at 694 (stating that cities are not liable unless action executed the city's "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy").

18. Id. at 695.


20. For ease of reference, this Article attributes the doctrine to Monell. In fact, the doctrine is the result of a series of decisions, see supra note 19, and various aspects might best be attributable to particular cases in that series. For example, the standard for training/supervision-based liability was principally enunciated in City of Canton while the standard for hiring-based liability was spelled out in Brown.
on inadequate training or supervision, and liability based on improper hiring. The four theories, while sometimes overlapping, provide quite different standards for determining whether a municipality will be liable for its employee’s wrongful act. A separate requirement cuts across and modifies these four theories: the policy, custom, training, or hiring must somehow be tied to actions by certain high-ranking, policymaking officials.

1. Formal Policy-Based Liability

Under the first theory, a municipality will be liable for an employee’s constitutional wrong if the employee’s conduct executed or implemented an official policy adopted by the city’s lawmakers.\(^\text{21}\) *Monell* itself was such a case. The Board of Education and the Department of Social Services had each officially adopted an unconstitutional maternity leave policy, and the plaintiffs’ supervisors simply carried out that policy when they directed the plaintiffs to take medically unnecessary maternity leaves.\(^\text{22}\)

2. Custom-Based Liability

Under the second theory, a municipality will be liable if the employees acted pursuant to the city’s governmental custom, even if that custom had never been formally adopted by the city’s lawmakers.\(^\text{23}\) Custom-based municipal liability recognizes the existence of practices that might be considered the city’s administrative common law—a set of practices so well-settled that they have the force of law.\(^\text{24}\) For example, a municipal police department may have a longstanding, consistent practice of treating domestic violence cases less seriously than other violent crimes, and a person injured as a result of such a custom may sue the city even without showing that the municipal policymakers had formally approved the practice.\(^\text{25}\)

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\[21. \text{Owen, 445 U.S. at 657; Monell, 436 U.S. at 690.}\]
\[22. \text{Monell, 436 U.S. at 660-61; Monell v. Dep’t of Soc. Servs., 532 F.2d 259, 260-61 (2d Cir. 1976) (indicating that supervisors directed that the leave be taken). The policy required female teachers to take a leave of absence after the fifth month of pregnancy without a showing that such a leave was medically necessary. Monell, 436 U.S. at 661.}\]
\[24. \text{See Monell, 436 U.S. at 691.}\]
\[25. \text{Watson v. City of Kansas City, 857 F.2d 690, 695-96 (10th Cir. 1988).}\]
3. Training/Supervision-Based Liability

Under the inadequate training or supervision theory, cities are liable for the constitutional wrongs of their employees if two requirements are met: First, the failure to train or supervise must be so deficient that it shows "deliberate indifference to the rights" of those with whom the employees will interact. Second, the failure must have actually caused the wrongdoing to occur. Deliberate indifference will be found where the nature of the employees' duties or a previous pattern of violations makes it obvious that, without further training, the employees are highly likely to violate citizens' federally protected rights. Thus, for example, failure to train police officers not to commit perjury does not, by itself, show deliberate indifference since the officers should not need training to know that perjury is unacceptable. However, if the officers demonstrate a pattern of lying under oath, the need for further training or supervision becomes obvious, and the continued failure to provide it will constitute deliberate indifference. Even if the need is obvious, the city will not be liable unless adequate training or supervision would have prevented the violation. Thus, the municipality will not be liable if the officer would have committed the same violation even if properly trained and supervised.

4. Hiring-Based Liability

In quite limited circumstances a municipality will be held liable for its employees' constitutional wrongs on the basis that the city failed to adequately screen the employees before hiring them. For the city to be liable under this theory, a plaintiff must show that "adequate scrutiny of an applicant's background would [have led] a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire... would be the deprivation of a third party's federally protected right," and that adequate screening would have shown that "this officer was highly likely to inflict the particular injury suffered by the plaintiff." A fortiori, plaintiffs could also prevail if they show that the city hired the employee despite having actual

27. Id. at 390.
28. Id. at 390 n.10.
30. Id. at 300.
31. City of Canton, 489 U.S. at 391.
32. Id. at 391; see also, e.g., Dorman v. Dist. of Columbia, 888 F.2d 159, 165-66 (D.C. Cir. 1989) (municipality not liable since better training would not have alerted police officers to suicide risk).
34. Id. at 412.
knowledge of facts demonstrating this high likelihood of employee misconduct.

5. The Overarching Requirement: Actions of City Policymakers

Each of these methods of establishing municipal liability is limited by an overarching requirement that, for a municipality to be liable, the constitutional wrongdoing must result from action or inaction by a person who can be categorized as an official municipal policymaker. Thus, formal policy can be seen as action formally taken by employees who qualify as policymakers. Custom can be defined as a practice that is so widespread that the municipal policymakers must have been aware of it and may be deemed to have adopted it as their policy. Liability based on inadequate training or supervision requires a finding that it should have been "plainly obvious" to the city's policymakers that further training or supervision was necessary and the conclusion that failure to provide it showed that those policymakers were "deliberately indifferent" to the high likelihood of constitutional wrongs. Finally, hiring-based liability can only be maintained when proper screening would have revealed the damning background information to a municipal policymaker. Thus, every form of municipal liability under Monell requires some form of action or culpable inaction by an identifiable individual who can properly be characterized as a municipal policymaker.

The standard for identifying policymakers has evolved over time. In Monell itself, cities' policymakers were identified generally as municipal employees "whose edicts or acts may fairly be said to represent official policy." However, this initial characterization was sharply narrowed in subsequent decisions: The wrongdoer must be an employee who has been given "final policymaking authority" to
establish the city's policy regarding the "particular matter[]."41 The city will not be liable if the employee has authority only to exercise discretion rather than to establish policy.42 For example, a sheriff who has final authority to hire deputies is not a policymaker unless he or she also has authority to determine the criterion for selecting deputies.43 If the employee's authority is constrained by policies made by his or her superiors or if the employee's decisions are subject to review and reversal by those superiors, the employee's actions will not be considered official policy.44 Thus, in its current iteration, the Monell doctrine tightly limits the number of employees whose conduct can be attributed to the city.

B. The Idiosyncratic Stinginess of Monell’s Four Theories

This conglomeration of standards is idiosyncratically protective of the municipal pocketbook. It is higher than the ordinary standard for private employer liability,45 higher than the standard for municipal liability for non-constitutional torts,46 and higher than the standard for individual liability for negligent selection of independent contractors.47 Remarkably, the standard for awarding compensatory damages against cities under § 1983 is even higher than the standard for awarding punitive damages against private employers.48 Monell confines entity liability in a manner that is unique to § 1983 and exists in no other area of the law.49

41. Pembaur, 475 U.S. at 483; see also Praprotnik, 485 U.S. at 123. The question of whether a particular employee has such authority is an issue of state law to be decided by the judge rather than the jury. See id. at 125; see also Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989).
42. Pembaur, 475 U.S. at 483 n.12.
43. Id.
44. Praprotnik, 485 U.S. at 127. If the employee’s superiors review and affirm both the decision itself and the basis for that decision, the city may be held liable. Id. However, in such a case, it is the action of the reviewing officials that is treated as creating municipal policy since only they are considered to be policymakers. Id.
45. See infra text accompanying note 50.
46. See infra text accompanying notes 51-52.
47. See infra text accompanying notes 53-54.
48. See infra text accompanying notes 55-68.
Private employers are, of course, routinely held liable on a pure respondeat superior basis for their employees' torts. Moreover, where municipalities are subject to state law liability for non-constitutional torts, that liability is uniformly premised on the same principles of respondeat superior liability that apply to other employers. The California Supreme Court's statement in *Mary M. v. City of Los Angeles* is typical: "The doctrine of respondeat superior applies to public and private employers alike." The author has been unable to identify a single state that restricts its cities' liability for employees' non-constitutional torts in a manner similar to the way *Monell* restricts municipal liability for constitutional wrongs.

*Monell*’s standards are even higher than the standards for liability for the torts of nonemployees, such as a defendant's independent contractors. Defendants are generally liable for the torts of an independent contractor whenever they fail "to exercise reasonable care to employ a competent and careful contractor." There is no requirement that plaintiffs demonstrate (as they must under the *Monell* doctrine) that the tort was the "plainly obvious consequence" of hiring the contractor or that adequate screening would have made it obvious that "this [contractor] was highly likely to inflict the particular injury suffered by the plaintiff."
Remarkably, *Monell* confines cities’ liability for compensatory damages more tightly than the common law restricts private employers’ liability for punitive damages. Most jurisdictions award punitive damages against employers on a respondeat superior basis without any additional restrictions. Other jurisdictions apply the limitations set out in the *Restatement (Second) of Torts*—limitations that are similar to, but far less restrictive than, the *Monell* standards. The *Restatement* provides:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal or a managerial agent authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

Various subsections of the *Restatement* standard roughly parallel components of the *Monell* doctrine: subsections (a) and (d) are requirement sets a significantly higher standard. In *Brown* itself, the Court held that even a long police record that included public drunkenness, assault and battery, and resisting arrest was not enough to make it “plainly obvious” that a deputy would be likely to use excessive force in effectuating arrests. *See Brown*, 520 U.S. at 397. Similarly, in *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001), the court held that permitting police officers to work for a private investigator with a criminal record that included arson, wiretapping, perjury, and bribery was not enough to make the city liable for the officer’s attempted murder on behalf of that investigator.

55. The Supreme Court has, of course, held that municipalities may not be sued under § 1983 for punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *see also*, *Schueler v. Martin*, 674 A.2d 882 (Del. Super. Ct. 1996) (holding that cities are immune from punitive damages under state law).


58. *Restatement (Second) of Torts* § 909 (1979). Identical standards are set forth in the *Restatement (Second) of Agency*. *Restatement (Second) of Agency* § 217C (1958). Because the *Restatement (Second) of Torts* is the original source for the language and the comments to it are more extensive, this Article treats it as the source for the standards.
somewhat analogous to Monell's formal policy route; subsection (b) is reminiscent of the inadequate hiring route; and subsection (c) bears some similarity to Monell's requirement of action by a high ranking policymaker. However, Monell's restrictions are substantially more protective of the employer. For example, under the Restatement, an employer is liable for the acts of any "managerial agent," while under Monell and its progeny, the employer is only liable for the acts of employees with "final policymaking authority"—authority that is unconstrained by policies made by their supervisors and is not subject to review by higher authorities. As a result, jurisdictions that follow the Restatement have held employers liable for punitive damages for the acts of such relatively low ranking employees as a Taco Bell shift manager, a K-Mart assistant store manager, the night manager of a motel, and even a Frito-Lay district sales manager who was performing the duties of a route salesman servicing a convenience store. In sharp contrast, decisions under Monell have held that governmental entities are not subject to liability for the actions of such high ranking officials as the city's chief of police, a school district's superintendent, or the city's fire chief. Thus, it is significantly easier to hold an employer liable for punitive damages

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59. Restatement (Second) of Torts, supra note 58, § 909(c).
61. Gould v. Taco Bell, 722 P.2d 511 (Kan. 1986) (holding that punitive damages are justified against corporation because of knowledge and inaction by shift managers).
63. Purvis v. Prattco, Inc., 595 S.W.2d 103 (Tex. 1980) (holding that punitive damages are justified against corporation because of action of a night manager).
64. Ramos v. Frito-Lay, Inc., 784 S.W.2d 667 (Tex. 1990) (holding that punitive damages are justified against a nationwide corporation because of actions of employee with title of district sales manager who was performing duties of a route salesman at the time).
65. Venters v. City of Delphi, 123 F.3d 956 (7th Cir. 1997) (holding that city is not liable for actions of police chief because, although chief had authority to hire, fire, and discipline employees, he did not set employment policy); see also Radic v. Chi. Trans. Auth., 73 F.3d 159, 161 (7th Cir. 1996) (stating that there is no municipal liability even if employee had "authority to make administratively final decisions" unless he or she also had "authority to establish official municipal policy").
66. Springdale Educ. Ass'n v. Springdale Sch. Dist., 133 F.3d 649 (8th Cir. 1998); Adkins v. Bd. of Educ., 982 F.2d 952 (6th Cir. 1993) (finding that a school district is not liable because superintendent's hiring recommendations were subject to review by Board of Education).
67. Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro, 64 F.3d 962, 965-66 (4th Cir. 1995) (finding that city is not liable since only the city manager and city council, rather than the fire chief, could make policy regarding employment relations within the fire department); Gillette v. Delmore, 979 F.2d 1342 (9th Cir. 1992) (finding that city is not liable since fire chief's authority to discharge employees was subject to city manager review).
under either the majority or the Restatement rules than it is to hold one liable for compensatory damages under Monell.\textsuperscript{68}

Of course, the fact that Monell's constraints are stricter than those applied for nonconstitutional torts does not necessarily mean that the Monell doctrine is wrong.\textsuperscript{69} But the fact that they are idiosyncratic to § 1983 does suggest that those constraints need a compelling justification.\textsuperscript{70} The remainder of this Article will focus on whether the statute's history and common law background provide that justification.

\begin{itemize}
  \item 68. Justices Souter and Breyer have also argued that Brown's standard for inadequate hiring cases is significantly higher than the "reckless" hiring standard of the Restatement. Bd. of County Comm'rs v. Brown, 520 U.S. 397, 422 (1997) (Souter, J., dissenting); id. at 434-35 (Breyer, J., dissenting). While Justice O'Connor denies this characterization of her opinion, \textit{id.} at 412, subsequent lower court cases suggest that the standard is an exceptionally difficult one to meet. \textit{See}, e.g., Piotrowski v. City of Houston, 237 F.3d 567 (5th Cir. 2001) (holding that, even if a policy of permitting police officers to work for a private investigator with a criminal record that included arson, wiretapping, perjury, and bribery was enough to make it likely that the officers would commit some crimes, the city could not be liable because it does not demonstrate that the city would have been indifferent to the particular crime—attempted murder).


  \item 70. The presumption against idiosyncratic interpretation expresses more than a preference for intellectual symmetry: it is a significant protection against judicial abuse. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), \textit{vacated as moot}, 235 F.3d 1054 (8th Cir. 2000) (en banc). By requiring that courts decide cases according to generally applicable principles, the presumption prevents courts from discriminating between favored and disfavored parties or favored and disfavored statutes. In the context of § 1983, the presumption in favor of applying contemporary common law standards restricts the court's ability to judicially restrict the congressionally created cause of action. \textit{But see} Achtenberg, supra note 69, at 524-28 (arguing that, in the context of individual immunity issues, this "dynamic incorporation" approach gives state courts too much power to restrict the scope of § 1983).
\end{itemize}
II. Monell’s Misreading of the Common Law Background and the Real Nineteenth-Century Rationales for Respondeat Superior

Monell’s rejection of respondeat superior and its adoption of these idiosyncratic requirements for employer liability were based primarily on the Court’s interpretation of the legislative history of the Ku Klux Act.71 In particular, the Court concluded that Congress’s rejection of the so-called Sherman Amendment—a proposal to make cities liable for injuries resulting from the depredations of the Ku Klux Klan or from similar mob violence—demonstrated that the enacting Congress was opposed to vicarious liability and thus opposed to respondeat superior.72 The Court also argued that loss spreading and loss prevention, which it claimed were the sole rationales for respondeat superior, were also advanced as arguments for the Sherman Amendment, and that the Congress that found those rationales inadequate to justify the Sherman Amendment would have found them equally inadequate to justify respondeat superior.73

The Court’s conclusions rest on historically inaccurate assumptions about the nineteenth-century justifications for respondeat superior. In 1871, when § 1983 was enacted, lawyers and judges saw respondeat superior as the natural result of four underlying rationales which both justified and limited employer liability: (1) the legal fiction that master and servant were a single “legal unity,” (2) the concept that legal responsibility necessarily followed from the legal power to control another’s actions, (3) the belief that masters implicitly warranted that their servants were competent and well-intentioned, and (4) the principle that those who sought to profit from servants’ actions should bear the costs that those actions imposed on others.74 While some of these rationales may sound strange to twenty-first-century ears, they were well-recognized legal truisms regularly invoked in nineteenth-century treatises and decisions.75 To the nineteenth-century lawyer-legislators who dominated the Forty-Second Congress, these rationales were powerful arguments in favor of holding employers (including municipal employers) liable for the torts of their employees and were equally powerful arguments against adopting the type of liability contemplated by the Sherman Amendment.76 Rejection of the Sherman Amendment was not a

71. See Pembaur v. City of Cincinnati, 475 U.S. 469, 478-79 & n.7 (1986) (stating that Monell rested primarily on legislative history including inferences from rejection of the Sherman Amendment). To a lesser extent, the Court relied on a strained reading of the text of the statute.
73. Id.
74. See infra Parts II.A.1-4.
75. See infra Parts II.A.1-4.
76. See infra Part II.B.
rejection of those rationales but instead a straightforward application of them.

A. The Nineteenth-Century Rationales for Respondeat Superior

1. Liability Based on the Legal Unity of Master and Servant

The first rationale rested on a concept that nineteenth-century law considered inherently inseparable from the master-servant relationship, the "legal unity of the principal and agent." Prominent nineteenth-century commentators and innumerable nineteenth-century courts explained that employers' liability for the torts of

77. See, e.g., New Orleans, Jackson, & Great N. R.R. Co. v. Bailey, 40 Miss. 395, 453 (1866); see also Mass. Life Ins. Co. v. Eshelman, 30 Ohio St. 647, 658 (1876) ("This legal unity of principal and agent . . . is an incident which the law has wisely attached to the relation from its earliest history."); Atl. & Great W. Ry. Co. v. Dunn, 19 Ohio St. 162, 169 (1869) (stating that "legal identity of principal and agent, is fundamental" and is particularly applicable to corporations because they can act only through their servants).

78. See, e.g., 1 C.G. Addison, A Treatise on the Law of Torts 45 (H.G. Wood ed., 1881) (stating that an employee's "acts are, in contemplation of the law, the acts of his master"); 1 id. at 585 (holding that servants' acts will be treated at law as the act of the master); 1 William Blackstone, Commentaries *432 ("[T]he wrong done by the servant is looked upon in law as the wrong of the master himself."); 2 Thomas Waterman, A Treatise on the Law of Corporations Other than Municipal 537 (1888) (describing the legal unity rationale as being "as old as the right of trial by jury itself"); see also Norman Fetzer, Handbook of Equity Jurisprudence 88 (1895) (describing the legal identity of master and servant as one of the explanations for the rule that notice to the servant is notice to the master); 1 Simon Greenleaf, A Treatise on the Law of Evidence 135 (12th ed. 1866) (describing the legal identity of agent and principal as the basis for admitting agents' declarations against the principal). But see 2 Joseph Story, Commentaries on the Law of Agency § 452 (9th ed. 1882) (describing the legal unity rationale as "artificial and unsatisfactory"). Holmes discussed the pervasive (and in his view, pernicious) effect of the fictional unity of master and servant in two well-known lectures on agency. See Oliver Wendell Holmes Jr., Agency, 4 Harv. L. Rev. 345 (1891); Oliver Wendell Holmes Jr., Agency II, 5 Harv. L. Rev. 1 (1891).

79. See, e.g., Kielley v. Belcher Silver Min. Co., 14 F. Cas. 460, 461 (C.C.D. Nev. 1875) (No. 7760) (holding that the act of a servant is considered at law to be "the act of the master himself"); Sproul v. Hemmingway, 31 Mass. (14 Pick.) 1, 5 (1833) (holding that acts done by persons employed to operate a coach or vessel are considered at law to have been done by the employer); Bailey, 40 Miss. at 452 (stating that respondeat superior is based on the principle that the "act of the agent is the act of the principal himself"); Hopkins v. Atl. & Saint Lawrence R.R., 36 N.H. 9, 17 (1857) (holding that acts of corporate employees within the course of employment are the acts of employer itself); McCafferty v. Spuyten Duyvil & Port Morris R.R. Co., 61 N.Y. 178, 181 (1874) (holding that master is liable for acts of his servants); Stevens v. Armstrong & Squires, 6 N.Y. 435, 439 (1852) (noting that master is liable for acts of his servants because "such servants represent the master himself and their acts stand upon the same footing as his own"); Dunn, 19 Ohio St. at 168 ("The act of the servant, done within the scope and in the exercise of his employment, is in law the act of the master himself."). In at least one jurisdiction, "one could state a cause of action by pleading the acts of the agent as the acts of the principle." Charles A. Rothfeld,
their employees rested on the maxim that the acts of the servant simply were, in the contemplation of the law, the acts of the master. Blackstone himself had written that "the wrong done by the servant is looked upon in law as the wrong of the master himself," and American authorities consistently echoed the same theme. As one court put it,

no general rule seems to be more firmly established ... than that which holds that the principal is civilly responsible in damages for the acts of his agents, whether negligent or wilful, done in his employment, to the same extent as if the principal himself were the actual wrong-doer. ... What is the principle upon which this rule of damages is founded? ... It is that the act of the agent is the act of the principal himself.81

The legal unity of master and servant was, of course, a legal fiction, and it sounds as odd to modern ears as the related rule that a husband was liable for his wife's torts because "husband and wife are one person in law." Nonetheless, however arcane or illogical the legal unity concept may have seemed to members of the Court in 1978 when Monell was written, it was a familiar legal truism to members of Congress in 1871 when § 1983 was enacted.

2. Liability Based on the Master's Legal Power to Control and Direct the Servant

The second key jurisprudential justification for respondeat superior was the belief that liability naturally flowed from the employer's legal power to control or direct his servant's actions. The importance nineteenth-century courts placed on this rationale can hardly be overemphasized.82 Respondeat superior was described as having been


80. Blackstone, supra note 78, at *432.

81. Bailey, 40 Miss. at 452 (emphasis added).

82. Id. at 453. Interestingly, even the nineteenth-century courts recognized that these unities were legal fictions. Id. For a late-nineteenth-century explanation of the derivation of the doctrine from Roman law, see Kingan & Co. v. Silvers, 37 N.E. 413, 417 (Ind. Ct. App. 1894), which explains, under Roman law, that the pater familias was liable for all wrongs committed by any member of his family (including his slaves and animals) because they were all deemed to be part of a single unity infused with the master's personality.

83. In explaining respondeat superior, the courts often coupled masters' power to control their servants with their power to select them. See, e.g., Du Pratt v. Lick, 38 Cal. 691, 692 (1869) (stating that the justification for respondeat superior is the "power of selection and direction" of employees); Cuff v. Newark & N.Y. R.R. Co., 35 N.J.L. 17, 23 (N.J. Sup. Ct. 1870) (stating that the master is liable because the master has the power to select, control, and discharge the servant); Ham v. City of New York, 70 N.Y. 459, 461-62 (1877) (same); Maxmilian v. City of New York, 62 N.Y. 160 (1875) (same); Goddard v. Grand Trunk Ry. of Canada, 57 Me. 202, 214 (1869) ("The carrier selects his own servants and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they
“founded on [the employer’s] power of control and direction.”  

Courts described control as “the reason of the rule,” or stated that “control alone furnishes a ground for holding the master or principal liable for the acts of the servant or agent.” As one court summarized the prevailing view, “[t]he responsibility of the master grows out of, is measured by, and begins and ends with his control of the servant.”

The courts explained that masters’ power to control their servants’ conduct created a duty to exercise that power and stated that breach of that duty was the basis for employers’ liability. Respondeat superior “is founded on the power of control and direction which the superior has a right to exercise, and which, for the safety of other persons, he is bound to exercise over the acts of his subordinates.” Masters’ liability was seen as the necessary consequence of their “duty to so control [their servants’] acts that no injury may be done to third persons.”

For nineteenth-century lawyers, the existence of this duty was routinely recognized as an indispensable justification for holding employers liable for their employees’ torts.

However, the Monell Court, writing more than one hundred years later, anachronistically discounted control as a justification for employer liability. Relying solely on Harper and James’ influential 1956 treatise on tort law, the Court insisted that “on examination, [control] is apparently insufficient to justify the doctrine of respondeat superior.” However, the opinions of two mid-twentieth-century
scholars (or of various late twentieth-century Supreme Court Justices\textsuperscript{93}) on the wisdom of that justification are simply beside the point. Monell's validity hinges on the proposition that members of Congress, sitting in 1871, could not have rejected the Sherman Amendment without implicitly rejecting respondeat superior as well. To prove that proposition, the Court must identify what those nineteenth-century legislators considered to be the underlying rationales for respondeat superior—not demonstrate that twentieth-century commentators disagreed with those rationales. After all, members of the Forty-Second Congress could not have read a treatise that was written years after their deaths. It is simply anachronistic to transplant mid-twentieth-century treatise writers' conclusions into nineteenth-century legislators' minds.\textsuperscript{94}

3. Liability Based on Implicit Warranty of Servant's Good Conduct

A third nineteenth-century justification for respondeat superior was the belief that, by entrusting work to employees, an employer implicitly represented to the public that the employees were careful, competent, and well-intentioned; and that, if that representation turned out to be false, the employer was liable based on breach of warranty.\textsuperscript{95} Justice Story's influential Commentaries on the Law of Agency\textsuperscript{96} taught that employer liability was based on the fact that "the principal holds out his agent, as competent, and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."\textsuperscript{97} The warranty rationale had

\textsuperscript{93.} In addition to its citation to Harper and James, the Court provided a puzzling reference to Rizzo v. Goode, 423 U.S. 362, 370-71 (1976), suggesting that Rizzo established that "the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability," Monell, 436 U.S. at 694 n.58. Rizzo could hardly have shown that a city's right to control its employees was an inadequate rationale for municipal respondeat superior liability for damages both because it was decided before cities could be sued at all and because it was a suit for equitable relief against supervisory officials rather than a suit for damages against the city. In any event, Rizzo did not purport to discuss whether members of the Forty-Second Congress thought that respondeat superior was justified by the masters' right to control their servants—the crucial issue for the Court's argument in Monell. See Rizzo, 423 U.S. at 370-71.

\textsuperscript{94.} It is particularly anachronistic for the Court to have relied on the 1956 edition of the Harper and James treatise since that was the first edition to reject the control rationale for respondeat superior. The immediate predecessor work did not do so. Compare 2 Harper & James, supra note 91, § 26.3, with Fowler Vincent Harper, A Treatise on the Law of Torts § 291 (1933).

\textsuperscript{95.} This warranty rationale was closely related to the idea that employers were strictly liable as a result of their selection of the servant who subsequently committed the wrong. See, e.g., Kelly v. Mayor &c. of New York, 11 N.Y. 432, 436 (1854). For further cases resting respondeat superior on employers' power to select and control their servants, see supra note 83.

\textsuperscript{96.} Story, supra note 78.

\textsuperscript{97.} 2 id. § 452, at 523. For similar, roughly contemporaneous English views, see Frederick Pollock, The Law of Torts 52 (1887) ("[T]he master 'is considered as bound
its most obvious application in cases of fraud, deceit, and other misrepresentation, but neither Story nor the courts treated it as being limited to torts involving deception. Instead, it was invoked in a wide variety of contexts including assaults and cases of simple negligence. By the mid-nineteenth century, the warranty rationale had been invoked so frequently that courts described it as a "settled rule" that expressed "[t]he foundation of the rule [of] respondeat superior."
4. Liability Based on the Reciprocal Relationship Between Benefits and Liabilities

A fourth prominent nineteenth-century justification for respondeat superior was the concept that benefits and liabilities should be reciprocal, and thus that those who hope to profit from an activity must also bear its costs. Because employers expected to profit from their employees' work, it was fair for them to pay for their employees' torts "thus making the benefit and liability reciprocal." This precept was seen as a crucial logical foundation for respondeat superior; and an often-cited 1824 English case, Hall v. Smith, stated it succinctly: "The maxim of respondeat superior is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." American courts enthusiastically endorsed this rationale for respondeat superior; and, by 1875, there was "substantial agreement of judges [that Hall v. Smith accurately stated] the reason of the rule making masters liable for the acts of their servants." Thus, nineteenth-century lawyers and judges explained respondeat superior, not as an arbitrary historical artifact, but as the logical result of four underlying principles. This does not mean that nineteenth-century judges, any more than their contemporary counterparts, were always consistent or that their reasoning was always transparent. At times, their decisions emphasized one rationale rather than another.

105. Cardot v. Barney, 63 N.Y. 281, 287 (1875) ("[H]e who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it, thus making the benefit and liability reciprocal." (internal quotations omitted)); see also infra note 108. As discussed below, this concept continues to be accepted as a legitimate argument for respondeat superior. See infra text accompanying notes 108-09.
107. Id. at 267.
108. See, e.g., Huey v. Richardson, 2 Del. (2 Harr.) 206 (1837) (stating that respondeat superior is based on a principle that those who expect to benefit from servants' acts are liable for the injuries they cause); New Orleans, Jackson, & Great N. R.R. Co. v. Bailey, 40 Miss. 395 (1866) (explaining that because the law permits masters to reap the benefit of conducting their business through agents, it is justified in expecting them to pay the costs of their agents' torts); Cardot, 63 N.Y. at 281 (same); Hickock v. Trs. of the Vill. of Plattsburgh, 15 Barb. 427 (N.Y. Gen. Term 1853) (same); Cleveland, Columbus & Cincinnati R.R. Co. v. Keary, 3 Ohio St. 201, 208 (1854) (holding that loss should fall on those who selected the servant and "for whose benefit and advantage" the work was done); Sawyer v. Corse, 58 Va. (17 Gratt.) 230 (1867) (same); see also Fetter, supra note 78, at 88 (describing reciprocity between benefits and detriments as "the true reason" for the rule that notice to the servant is notice to the master). Most American courts were unwilling to extend Hall to its logical conclusion and refused to apply the rationale to hold employers liable for the torts of independent contractors. See, e.g., Kellogg v. Payne, 21 Iowa 575 (1866); Clark's Adm'x v. Hannibal & St. Joseph R.R. Co., 36 Mo. 202 (1865).
109. Cardot, 63 N.Y. at 287.
At times, they combined several. At the edges of the doctrine, the principles sometimes tugged in conflicting directions. But one cannot read the nineteenth-century cases without concluding that these four principles were understood to be the core justifications for respondeat superior and the crucial factors defining the doctrine's limits.

B. The Rationales for Respondeat Superior and the Sherman Amendment

The Forty-Second Congress's rejection of the Sherman Amendment was not merely consistent with the nineteenth-century rationales for respondeat superior; it was compelled by those rationales. The Sherman Amendment itself said nothing about a city's § 1983 liability for its employees' constitutional torts. Instead it would have added a separate section to the Ku Klux Act making cities liable for damages resulting, not from the conduct of their employees, but rather from racially motivated mob violence occurring within the cities' boundaries. Rejection of municipal liability for the actions of the Klan and similar organizations did not suggest that the members of

110. This was most apparent when the courts dealt with the torts of independent contractors because the reciprocity rationale (and arguably the warranty rationale) militated in favor of liability while the control and legal unity principles argued against it. See, e.g., Kellogg, 21 Iowa at 575 (rejecting liability); Clark's Adm'x, 36 Mo. at 202 (same).

111. The crucial rejected version of the Sherman Amendment (the First Conference Committee Substitute) provided in relevant part that cities, counties, and parishes would be liable for property damages or personal injuries suffered as a result of the actions of "any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude." Cong. Globe, 42d Cong., 1st Sess. 749 (1871). The Sherman Amendment actually went through three principal versions: As originally introduced, it would have effectively imposed individual personal liability for mob violence on each inhabitant of the city or county in which the violence occurred. Id. at 725. The language of the amendment that appears in the Globe, id. at 725, is the language of the amendment as it actually passed the Senate. Monell mistakenly quotes a slightly different preliminary version that Senator Sherman stated that he intended to introduce. Compare Monell v. Dep't of Soc. Servs., 436 U.S. 658, 702-03 (1978) (quoting Cong. Globe, 42d Cong., 1st Sess. at 663), with Cong. Globe, 42d Cong., 1st Sess. at 705, 707-08. The Senate promptly passed this original Sherman Amendment, Cong. Globe, 42d Cong., 1st Sess. at 705, 707, but it was just as promptly defeated without significant debate in the House. Id. at 725. The bill, as a whole, was then referred to the first conference committee, which produced the version that is discussed above. That first conference committee substitute also passed the Senate but was defeated in the House, and it is the version on which Monell focused. Finally, a second conference committee drafted a third version of the amendment that imposed liability only on persons having knowledge of the impending riot and the power to prevent it. Id. at 804. This final version was adopted by both houses and became law as section 6 of the Ku Klux Act. Civil Rights Act of 1871, Act of Apr. 20, 1871, ch. 22, § 6, 17 Stat. 13.
the Forty-Second Congress rejected the principles underlying respondeat superior; it demonstrated their fidelity to those principles.

The four fundamental nineteenth-century justifications for respondeat superior—the legal unity of master and servant, the belief that liability flowed from the power to control, the idea that masters implicitly warranted their employees' fitness, and the principle that liabilities and expected benefits should be reciprocal—all militated against municipal liability for Klan outrages. The city and the Klan were not a "single unity" and the actions of the Klan were not, "in the contemplation of the law," the actions of the city.\footnote{112. See supra note 77.} The city in which the Klan committed its depredations did not control the Klan's conduct. The city could neither be seen as having held out Klan marauders as trustworthy or as having warranted their good conduct. Because the city had not sought to benefit from the Klan's actions, there was no reciprocity justification for holding the city liable for the Klan's misdeeds.

As a result, rejection of the Sherman Amendment does not imply that Congress rejected the four rationales for respondeat superior. Instead, belief in those rationales—belief that vicarious liability should be based on the defendant's power to control the direct tortfeasor, or on the legal unity between the tortfeasor and his employer, or on the master's implied warranty of the servant's fitness, or on the need for reciprocity between benefits and responsibility—would logically lead nineteenth-century lawyer-legislators to vote against the Sherman Amendment and in favor of municipal respondeat superior. Each of those rationales supported respondeat superior, but not one of them supported the Sherman Amendment.

C. The Monell Court's Supposed Rationales for Respondeat Superior

To conclude that Congress's rejection of the Sherman Amendment implied a similar rejection of respondeat superior, \textit{Monell} ignored three of the rationales (the legal unity, warranty, and reciprocity rationales) and unjustifiably discarded the fourth (the control rationale) on the anachronistic basis that mid-twentieth-century commentators considered it inadequate. Instead of dealing with the actual nineteenth-century rationales for the doctrine, \textit{Monell} assumed that there were only two significant\footnote{113. The Court does not explicitly claim that these are the only two justifications—it merely says that they "stand out"—but it treats them as the only ones that need to be discussed. \textit{Monell}, 436 U.S. at 693.} justifications for the doctrine: community-wide loss spreading and loss prevention. It then argued that Congress had rejected both as justifications for the Sherman Amendment and therefore implicitly rejected the only possible justifications for respondeat superior.
The structural flaw in this argument is apparent from the previous discussion. Even if loss spreading and loss prevention had been important nineteenth-century justifications for respondeat superior—and, in fact, neither was—they were not the only or most significant justifications. As a result, even if Congress had concluded that those two justifications were inadequate to justify adopting the Sherman Amendment, that conclusion would not even suggest that Congress had rejected respondeat superior, since the four dominant nineteenth-century rationales (legal unity, control, warranty, and reciprocity) supported respondeat superior while militating against the Sherman Amendment. But even without the structural flaw, the Court's discussion of mutual insurance and loss spreading fails to support its rejection of respondeat superior.

1. The Supposed Community-Wide Loss-Spreading Rationale

The Monell Court's reliance on Congress's rejection of the community-wide loss-spreading or "mutual insurance" rationale for the Sherman Amendment suffers from an additional independent and insuperable flaw: It is based on the false assumption that community-wide loss spreading was a nineteenth-century rationale for respondeat superior. It was not. The author has reviewed hundreds of nineteenth-century cases discussing respondeat superior and has been unable to find a single decision justifying the doctrine on the basis that employer liability would spread the costs of torts to the community as a whole. The Monell Court has mistakenly conflated mutual insurance with the fundamentally different concept of reciprocity.

The opinion contends that a commonly suggested rationale for respondeat superior is that "the cost of accidents [or constitutional wrongs] should be spread to the community as a whole."

The opinion argues that this justification was advanced by Sherman Amendment proponents, who described it as providing "mutual insurance," but was deemed an insufficient justification by the House majority. As a result, the Court concluded that Congress would not have considered the mutual insurance rationale an adequate justification for respondeat superior.

However, a comparison of the actual nineteenth-century reciprocity justification for respondeat superior and the "mutual insurance" arguments made by proponents of the Sherman Amendment demonstrates that Justice Brennan mixed apples and oranges. Congress may have rejected community-wide loss sharing as a justification for the Sherman Amendment, but community-wide loss

114. Id. at 693-94.
sharing is neither the effect of respondeat superior nor the nineteenth-century justification for it.\textsuperscript{115}

Respondeat superior shifts the costs of employee negligence, not to the community as a whole (as \textit{Monell} suggested), but to the various beneficiaries of the enterprises that profit from the tortfeasing employees’ efforts.\textsuperscript{116} Thus, the employer who will reap the benefit of good work by an employee must also bear the burden of any damages the employee unexpectedly inflicts. Just as the employer shifts some of any benefits to various constituencies of the enterprise (shareholders, officers, employees, customers),\textsuperscript{117} the employer will shift some of the costs. This internalization of both unexpected costs and unexpected benefits is a sound economic justification for the reciprocity rationale’s dictate that those who benefit from an activity must bear its costs as well.

The concept that “benefit and liability [should be] reciprocal”\textsuperscript{118} is fundamentally different from the rationale for community-wide

\textsuperscript{115}. The improbability of Justice Brennan’s argument that Congress was opposed to anything that could, in any sense, be called “insurance” is demonstrated by the fact that mutual insurance justifications were offered not just for the versions of the Sherman Amendment that Congress rejected but also for the final version that Congress approved. After the House rejected the original and first conference committee versions of the Sherman Amendment, a second conference committee drafted a version that imposed liability on all persons “having knowledge” that the riot was going to occur and “power to prevent or aid in preventing the same.” Cong. Globe, 42d Cong., 1st Sess. at 804. This version, like the earlier one, was defended by its proponents as “mutual insurance.” Senator George Edmunds, the Senate manager of the bill, stated that the final version of the bill would make each person with knowledge of an impending outrage a “mutual insurer for [his or her] neighbor.” \textit{Id.} at 824-25. Yet, despite this insurance effect, the final version easily passed both the House and Senate. Contrary to Justice Brennan’s belief, the House did not reject insurance for riot victims across the board—only the particular type of community wide mutual insurance embodied in the first conference committee version of the Sherman Amendment.

\textsuperscript{116}. The authorities on which Justice Brennan relies make this point clearly. Harper & James, \textit{supra} note 91, § 26.5 (explaining that respondeat superior “tends to provide reasonable assurance that, like other costs, accident losses will be broadly and equitably distributed among the beneficiaries of the enterprises that entail them”) (emphasis added); Prosser, \textit{supra} note 56, at 459 (stating that under respondeat superior, the employer shifts the costs of accidents “through prices, rates or liability insurance”); see also Harper, \textit{supra} note 94, § 291 (stating that the rulemaking employer liable for his employees’ torts “is based primarily upon the social policy of putting the burden of an enterprise upon him for whose immediate benefit the project is being carried out and such person’s superior ability to administer the risk”). Of course, no man is an island, and shifting costs to an enterprise may have some tangential impact on any member of the community. But this impact is only stochastically affected by the existence or non-existence of respondeat superior, or even by the underlying liability rule. A community member who is not connected to the employer may be hurt as easily by the fact that the plaintiff suffers an uncompensated loss as by the fact that the tortfeasor’s employer pays for its employee’s wrong.

\textsuperscript{117}. 5 Fowler Harper et al., \textit{The Law of Torts} § 26.5 n.15 (2d ed. 1986).

\textsuperscript{118}. Cardot v. Barney, 63 N.Y. 281, 287 (1875).
mutual insurance against wrongdoing, and rejection of the latter does not imply rejection of the former. Social insurance against wrongdoing could—and some have argued should—be created by legislation, but it is not what exists under respondeat superior. It is one thing to argue that, because a city (like any other employer) benefits from its employees' work, it should bear the costs of those employees' misdeeds; it is quite another to argue that a city should pay for damage created by rioters, who were not in any sense working for the municipality's benefit. Rejection of the latter does not imply rejection of the former. As a result, a nineteenth-century commentator such as Judge John Dillon could entirely consistently state that a "municipal corporation is not an insurer against accidents upon the streets and sidewalks," while at the same time recognizing that cities were liable under respondeat superior for the malfeasance of their own employees.

Yet it was a mutual insurance argument—the argument that the costs should be "spread to the community as a whole"—rather than a reciprocity argument that was made to justify the Sherman Amendment. An analysis of the "insurance" rationale advanced by the amendment's proponents demonstrates that they were arguing for community-wide loss sharing rather than for enterprise liability. Congress's rejection of their arguments may indicate something about Congress's view of the wisdom of social insurance for mob-inflicted harms, but it tells us nothing about Congress's view of the reciprocity rationale for respondeat superior.

Representative Benjamin Butler, the sole source cited by Justice Brennan for the insurance rationale for the Sherman Amendment,
explicitly treated the amendment as a form of mutual insurance through which the entire community—not just the enterprise that employed the wrongdoers or the persons who benefited from their conduct—would share the costs of Ku Klux Klan depredations.

We will not say to the man who has suffered the loss, "You shall bear our losses alone;" but we will stand up manfully, put our hands in our pockets, and pay our share of the loss, in order to make good his damage; we will bear equally with him the burden and the wrong.125

Butler's speech responded to an attack on the amendment by Representative Michael Kerr,126 who had argued that it punished cities even though they had no notice or opportunity to prevent the riot.127 Butler made it clear that he considered that objection entirely beside the point because his mutual insurance justification for the Sherman Amendment128 was a form of community risk-sharing rather than an effort to shift costs to entities that were somehow responsible for the wrong.

The difficulty in the argument—altogether on the other side—has been that this has been treated as if it were a punitive section only. It is not. It is an insurance section. It insures the citizen the protection of the laws; and the considerations as to the want of power to punish or the want of power to interfere with crimes in the States nowhere applies to this section.129

Butler explained that Massachusetts's riot act, like the Sherman Amendment (but unlike the riot acts of several other states), did not require notice, and he concluded with a crystal clear call for community-wide risk sharing: "And I desire now only to say to other communities precisely what we [in Massachusetts] say to our own communities, 'Bear ye one another's burdens.'"130 Thus, the community was to share the "burden and the wrong,"131 not because the wrongdoer was the community's legal alter ego or acted for its

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125. Id. at 792.
126. Representative Kerr of Indiana had served as a Democratic member of the select committee that drafted H.R. 320 and was the principal spokesperson for the committee minority that opposed the bill. See id. at 249; id. app. 46-50. Butler was a Republican member of the committee. See id. at 249.
127. Id. at 792. For Kerr's comments to this effect, see id at 788. Kerr's argument rests on the same basis as the control rationale for respondeat superior—that a defendant's lack of the ability to control the wrongdoer is a powerful argument against liability for the wrongdoer's actions.
128. Mutual insurance was not Butler's only argument for the amendment. See supra note 123; see also Cong. Globe, 42d Cong., 1st Sess. at 792.
130. Id.
131. Id.
benefit or was under its control, but rather, because it was unfair that one community member should have to singlehandedly bear the entire loss, regardless of who was responsible for the wrong. Thus, if Congress rejected the Sherman Amendment proponent's mutual insurance arguments, it rejected something quite different from the rationales for respondeat superior.

2. The Supposed Loss-Prevention Rationale

*Monell* also identified what might be described as a "loss-prevention" rationale for respondeat superior—"the common-sense notion that no matter how blameless an employer appears to be in an individual case, accidents [or constitutional wrongs] might nonetheless be reduced if employers had to bear the cost of accidents." The Court then claimed that the defeat of the Sherman Amendment necessarily meant that Congress would have found this rationale inadequate to sustain municipal respondeat superior. *Monell*'s basis for this conclusion is somewhat unclear but it seems to rest on two related arguments: that the Forty-Second Congress would have considered this rationale constitutionally objectionable and that it

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132. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 693 (1978). If Justice Brennan meant to assert that nineteenth-century courts shared this "common sense notion," he was probably mistaken. *See*, e.g., New Orleans, Jackson, & Great N. R.R. Co. v. Bailey, 40 Miss. 395 (1866) (upholding respondeat superior liability despite argument that nothing the employer could have done would have reduced the likelihood of accidents). The author has been unable to find a single case that justified respondeat superior on the basis that the number of accidents would be reduced by holding blameless employers liable. This is not surprising: Such a justification would have been inconsistent with the legal unity rationale because the wrongful acts of the servant were considered to be the acts of the employer. In fact, it appears that nineteenth-century courts rarely mentioned loss prevention of any sort as a justification for respondeat superior. *But see* Mobile & Ohio R.R. v. Thomas, 42 Ala. 672 (1868) (explaining that respondeat superior serves to protect the public and fellow servant doctrine serves that end by giving employees incentives to prevent negligence by their colleagues). When they did so, it was most commonly in the context of saying that respondeat superior was based on the employer's power to control employees. *See*, e.g., Boswell v. Laird, 8 Cal. 469 (1857) (describing how respondeat superior is based on the power of control that the master is bound to exercise for the safety of the public); Palmer v. City of Lincoln, 5 Neb. 136 (1876) (same); Clark v. Fry, 8 Ohio St. 358 (1858) (same). As odd as it may seem to modern readers, more used to economic and consequentialist arguments, the nineteenth-century courts appeared more influenced by the fairness and distributional concerns embodied in the four rationales discussed in Part II.A. *See*, e.g., *Bailey*, 40 Miss. at 395 (stating that, even if it is positively certain that accidents will occur, it is fairer that the master bear the cost than a stranger); Reynolds v. Witte, 13 S.C. 5 (1880) (finding that if someone must lose from an employee's misconduct, it is fairer that the loss fall on the employer than on a third party). The effect on the overall rate of accidents appears to have been far less of a factor.

133. Monell, 436 U.S. at 694 (stating that the loss-prevention justification "was obviously insufficient to sustain the amendment against perceived constitutional difficulties and there is no reason to suppose that a more general liability imposed for a similar reason would have been thought less constitutionally objectionable").
would have considered it an inadequate policy justification. Neither of these arguments is sound.

The Court’s first argument—that the Forty-Second Congress would have found the Sherman Amendment and respondeat superior equally constitutionally objectionable—has been thoroughly refuted by other scholars, and their analysis will not be repeated here. Suffice it to say that the principal constitutional objections to the Sherman Amendment were based on the fear that, by making cities liable for failure to prevent Klan violence, the amendment would compel local governments to create police forces or to assign peacekeeping functions to existing officials. In the 1870s, this was considered constitutionally questionable under the then-prevalent dual sovereignty doctrine that was understood to forbid the federal government from assigning federal tasks to state or local governments or their officials. However, municipal respondeat superior liability for wrongs committed by a city’s existing employees while performing municipally assigned tasks was not subject to those perceived constitutional difficulties. The Monell Court implicitly conceded this point itself when it recognized that the opponents of the Sherman Amendment did not object to imposing liability on a municipality that exercised its state-created authority in a way that violated the Federal Constitution.

The Court may also have been suggesting that the Forty-Second Congress would have thought that loss prevention was an insufficient policy reason to adopt respondeat superior. The Court seems to suggest that, because the loss-prevention rationale was not sufficiently persuasive to convince Congress to adopt “the only form of vicarious liability presented to it” (the Sherman Amendment), the rationale would necessarily have been seen as insufficient to justify municipal respondeat superior. But, for two reasons, this argument also fails.

First, as previously discussed, even if Congress thought that the possibility of loss prevention was inadequate to justify adopting the

\[\text{134. Id. at 692 n.57, 694.}\]
\[\text{136. Kramer & Sykes, supra note 135, at 258 & n.36.}\]
\[\text{137. The dual sovereignty doctrine was derived from cases such as Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), and Collector v. Day, 78 U.S. (11 Wall.) 113 (1870).}\]
\[\text{138. Rothfeld, supra note 79, at 945-46.}\]
\[\text{139. Monell, 436 U.S. at 679-82.}\]
\[\text{140. Id. at 692 n.57.}\]
\[\text{141. See supra Part II.B.}\]
Sherman Amendment, that conclusion would tell us nothing about whether Congress had rejected respondeat superior, a doctrine that was justified by four independent rationales (legal unity, control, warranty, and reciprocity) that militated against the Sherman Amendment. Second, a decision maker’s rejection of a drastic means to accomplish a particular goal does not suggest that it thought the goal was unimportant. A legislature’s decision not to impose the death penalty hardly suggests that the legislators considered deterrence of murder an unworthy goal, and no rational court would interpret the rest of the state’s penal code on the assumption that it did. It is equally irrational to use Congress’s rejection of the Sherman Amendment’s extreme form of vicarious liability as a reason to conclude that Congress was unwilling to use less drastic forms of vicarious liability to prevent constitutional wrongs.

State law analogs demonstrate that it is not at all unusual for a legislature to reject new forms of vicarious liability without rejecting accident prevention as a goal or respondeat superior as a means to that goal. Supporters of dram shop acts frequently argue that, by imposing liability on tavern owners for torts committed by those to whom they serve liquor, the legislation will reduce the number of alcohol-related injuries. But the rejection of dram shop legislation has not been interpreted to suggest that the legislature was not concerned about preventing alcohol abuse or that it objected to victims’ respondeat superior suits against drunk drivers’ employers. Similarly, a legislature’s refusal to abrogate the common law rule that parents are not generally liable for the torts of their minor children does not mean that it believes that preventing such torts is unimportant or that it thinks that the victims should be barred from suing minors’ employers.

142. Correctly or incorrectly, the legislators may believe that the death penalty provides no marginal deterrence, that its costs outweigh its benefits, that its finality makes it too risky, or that it is inherently immoral.

143. See, e.g., Thies v. Cooper, 753 P.2d 1280, 1285 (Kan. 1988) (recognizing that Kansas had not adopted a dram shop act but also recognizing that employers are liable for the acts of drunk driving employees while they are acting in the course and scope of employment).

144. See Strong v. Riggs, 21 S.W.3d 12, 21 (Mo. 2000) (recognizing that parents are not liable for the torts of their children but also recognizing that the child’s employer would be liable). There were many nineteenth-century expressions of the same principle. See, e.g., Wilson v. Garrard, 59 Ill. 51, 51 (1871) (“A father is not liable for the torts of his children, committed without his knowledge or consent, and not in the course of his employ.”); Teagarden v. McLaughlin, 86 Ind. 476, 478 (1882) (same); Edwards v. Crume, 13 Kan. 348, 350 (1874) (holding that the father is not liable for his son’s torts where they “had no connection with [the] father’s business, were not ratified by him, [and conferred] no benefit on him”); Lashbrook v. Patten, 62 Ky. (1 Duv.) 317, 318 (1864) (same); Maddox v. Brown, 71 Me. 432, 434 (1880) (holding that a parent was not liable for his son’s tort where no master-servant relationship existed); Strohl v. Levan, 39 Pa. 177, 185 (1861) (holding father liable for the tort of his son where they were in master-servant relationship); Schaefer v. Osterbrink, 30 N.W. 922,
Thus, Monell's legislative history argument fails to justify the Court's repudiation of municipal respondeat superior. The rejection of the Sherman Amendment did not signify that Congress had rejected the only persuasive bases for vicarious employer liability. In fact, for nineteenth-century lawyers such as those in the Forty-Second Congress, the most familiar justifications for respondeat superior—the legal identity, control, reciprocity, and warranty rationales—were powerful arguments against the type of liability created by the Sherman Amendment. If the rejection of that amendment demonstrates anything, it demonstrates the Forty-Second Congress's fidelity to the principles underlying respondeat superior: that master and servant should be treated as a legal unity, that legal liability follows from the power to control employees' conduct, that those who benefit from an employees' work should pay for employees' torts, and that those who hold out an employee as being competent and trustworthy should be deemed to have warranted the employee's good conduct.

D. An Aside on the Sherman Amendment Opponents' Principal Arguments

Monell's analysis of the reasons for rejection of the Sherman Amendment is problematic in another respect: It focuses on supposed reasons for rejection of arguments for the amendment instead of looking at the opponents' actual arguments against the amendment. The principal arguments actually made by the opponents of the Sherman Amendment demonstrate why opposition to that amendment was entirely consistent with support for respondeat superior. The opponents repeatedly stressed two related problems with Sherman Amendment liability: Under the amendment, a city could be held liable even though it had no notice of the impending depredations and even though it had done nothing to cause, and everything in its power to prevent, those depredations. These arguments were pertinent to the Sherman Amendment—but utterly inapplicable to § 1983—because of the recognized distinction between liability for nonfeasance (the type of liability that would have been created by the Sherman Amendment) and liability for malfeasance.


145. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 770, 773 (1871) (Senator Thurman); *id.* at 762 (Senator Stevenson); *id.* at 788 (Representative Kerr).

146. *See, e.g.*, *id.* at 762 (Senator Stevenson); *id.* at 770-71 (Senator Thurman); *id.* at 765 (Senator Casserly arguing that the amendment would be unfair in sparsely settled areas where there were not enough police to prevent riots); *id.* at 788 (Representative Kerr); *id.* at 791 (Representative Willard).
Both nineteenth-century and contemporary municipal tort law distinguish between nonfeasance on the one hand and malfeasance on the other (that is, between passive and active negligence). When a city's fault consists of its failure to correct a condition created by others or by natural causes (for example, failure to repair a crack in a sidewalk), the city's negligence is considered "passive" (nonfeasance), and liability accrues only if the city had actual or constructive notice of the condition. On the other hand, if the city's employees themselves created the condition (for example, if they cracked the sidewalk while removing a tree stump), no further notice is required because the city employees' knowledge of their own conduct is sufficient. Notice is treated as a prerequisite for suits based on nonfeasance but not for suits based on malfeasance, and this rule was at least as well-established in the nineteenth century as it is today. Thus, under then-prevailing tort doctrine, suits for the type

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147. Some nineteenth-century sources made a tripartite distinction between malfeasance, misfeasance, and nonfeasance. See, e.g., Bell v. Josselyn, 69 Mass. (3 Gray) 309, 311 (1855) ("Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all."). However, in the contexts discussed in this Article, misfeasance and malfeasance were treated the same in the nineteenth century, and the two terms will be used interchangeably.


150. See 19 McQuillin, supra note 148, § 54:181. Like respondeat superior itself, this rule was based on the unity and reciprocity rationales. Nineteenth-century writers explained that notice to the employee was constructive notice to the master because of their "legal identity" and because the master had "avail[ed] himself of the benefits" of the agent's work and therefore should be responsible for the agent's knowledge. Fetter, supra note 78, at 88.


152. See, e.g., 2 Dillon, supra note 120, § 789, at 918 (stating that no notice is required when defect is caused by the misfeasance of the city or its officers or servants); see also, e.g., City of Chicago v. Brophy, 79 Ill. 277, 280 (1875) (holding that no notice is required where city employees created the dangerous condition while doing street work); Mayor of Balt. v. O'Donnell, 53 Md. 110 (1880) (holding that city was properly held liable even though it had no notice when dangerous condition was created by employee of its contractor); Burditt v. Town of Winchester, 91 N.E. 880, 881 (Mass. 1910) (stating that where employees cause defective conditions, town is deemed to have "notice by its servants and agents"); Hinckley v. Inhabitants of Somerset, 14 N.E. 166, 170 (Mass. 1887) ("'There is no occasion to prove actual notice to a city or town of its own acts, or acts which are constructively its own.'" (quoting Monies v. Lynn, 119 Mass. 273, 275 (1876))); Brooks v. Inhabitants of Somerville, 106 Mass. 271 (1871) (holding that no notice need be given when injury-causing road defect was caused by town's contractor since acts of a town's servants or agents should be treated as acts of the town itself); Russell v. Inhabitants of Columbia, 74 Mo. 480 (1881) (explaining that where injury-causing defect is the result of the acts of a third party, the city is not liable until it has actual or constructive notice, but where the defect is the result of the city's employee's actions, the city is liable without further
of conduct for which § 1983 provided relief—misfeasance by a municipal employee—required no further notice to the municipality.

Similarly, the second argument (that the Sherman Amendment could make a city liable even though it had not caused the harm or could not have prevented it) can be properly understood only in light of nineteenth-century limitations on municipal liability for nonfeasance. The argument of Representative Michael Kerr, the conference committee’s Democratic House member, is representative. Kerr argued that the Sherman Amendment would be an unjustified effort to punish a county for failure to prevent harms resulting from the acts of unrelated third persons. However, Kerr recognized that a number of states did have similar statutes creating liability for nonfeasance and specifically referred to statutorily created municipal liability for failures to keep up the public highways, failures to keep the bridges of the county in good repair, or failures of cities to keep their streets in safe condition, or failures to protect the people against mobs, against open, numerous, riotous, tumultuous uprisings of the people, leading to the destruction of property.

Kerr then explained that these state statutes could be justified because the covered offenses’ public nature put the county on notice and gave it an opportunity to prevent the harms. On the other
hand, Kerr complained, the Sherman Amendment made the county liable for nonfeasance without any such notice.

It is not required to be proved [under the Sherman Amendment] that there was any previous indication of the purpose of these wrong-doers, or that there were any rioters roaming over the country, or through the community, that could put any portion whatever of the people upon notice or even upon inquiry.\textsuperscript{156}

Kerr’s choice of examples is revealing because road and bridge cases were the prototypical decisions explaining the distinction between malfeasance and nonfeasance and establishing that notice was needed only in suits alleging the latter.\textsuperscript{157} By using those examples, Kerr was referring to a body of law that was well known to his many lawyer colleagues in the House.\textsuperscript{158} That body of law provided a powerful argument against the Sherman Amendment because it taught that a city should not be held liable for the harms caused by the wrongful acts of others unless it had notice in time to prevent the harms.\textsuperscript{159} But that same body of law supported respondeat superior liability, consistently holding that a city would be liable without further notice if the harm had been caused by “\textit{positive misfeasance} [by the municipal] corporation, its officers, or \textit{servants}, or by others under its authority.”\textsuperscript{160} The road and bridge cases regularly treated conduct by city employees as the city’s own conduct, and they did so even though the employees—usually street repair workers or at most foremen—were ones who could never be considered policymakers under \textit{Monell}.\textsuperscript{161}

\begin{footnotesize}
\begin{itemize}
\item[156.] \textit{Id.}
\item[157.] \textit{See supra} note 152.
\item[158.] Because that body of law provided one of the closest analogies to the Sherman Amendment, it is not surprising that references to municipal liability in road and bridge cases were sprinkled throughout the debates. \textit{See, e.g.}, Cong. Globe, 42d Cong., 1st Sess. at 792 (exchange between Representatives Willard and Butler).
\item[159.] \textit{See, e.g.}, 2 Dillon, \textit{supra} note 120, § 789, at 918 (explaining that where the liability of the city is based on its failure to protect its citizens against dangers created by others, the plaintiff must show notice to the city).
\item[160.] 2 Dillon, \textit{supra} note 120, § 789, at 918 (second emphasis added).
\item[161.] \textit{See, e.g.}, Monies v. City of Lynn, 119 Mass. 273, 274-75 (1876) (stating that the negligence of a city's street repair employees is the negligence of the city itself); Brooks v. Inhabitants of Somerville, 106 Mass. 271, 274 (1871) (holding that no notice need be given to a town of its servants' conduct because there is no need to notify a defendant of its "own acts"); 2 Dillon, \textit{supra} note 120, § 789, at 911-19 (treating misfeasance of city's servants as equivalent to misfeasance by the city itself or its officers). A number of cases extended this principle beyond respondeat superior and made the city liable for action of its independent contractor's employees. \textit{2 Id.} §§ 791-93, at 922-25.
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Senator Frederick Frelinghuysen's criticism of the Sherman Amendment is also based on the distinction between nonfeasance and malfeasance. Frelinghuysen argued that the Sherman Amendment was improper because it made municipalities liable even though they had committed no wrong. He explained that, if the principle of the Sherman Amendment were accepted, the federal government "would to-day be liable to make compensation for all the damages that have resulted from the rebellion in the southern country" because it had not prevented the Civil War. Thus, like Kerr, Frelinghuysen objected to the Sherman Amendment because it made a city liable for nonfeasance—for failure to prevent harms resulting from the acts of others—an objection that casts no doubt on his willingness to recognize municipal respondeat superior liability for harms inflicted by the city's own employees.

Thus, the arguments of the opponents of the Sherman Amendment cannot reasonably be seen as indicating a congressional rejection of respondeat superior or as supporting Monell's idiosyncratic limitations on municipal liability. Instead, the debates demonstrate that Congress rejected the Sherman Amendment because it violated a well-established body of existing law that limited municipal liability for nonfeasance while recognizing municipal respondeat superior for

162. An isolated quote from Senator Frelinghuysen is the sole basis for Justice Brennan's claim that the rationale for the Sherman Amendment was loss prevention. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) (quoting Frelinghuysen as stating that "[t]he obligation to make compensation for injury resulting from riot is, by arbitrary enactment of statutes, affirmatory law, and the reason of passing the statute is to secure a more perfect police regulation") (emphasis added). This reliance is misplaced for three reasons. First, Frelinghuysen was an opponent of the Sherman Amendment and thus is an unlikely source to cite for the rationales that the proponents offered for it. Second, it is far from clear that the phrase "to secure a more perfect police regulation," even taken in isolation, refers to loss prevention. Third, as discussed in the text, a review of the full context of Frelinghuysen's speech makes it clear that his objection to the statute was not that loss prevention was an inadequate justification, but rather that the amendment would impose an unjust liability for nonfeasance. Senator Frederick Frelinghuysen opposed the Sherman Amendment but favored the Ku Klux Act as a whole including section one of the Act—the section that is now codified as 42 U.S.C. § 1983. He also played an important but only recently recognized role in the drafting of that section. Although Representative Samuel Shellabarger is usually credited as the author of the entire act, section one was actually taken from an earlier bill drafted by Frelinghuysen. S. 243, 42d Cong. § 1 (1871). For a more detailed discussion, see David Achtenberg, A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law, 1999 Utah L. Rev. 1, 48-51.

163. Cong. Globe, 42d Cong., 1st Sess. at 777. One sentence of Frelinghuysen's speech, if taken out of context, seems to suggest that he thought that cities can never be sued for damages. "Why, sir,... a town, or a county is under no possible obligation to make compensation for damages." Id. However, it is clear from the immediately following paragraph that he meant that cities had no obligation, absent a statute, to pay damages for failure to keep the peace—not that they never could be sued for damages for misfeasance by their own employees. Id.

164. Id.
city employees' misfeasance, that is, for the type of conduct covered by § 1983.

III. NINETEENTH-CENTURY COMMON LAW AND MUNICIPAL RESPONDEAT SUPERIOR

Rejection of the Sherman Amendment shows Congress's fidelity to the underlying rationales for respondeat superior but does not, by itself, show that the Monell doctrine is inconsistent with the legislative will. In order to implement the Forty-Second Congress's will the Court must look farther: It must try to determine whether, and to what extent, those rationales led nineteenth-century courts to apply respondeat superior to cities as well as to private employers. This approach is consistent with a line of cases in which the Supreme Court has used the common law, as it existed in 1871, as a guide to the meaning of § 1983. In those cases, the Court treats the common law as a set of background understandings that are presumptively incorporated into § 1983 unless there is a convincing reason not to do so.

165. This Article takes as a given that the proper goal of statutory interpretation is to implement the will of the legislature. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (stating that the Court must give "effect to the will of the Legislature"). This is far from a universally accepted proposition and many argue that the Court should worry less about the goals of the enacting Congress and more about the Court's own views about "consideration[s] of policy and practicality." John C. Jeffries Jr., Disaggregating Constitutional Torts, 110 Yale L.J. 259, 259-62 (2000); see also Jack M. Beermann, A Critical Approach to Section 1983 with Special Attention to Sources of Law, 42 Stan. L. Rev. 51, 84-101 (1989); id. at 56-57 & nn.36-41 (collecting sources). The author has previously argued that such an approach could be justified only if the Forty-Second Congress intended to delegate such lawmaking authority to the Court and that the "history of the relationship between Congress and the Court during Reconstruction makes it exceptionally unlikely that the Forty-Second Congress would have given the Court such unchecked power." Achtenberg, supra note 69, at 531-35. Even if one believes that the Court often uses statements about § 1983's legislative history as a mask for its own policy decisions, a more accurate understanding of that history should make such a subterfuge more difficult.

166. See, e.g., Will v. Mich. State Dep't of Police, 491 U.S. 58, 67 (1989) (stating that because the Forty-Second Congress was familiar with existing common law principles, the Court assumes it intended those principles to apply absent evidence to the contrary); Briscoe v. LaHue, 460 U.S. 325, 336 (1983) (same); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981) (same). The Court has not always limited itself to the common law as of the date of enactment and instead has sometimes incorporated subsequent common law developments. See, e.g., Smith v. Wade, 461 U.S. 30, 34 (1983) (stating that the Court can resolve interpretative issues by considering modern as well as nineteenth-century common law). As discussed in Part I.B, modern case law does apply respondeat superior to municipalities and thus does not support Monell. See supra notes 51-52 and accompanying text. For a discussion of three inconsistent ways the Court has used the common law to interpret § 1983, see Achtenberg, supra note 69, at 511-28 (identifying a "Golden Rule Approach," a "Static Incorporation Approach," and a "Dynamic Incorporation Approach").
In his dissent in *City of Oklahoma City v. Tuttle*, Justice Stevens invoked this approach to argue that respondeat superior should be applied to municipal defendants in § 1983 cases. Stevens argued that, in 1871, respondeat superior was a well-established common law doctrine that was routinely applied to hold both private and municipal corporations liable for the torts of their employees. Because the members of the Forty-Second Congress were well-versed in the common law of their time, Justice Stevens argued, they would have expected courts to apply respondeat superior to decide municipal liability issues under § 1983. Justice Rehnquist's majority opinion disagreed with this broad characterization of the nineteenth-century common law of municipal liability, noting that “certain rather complicated municipal tort immunities existed at the time § 1983 was enacted,” and suggesting that these immunities at least muddied the background understanding and cast doubt on Congress's intentions.

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168. Id. at 835-41.
169. Id. at 835-38.
170. Id. Many commentators have agreed with this conclusion. See, e.g., Mead, supra note 135, at 526-27; Rothfeld, supra note 79, 956-61. But see Kramer & Sykes, supra note 135, at 249 (recognizing nineteenth-century prevalence of municipal respondeat superior but arguing that it was mitigated by the governmental proprietary distinction and proposing that the Court should turn to economic analysis instead); Harold S. Lewis Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. Pa. L. Rev. 755, 766 n.51 (1992) (same, but proposing a modified form of respondeat superior under § 1983 instead).
172. Unfortunately, Justice Rehnquist made no effort to explain how the existence of these immunities would justify elimination of respondeat superior or the creation of the idiosyncratic standard created by *Monell* and its progeny. This Article attempts to fill this gap by explaining how the governmental-proprietary distinction does somewhat undermine the argument for municipal respondeat superior and by showing how the nineteenth-century public officer doctrine might justify something similar to the *Monell* doctrine. See infra Parts III.B, IV.A. Justice Rehnquist does refer to one nineteenth-century case, *Thayer v. Boston*, 36 Mass. (19 Pick.) 511 (1837), and suggests that it “seems in harmony” with the *Monell* doctrine. Tuttle, 471 U.S. at 819 n.5. *Thayer*, like a number of other early nineteenth-century cases, stated that cities were not liable for the unauthorized and unlawful acts of their “officers [unless it appeared] that they were expressly authorized to do the acts, by the city government, or that they were done bona fide in pursuance of a general authority to act for the city, on the subject to which they relate.” Id. (quoting *Thayer*, 36 Mass. (19 Pick.) at 516-17). However, these cases did not represent any *Monell*-like limitation on municipal respondeat superior. Instead, they represented an early and restrictive interpretation of the general “course and scope” of employment requirement—an interpretation that was a minority view even at the beginning of the nineteenth century and soon became even less representative. Rothfeld, supra note 79, at 957-59 n.100. The author shared Justice Rehnquist's misunderstanding of *Thayer* and made a similar—and equally mistaken—suggestion in a brief submitted to the Court five years before *Tuttle* was decided. Brief for Petitioner at 15 n.3. Owen v. City of Independence, 445 U.S. 622 (1980) (No. 78-1779)). However, as Justice Frankfurter long ago warned, “Wisdom too often never comes, and so one ought not to reject it merely because it
But the nineteenth-century legal stream was neither as clear nor as murky as the two Justices argued. Justice Stevens was undoubtedly correct that late nineteenth-century courts routinely used respondeat superior to hold municipal corporations liable for the wrongs of their employees. The Ohio Supreme Court forcefully expressed the prevailing view as follows: "We have again and again affirmed, that the liabilities of corporations, private and municipal, are no less extensive; and that the maxim, respondeat superior, properly applies to them, in the same manner, and to the same extent, as in its application to the liabilities of private individuals." The Ohio court's treatment of municipal respondeat superior as well-settled law was fully supported by numerous cases holding municipalities liable for their employees' torts. As one Louisiana court put it: "The liability of municipal corporations for the acts of their agent is, as a general rule, too well settled at this day to be seriously questioned."

On the other hand, Justice Rehnquist was also correct: There were two strands of nineteenth-century cases that did sometimes reject municipal liability for torts committed by individuals on the public payroll. Justice Rehnquist identifies these immunities only by referring his readers to segments of the majority and dissenting opinions in Owen v. City of Independence. Those segments discuss two lines of authorities: cases distinguishing between so-called "governmental" and "proprietary" acts, and ones distinguishing between "discretionary" and "ministerial" functions. However,

173. City of Dayton v. Pease, 4 Ohio St. 80, 95 (1854).
174. See Rothfeld, supra note 79, at 957-59 n.100 (citing numerous nineteenth-century authorities); see also Dwight Arven Jones, A Treatise on the Negligence of Municipal Corporations § 161, at 312 (1892) (describing the application of respondeat superior to municipal corporations as "thoroughly well settled"); 2 Story, supra note 78, § 308 (stating that, at least in suits arising out of public works projects, "the maxim respondeat superior, properly applies [to municipal corporations], in the same manner and to the same extent as in its application to the liabilities of private individuals"); Waterman L. Williams, The Liability of Municipal Corporations for Torts 26 (1901) (stating that "the maxim of respondeat superior applies to [municipal corporations] in the same manner and to the same extent as in the case of private individuals").
175. Johnson v. Municipality No. One, 5 La. Ann. 100, 100 (1850); see also Cummins v. City of Seymour, 79 Ind. 491, 493 (1881).
176. Tuttle, 471 U.S. at 819 n.5 (relying on Owen, 445 U.S. at 644-50); Owen, 445 U.S. at 676-79 (Powell, J., dissenting).
177. Owen, 445 U.S. at 644-48; id. at 676-77 & n.16 (Powell, J., dissenting); see infra Part III.B.
178. Owen, 445 U.S. at 648-50; id. at 677-78 (Powell, J., dissenting); see infra Part III.B.
viewed from a nineteenth-century perspective, neither of these two distinctions undermines Justice Stevens’s argument that the Forty-Second Congress would have expected the ordinary rules of respondeat superior to apply to cities. The discretionary-ministerial distinction was utterly irrelevant to the respondeat superior question. The governmental-proprietary distinction was an application of the normal rules of respondeat superior, not an exception to those rules. Thus, Justice Rehnquist’s “complicated municipal tort immunities” cannot bear the weight he places on them. Each of the distinctions will be discussed below.

A. The Discretionary-Ministerial Distinction

Nineteenth-century courts sometimes held that cities were exempt from common law tort negligence liability for their officers’ “discretionary” (as opposed to “ministerial”) decisions. Thus, a city generally was not liable for damage to adjoining landowners resulting from a city council’s negligent decision to build a street in a particular location, but was liable for city worker’s negligent execution of that decision.

However, this exemption was not a restriction on respondeat superior liability but rather a state law allocation of power issue. When a state delegates to city officials the discretion to decide an issue, a jury should not be given authority to second guess the reasonableness of that decision by finding the decision to be negligent. The exemption is based not on a rejection of vicarious liability but instead on the principle that it is improper to submit “to the jury the ultimate determination of matters that the state has

179. See infra text accompanying notes 183-87.
180. See infra text accompanying notes 188-96.
181. Discretionary functions were sometimes described as “judicial” or “legislative.” See, e.g., Rochester White Lead Co. v. City of Rochester, 3 N.Y. 463, 466 (1850) (describing the functions as “judicial”); Wilson v. Mayor of New York, 1 Denio 595, 599 (N.Y. Sup. Ct. 1845) (“[I]f his powers are discretionary, to be exerted or withheld, according to his own view of what is necessary and proper, they are in their nature judicial.”); 2 Dillon, supra note 120, § 753, at 862 (describing the exemption as covering “discretionary powers of a public or legislative character” and later using the term “judicial”); Williams, supra note 174, § 6, at 13-14 (explaining that if the construction work is carried out in a negligent fashion by the city’s employees, the city will be liable).
182. Compare Williams, supra note 174, § 6, at 13-14 (explaining that once a state legislature gives city officials authority to lay out streets, “their decision is final, and cannot properly at any subsequent time be submitted to a jury for revision”), and id. § 6, at 13-14 (explaining that discretionary decisions cannot be challenged on the basis that they were negligent), with id. § 66, at 103 (explaining that if the construction work is carried out in a negligent fashion by the city’s employees, the city will be liable). See also Hill v. City of Boston, 122 Mass. 344, 358-59 (1877) (stating that a city generally is not liable for a discretionary decision as to where to place sewers but may be liable for negligent construction or maintenance of the sewers); Rochester White Lead Co. v. City of Rochester, 3 N.Y. 463, 467 (1850) (same).
183. See infra notes 184-85.
intrusted [sic] to the judgment and discretion of the municipal authorities."[^184] The exemption was necessary to avoid "tak[ing] the final determination of certain matters out of the hands of those to whom the state committed it, and put[ting] it into the hands of a body [the jury] which the state never intended should have it."[^185]

As a result, the discretionary-ministerial distinction simply cannot serve as a foundation for Monell's rule eliminating municipal respondeat superior liability for constitutional violations. As a doctrine determining who—cities and their officials or judges and juries—should determine whether certain decisions were reasonable, it is utterly irrelevant to claims that those decisions violated constitutional rights. "[A] municipality has no ‘discretion’ to violate the Federal Constitution,"[^186] and the state cannot delegate such discretion to it. The discretionary function exemption could not protect a municipality if its actions "are of such a character as to constitute a positive invasion of those individual rights that the Constitution guarantees. Legislative sanction cannot, in such cases afford a protection to the corporation engaged in performing such acts from the legal consequences of them."[^187]

In any event, applying the discretionary-ministerial distinction to § 1983 would turn Monell upside down. A formal decision by a city's

[^184]: Williams, supra note 174, § 6, at 16; see also City of Little Rock v. Willis, 27 Ark. 572, 577 (1872) (making city liable for discretionary decisions would give discretionary power to "the judiciary, instead of the City Council, where the Legislature placed it"); Mills v. City of Brooklyn, 32 N.Y. 489, 495 (1865) (stating that discretion that "the law has committed to the city council . . . [should not] be exercised by the judicial tribunals"); Carr v. N. Liberties, 35 Pa. 324, 329 (1860) (recognizing that when a town council is given discretion, a court should not "substitute the judgment of a jury . . . for that of the representatives of the town itself"). The doctrine also exempted discretionary decisions from judicial interference by way of injunction or mandamus. See, e.g., Platte & Denver Canal & Milling Co. v. Lee, 29 P. 1036, 1039 (Colo. 1892) (recognizing that discretionary function exemption does not apply when the city's action would violate "vested rights"); Keogh v. Mayor of Wilmington, 4 Del. Ch. 491, 500 (1872) (recognizing that the judiciary may interfere with a city's discretionary decisions when they would violate private rights). This was simply one application of the more general rule that the discretionary function exemption could not shield a city when it violated an absolute duty. See, e.g., Williams, supra note 174, § 8, at 19-20 (stating that municipalities are liable for noncompliance with statutes to the same extent as any legal individual).

[^185]: Owen, 445 U.S. at 649.

[^186]: 1 Charles Fisk Beach, Commentaries on the Law of Public Corporations 265 (1893) (permitting suits for discretionary decisions would "transfer to court and jury the discretion which the law vests in the municipality").
lawmakers is the quintessential example of city policy for which a city is liable under Monell, while it is the quintessential example of a discretionary decision for which a city is exempt under the discretionary-ministerial distinction. On the other hand, wrongful conduct by low-level city employees was likely to be considered ministerial action for which a city would be liable, while it is also the type of non-policy-executing conduct for which a city is exempt under Monell. If the discretionary decision exemption were exported into § 1983, cities would become exempt for actions that implement or execute official policy and liable for those that do not—the polar opposite of the result reached in Monell.

B. The Governmental-Proprietary Distinction

Unlike the exemption for discretionary decisions, the doctrine that later became known as the governmental-proprietary distinction did deal with respondeat superior. In fact, it dealt exclusively with respondeat superior. However, the governmental-proprietary distinction was seen, not as creating an exception to respondeat superior, but rather as a logical corollary of one of that doctrine's central principles: A defendant could not be liable under respondeat superior unless the tortfeasor was that defendant's servant or agent.

188. Despite its name, the nineteenth-century "governmental-proprietary" distinction was not based on whether a particular function had historically been provided primarily by city governments. Murray Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test, 53 U. Cin. L. Rev. 469, 473 (1984). Firefighting, for example, was considered "governmental" even though it had been performed almost exclusively by private volunteer companies until the middle of the nineteenth century. Fred S. McChesney, Government Prohibitions on Volunteer Fire Fighting in Nineteenth-Century America: A Property Rights Perspective, 15 J. Legal Stud. 69, 72-78 (1986). Cincinnati created the first paid municipal fire department in 1853 and some major cities such as Philadelphia continued to rely on volunteer clubs as late as 1870. Id. at 78. As the debate on the Sherman Amendment makes clear, municipal police departments were a recent development in 1871 and were far from universal. The first municipal police department was founded in London in 1829 and New York City's was not founded until the 1840s. Yet police officers were considered "governmental." While the Northwest Ordinance had mandated public education in the old northwest, free public education was relatively new and far from universal, particularly in the South before the Civil War. Nor were "governmental" functions limited to functions that involved "governing" in the ordinary sense of "ruling" or "asserting sovereign control." Police officers and jailers might be thought of as "governmental" in the ordinary sense; but firefighters, school maintenance workers, garbage collectors, and surveyors are not. Yet all were considered to perform "governmental" functions in the nineteenth century.

189. 2 Dillon, supra note 120, § 772, at 884. This understanding of the governmental-proprietary distinction continued to be discussed well into the early twentieth century. See, e.g., Jacob Aks, Note, Municipal Corporations: Tort Liability: Ultra Vires: Governmental and Corporate Functions, 14 Cornell L.Q. 351, 352 n.2 (1929) (recognizing that when performing governmental functions, the employee "is said to be the agent of the state, even though appointed and paid by the
As the era's leading treatise on municipal law explained: "[W]hen it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation." To apply this principle, courts needed to determine whether a particular tortfeasor should be treated as the city's agent or instead as a "public officer"—a phrase that, in nineteenth-century parlance, referred to an agent of the state itself. In making this sometimes difficult determination, courts utilized the same rationales that justified respondeat superior itself, asking whether the city rather than the state had the power to control the tortfeasor and whether the tortfeasor's work was performed for the benefit of the city or rather, for the benefit of the public (that is, the state) as a whole.

The governmental-proprietary distinction was also derived from another traditional respondeat superior principle. In the nineteenth century, as now, respondeat superior made masters liable for the torts of their servants but did not make supervisors (or persons in similar positions) liable for the torts of their subordinates; and this was true even if the supervisor was delegated the authority to select the subordinate employees. In suits against cities and officials, this

municipality). However, it was increasingly seen as a legal fiction and rejected. See, e.g., Evans v. Berry, 186 N.E. 203, 206-07 (N.Y. 1933).

190. 2 Dillon, supra note 120, § 772, at 884; see also Williams, supra note 174, § 11, at 26.

191. In the nineteenth century, the phrase "public officer" or "independent public officer" was used to refer to state agents and was used to contrast such officials with municipal employees. See, e.g., Maximilian v. Mayor of New York, 62 N.Y. 160, 169 (1875) (holding that city health commissioners "are not to be regarded as servants or agents of the [city], for whose acts or negligences [sic] it is liable, but as public or State officers"); City of Dayton v. Pease, 4 Ohio St. 80, 100 (1854) (using the phrase "public officer or agent of the state" as synonyms); 2 Dillon, supra note 120, § 772, at 885 (contrasting "public or state officers" on the one hand with "servants or agents of the [municipal] corporation"); Leroy Parker & Robert H. Worthington, The Law of Public Health and Safety, and the Powers and Duties of Boards of Health 177 (1892) (stating that employees performing governmental functions are "not to be regarded as servants or agents of the [municipal] corporation, for whose acts or negligence it is impliedly liable, but as public or State officers"); 1 Thomas G. Shearman & Amasa A. Redfield, A Treatise on the Law of Negligence § 253, at 469 (5th ed. 1898) (recognizing that employees performing public functions are "not agents of the [municipal] corporation, but of 'the greater public,' the state.").

192. 2 Dillon, supra note 120, § 772, at 884-85.

193. 2 Story, supra note 78, § 313 (acknowledging that a supervisory agent is not liable for the torts of those he hires for his principal; a supervisory servant is not liable for acts of laborers he hires for his master); Delmar W. Doddridge, Distinction Between Governmental and Proprietary Functions of Municipal Corporations, 23 Mich. L. Rev. 325, 334 (1925) (explaining that the state—not the city—is the real principal even if city appoints the servant); see also Cardot v. Barney, 63 N.Y. 281, 290 (1875). The court in Cardot stated that:

The defendant and the superintendent, by whose fault the death of the testator was caused, were in the same employ, both acting by the same authority; and the fact that the latter was subordinate to the former by no means makes him responsible for his acts; the superintendent or other
principle led to what was then known as the public officer doctrine: the doctrine that "public officers"—which included cities when serving the function of public officers—were not liable for the torts of those persons that they were required to employ in order to perform their duties to their employer, that is, the state. Because "public officers" and their subordinates were co-servants of the state—although of different rank—neither was the other's master and neither was liable for the other's torts.

Thus, nineteenth-century decisions rejecting municipal liability for the acts of persons performing governmental functions did not, as one plaintiff's attorney argued, cause the "doctrine of respondeat superior [to be] annihilated." Instead, as the court responded, those decisions enforced the rationales on which respondeat superior was founded by limiting liability to those who expect "to derive advantage from an act which is done by another for him" and to those who have the power to control the wrongdoer.

Bailey v. Mayor of New York, the decision that Justice Powell (and, by extension, Justice Rehnquist) described as the leading case general agent of a railroad, who by authority of the corporation employs and discharges the subordinates, is not the master so as to be made responsible under the doctrine of respondeat superior.

Id. 194. Bailey v. Mayor of New York, 3 Hill 531, 538 (N.Y. Sup. Ct. 1842) (holding that when a city is acting solely on behalf of the state, it would be treated as a public officer); City of Dayton v. Pease, 4 Ohio St. 80, 100 (1854) (stating that, when purely public duties are "devolved upon the [city] as a public officer or agent of the State . . . [the city] is only liable for [its] own misconduct"); Doddridge, supra note 193, at 334 (stating that municipal lack of respondeat superior liability for governmental functions is based on the idea that "the real superior is the State and not the municipality").

195. Robertson v. Sichel, 127 U.S. 507, 515-16 (1888) (holding that public officers are not responsible for torts of subagents); Keenan v. Southworth, 110 Mass. 474, 474-75 (1872) (stating that various ranks of postal officials are all public officers and therefore are not liable for each others' torts even those of tortfeasors they appoint or direct); Brown v. West, 76 A. 169, 169 (N.H. 1910) (holding that respondeat superior is not applicable where defendant is public officer and tortfeasor is subagent); Cardot 63 N.Y. at 286 (stating the general rule and noting an English exception for sheriffs who are considered the masters of their under-sheriffs because they derive profit based on services performed rather than a fixed salary); 1 Shearman & Redfield, supra note 191, § 319, at 553-54 (explaining that public officers not subject to respondeat superior liability because the "sub-agents they are allowed or required to appoint become, by such appointment, like themselves, agents of the government" (emphasis added)); 2 Story, supra note 78, § 319 (public officers not liable for torts of subagents); 2 id. § 319(a) (analogizing the non-liability of public officers for the torts of subordinate officers to the similar non-liability of private agents for the torts of their subagents).

196. Rothfeld, supra note 79, at 960.

197. Hickock v. Trs. of the Vill. of Plattsburgh, 15 Barb. 427, 441 (N.Y. Gen. Term 1853) (holding that a village is not liable for actions of trustees acting as road commissioners because, in that capacity, they are not controlled by the village and do not act for the village's benefit).

198. Id.

199. 3 Hill at 531.
establishing the governmental-proprietary distinction, illustrates the distinction's source in normal respondeat superior principles. The New York City Water Commissioners had constructed a dam which subsequently broke, damaging the plaintiffs' property. The defendants made two arguments, both based on traditional respondeat superior principles. First, they argued that, because the city did not appoint or control the water commissioners, they were not city employees, and therefore that the city was not liable for their negligence. The defendants supported this argument by pointing out that the commissioners were appointed by the state, were answerable only to the state, and could be removed by the state. Second, they argued that, even if the water commissioners were the defendants' agents, the defendants should be treated as public officers, that is, as servants of the state who, like other intermediate servants, were not liable for the torts of their subagents.

200. The two Bailey opinions, id., aff'd, 2 Denio 433 (N.Y. 1845), were regularly cited as examples of the judicial effort to determine whether a particular tortfeasor was properly considered an employee of the city for respondeat superior purposes. See, e.g., 2 Dillon, supra note 120, § 772, at 885 n.1 (contrasting Bailey with Russell v. Mayor of New York, 2 Denio 461, 473, 481 (N.Y. 1845) in which the court held that the city was not liable for the decision of the mayor and aldermen to destroy a building to prevent the spread of fire, since they were acting, not as agents of the city, but rather as agents of the state); Williams, supra note 174, § 11, at 26 n.2 (citing the two cases as examples of the difficulty in determining whether the tortfeasor was a municipal employee for purposes of respondeat superior). Other cases that Justice Powell cites as examples of the governmental-proprietary distinction similarly demonstrate that the distinction was a corollary derived from normal respondeat superior principles. Child v. City of Boston, 86 Mass. (4 Allen) 41, 51-52 (1862) (holding that a city is not responsible for an aldermen's decisions as to the building of sewers because, in making those decisions, aldermen do not act as agents of the city but as agents of the state; but once the sewer has been built, the city selects and controls the persons who maintain the sewers and therefore is responsible for their negligence); W. Coll. of Homeopathic Med. v. City of Cleveland, 12 Ohio St. 375, 379 (1861) (noting the distinction between acts done by local officials "as officers of the state, though elected by the people of the county," for which the county is not liable, and acts done by those officials when acting as officers of the county).

201. The nominal defendants in the case were the mayor and various other officers of the city, and the opinion consistently referred to them in the plural. However, the suit was recognized to be, in effect, a suit against the municipal corporation itself. Bailey, 3 Hill at 531 (headnote by reporter: "action against the corporation of the city of New-York"); id. at 535-36 (argument of counsel, referring to the defendants as "a corporation aggregate" and the "corporation of the city of New-York" and "a political corporation"); id. at 539 (referring to the defendants as "a municipal or public body" and "one of these public corporations").

202. Id. at 538 ("In other words, the commissioners not being [the City's] agents in the construction of the dam, the rule respondeat superior could not properly be applied.").

203. Id. at 543.

204. Id. at 538.

205. See supra text accompanying notes 193-94.
The court rejected these arguments on two traditional respondeat superior bases: reciprocity and control. First, it reasoned that the commissioners were properly treated as city agents since their work was performed for the benefit of the city rather than the state or general public. This reasoning is a direct expression of the reciprocity rationale, which emphasizes that respondeat superior is "bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." Second, the court found that the city—not the state—was the master who actually controlled the commissioners since the city had the authority to decide whether they should perform any work, the power to accept or reject the commissioner's proposed plans, and the authority to instruct the commissioners whether to proceed with the construction. This finding is an application of the control rationale under which respondeat superior "responsibility is placed where the power [to control] exists."

Thus, the Bailey court employed normal respondeat superior principles to determine whether the water commissioners were the city's agents, and then, having found that they were, used normal respondeat superior principles to hold the city liable for its agents' negligence. The governmental-proprietary distinction recognized by Bailey was not an exception to, or a limitation of, respondeat superior; it was an application of it.

Bailey was only one of innumerable nineteenth-century cases treating the governmental-proprietary distinction as the logical result of core respondeat superior principles. When deciding whether a city escaped liability because a particular tortfeasor was a "public officer" performing a "governmental" or "public" function (rather than a city "agent" performing a "proprietary" one) courts regularly relied on the fact that a city lacked the authority to direct and control a

206. The court also rejected the defendant's argument that the commissioners could not be the city's agents since they had been appointed by the state. The court reasoned that the city had adopted the commissioners as its agents by accepting the charter under which they were appointed, by affirmatively approving their planned work, and by directing them to proceed with it. Bailey, 3 Hill at 543-44; cf. Van Valkenburgh v. Mayor &c. of New York, 43 Barb. 109, 115 (N.Y. Gen. Term 1864) (holding that a different set of commissioners, also appointed by the state, were not the city's agents since the city had not adopted them as such).

207. Bailey, 3 Hill at 539 (stating that work is made for "the private emolument and advantage of the city").

208. See supra Part II.A.4.


210. Bailey, 3 Hill at 543-44.

211. See supra Part II.A.2.

particular tortfeasor (the control rationale)\textsuperscript{213} or the fact that the tortfeasor’s work was performed for the benefit of the public rather than the city (the reciprocity rationale).\textsuperscript{214} Similarly, courts used the reciprocity rationale to decide whether a city itself should be treated as a quasi-public officer, that is, an agent of the state who would not be liable for the torts of its co-agents or subagents.\textsuperscript{215} When these decisions rejected respondeat superior liability, they did so—not because the municipality was subject to different rules—but rather because, under the normal rules, the municipality was not properly treated as the tortfeasor’s master.

Applying the normal respondeat superior rules led to results that seem counterintuitive to a twenty-first-century reader. Police officers were not considered city employees even though chosen, appointed, and paid by the city,\textsuperscript{216} and this was true even if they were enforcing a

\begin{itemize}
\item \textsuperscript{213} Fisher v. City of Boston, 104 Mass. 87, 94 (1870) (finding that firefighters are public officers rather than servants of the city because the city has no control over them); Walcott v. Inhabitants of Swampscott, 83 Mass. (1 Allen) 101, 102 (1861) (finding that a surveyor of highways is not an agent of the town that elects him because the town has no control over him); Ham v. Mayor of New York, 70 N.Y. 459, 462-63 (1877) (finding New York City Department of Education employees to be “public or state officers” rather than city employees because the city could not control, direct, or discharge them); Maximilian v. Mayor of New York, 62 N.Y. 150, 169 (1875) (finding New York Department of Health employees to be “public officers” because they are not controlled by the city); City of Dayton v. Pease, 4 Ohio St. 80, 95 (1854) (finding that an engineer was a servant of the city rather than a public officer because he acted under the city’s commands).

\item \textsuperscript{214} Fisher, 104 Mass. at 93-94 (finding firefighters to be public officers rather than servants of the city because their work is performed for the good of the public rather than the city); Barney v. City of Lowell, 98 Mass. 570, 571-72 (1868) (same as to city’s superintendent of streets); Buttrick v. City of Lowell, 83 Mass. (1 Allen) 172, 173-74 (1861) (same as to city police officers); Walcott, 83 Mass. (1 Allen) at 102 (same as to town’s surveyor of highways); Hafford v. City of New Bedford, 82 Mass. (16 Gray) 297, 298 n.*, 302 (1860) (same even if firefighter is appointed by and paid by the city); Maximilian, 62 N.Y. at 169 (finding New York Department of Health commissioners to be “public officers” because they are performing work for the benefit of the public as a whole).

\item \textsuperscript{215} Culver v. City of Streator, 22 N.E. 810, 811 (Ill. 1889) (finding that police officers are not agents of the city and the city is not liable for their torts because “the city acts only as the agent of the state”); Pease, 4 Ohio St. at 99-100 (holding that a city is treated as a public officer when it is performing a purely public purpose).

\item \textsuperscript{216} See, e.g., Cook v. Mayor of Macon, 54 Ga. 468, 468-69 (1875) (finding that a police officer is an agent of the state even though appointed by the city); Calwell v. City of Boone, 2 N.W. 614, 615 (Iowa 1879) (“Police officers can in no sense be regarded as agents or servants of the city.”); Buttrick, 83 Mass. (1 Allen) at 173 (same); Pollock’s Adm’r v. Louisville, 76 Ky. (13 Bush) 221, 224-25 (1877) (finding that police officers are not officers of the city but of the commonwealth); 1 Dillon, supra note 120, § 34, at 146 n.1 (“[C]ases concur in holding that police officers are, in fact, state officers, and not municipal, although a particular city or town be taxed to pay them.”); 2 id. § 773, at 886 (“[P]olice officers appointed by a city are not its agents or servants.”); 1 Platt Potter, Treatise on the Law of Corporations: General and Local, Public and Private, Aggregate and Sole 481-82 (1879) (recognizing that a police officer is an agent of the state even though appointed by the city); 2 Seymour Thompson, The Law of Negligence in Relations Not Resting in Contract 737 (1880)
\end{itemize}
Firefighters were not considered city employees even if selected by the city's mayor or alderman and even if the fire department's expenses were paid by the city. Persons running a city's jail or workhouse were not considered agents of the city, nor were employees of a city's department of education. In fact, a broad range of persons that twenty-first-century readers would think of as city employees—and a substantial proportion of the likely targets of suits under § 1983—were treated as servants of the state rather than the city.

IV. THE NINETEENTH-CENTURY COMMON LAW AND THE TWENTY-FIRST-CENTURY ARGUMENT OVER MONELL

Thus, lawyers arguing that the Monell doctrine should be overturned and those arguing that it should be reaffirmed will face a common law background that can be summarized by the following four propositions:

First, nineteenth-century judges and lawyers believed that the doctrine of respondeat superior was based on four rationales: legal unity, control, warranty, and reciprocity. These rationales both justified the doctrine and defined its limits. While these rationales...
were powerful arguments in favor of municipal respondeat superior, they were equally powerful arguments against adopting the type of liability contemplated by the Sherman Amendment. As a result, the Monell Court was simply wrong to believe that members of Congress who opposed the Sherman Amendment were likely to also oppose municipal respondeat superior.

Second, nineteenth-century judges and lawyers believed that respondeat superior applied to cities in the same way that it applied to other corporations. However, like any other employer, cities were only liable for the acts of their own employees. In deciding whether a particular person was the city’s employee, nineteenth-century courts looked to the same four rationales that justified the doctrine’s existence, particularly the control and reciprocity rationales.

Third, as a result, public servants who were seen as not being controlled by the city or who performed functions that were seen as primarily benefiting the state or its citizens as a whole ("governmental functions") were treated as servants of the state ("public officers") rather than servants of the city. Because they were not the city’s employees, the city had no respondeat superior liability for their wrongs. This was not seen as an exception to the rule of respondeat superior but rather as a faithful application of the rule in light of its rationales.

Fourth, as a result of this "governmental-proprietary" distinction, cities avoided respondeat superior liability for the actions of a broad range of persons that a twenty-first-century lawyer or judge would consider to be city employees, including many who are frequent and logical targets of § 1983 actions.

Any historically sound argument must be consistent with these propositions. As a result, the lawyers supporting the Monell doctrine will not be able to rely on Monell’s own historical arguments against respondeat superior since those arguments are fatally flawed. Instead, they should urge the Court to treat nineteenth-century common law decisions as the enacting Congress’s background understanding, a set of rules that are presumptively incorporated into § 1983. Initially, they may be tempted to urge the Court to import the governmental-proprietary distinction into contemporary § 1983 jurisprudence. However, any effort to do so will face conceptual and practical difficulties, not the least of which is that either argument would logically lead to standards for municipal liability that would be utterly inconsistent with the Monell doctrine. To deal with these difficulties, they will need to delve even further into substantive nineteenth-century common law and argue that the Court should rely on a now-little-known line of cases defining the liability of “public officers” for the torts of their subordinates. Those decisions rejected respondeat superior and at the same time prefigured the Monell doctrine’s four limited routes to municipal liability and its requirement of action by
an official policymaker. Those arguments and that body of case law are discussed in Part IV.A.

Lawyers opposing Monell will attack the underlying foundation of this argument: the assumption that the enacting Congress would have expected future courts to incorporate nineteenth-century common law rules. They will argue that Congress would have expected the Court to treat the common law as nineteenth-century lawyers and judges saw it: not as a set of immutable, specific rules, but instead as a flexible decision-making process in which unchanging general principles—in this case, the fundamental rationales for respondeat superior—are applied to changing societal conditions to produce rules that vary from place to place and change as society itself changes. They will then argue that applying that process ineluctably leads to rejection of the underlying basis of both the governmental-proprietary distinction and Monell's supporters' argument: the fiction that a broad range of city-paid workers are really state rather than city employees. Those arguments are discussed in Part IV.B.


Lawyers urging the Court to reaffirm the Monell doctrine may be tempted to adopt a seductively simple position: Because Congress was presumptively familiar with the common law, the nineteenth-century governmental-proprietary distinction should be imported bodily into contemporary § 1983 jurisprudence, making cities liable on a respondeat superior basis for proprietary functions and freeing them entirely from liability for governmental functions. However, for two reasons, this argument is unlikely to be successful. First, throughout the twentieth century, the governmental-proprietary distinction was


222. For the reasons set forth in Part II, Monell's supporters will not be able to rely on Monell's own historical arguments. At the same time, the well-known existence of the governmental-proprietary distinction would make it unprofitable for Monell's opponents to adopt Justice Stevens's argument for simple incorporation of nineteenth-century common law. If late nineteenth-century common law fully and immutably defined the scope of § 1983 respondeat superior liability, then local governmental entities would not be liable for constitutional violations by police officers, teachers, firefighters, jail guards, or any other employee who would then have been treated as performing a "governmental function" and thus as an employee of the state rather than the city. See Lewis & Blumoff, supra note 170, at 766-67 n.51 (arguing that incorporation of nineteenth-century common law would require incorporation of the governmental-proprietary distinction and would eliminate liability for most § 1983 claims); see also Kramer & Sykes, supra note 135, at 262-63 (same and claiming that it might justify something similar to the Monell doctrine).
so widely criticized, and so uniformly abrogated, that it is hard to imagine a twenty-first-century Supreme Court attempting to revive it. Second, importing the distinction would create a dichotomy unknown to Monell, and would eliminate Monell's own distinction between actions that execute official policy and those that do not. As


224. See, e.g., Brinkman v. City of Indianapolis, 231 N.E.2d 169, 171-72 (Ind. 1967) (citing numerous states); Jones v. State Highway Comm'n, 557 S.W.2d 225, 227 n.1 (Mo. 1977) (en banc) (stating that twenty-nine states had abolished governmental immunities); Restatement (Second) of Torts, supra note 58, § 895c (stating that the distinction has been rejected by numerous jurisdictions); 1 Civil Actions Against State and Local Government § 1:8 (WestLaw ed., 2004) (listing thirty states as having abolished cities' governmental immunity); Joe R. Greenhill & Thomas V. Murto III, Governmental Immunity, 49 Tex. L. Rev. 462, 464-65, 465 n.27 (1971) (citing numerous cases).

225. The broad rejection of the governmental-proprietary distinction might tempt Monell's opponents to argue that the Court should incorporate contemporary rather than nineteenth-century common law. It is true that the Court has at times suggested that it is appropriate to apply “the common law of torts (both modern and as of 1871)” as a guide to the meaning of § 1983, stating that it would not “assume that Congress intended to perpetuate a now-obsolete doctrine.” Smith v. Wade, 461 U.S. 30, 34 & n.2 (1983) (emphasis added); see also Imbler v. Pachtman, 424 U.S. 409, 421-22, 422 n.19 (1976) (incorporating an immunity that the Court acknowledged had not existed until twenty-five years after § 1983 was enacted and did not become the majority rule until even later); Pierson v. Ray, 386 U.S. 547, 555 (1967) (relying on the twentieth-century “prevailing view” to justify incorporating a form of qualified immunity for police officers). See generally Achtenberg, supra note 69, at 524-28. Lawyers seeking to overturn Monell could argue that municipalities are currently subject to respondeat superior liability for the non-constitutional torts of their employees, that the governmental-proprietary distinction is a “now-obsolete doctrine” that has been rejected by a majority of the states, and therefore that municipal respondeat superior—unqualified by the governmental-proprietary distinction—should be applied under § 1983. But this “dynamic incorporation” argument is historically flawed and practically unworkable. The Forty-Second Congress had grave doubts that state courts would adequately protect individual rights and was highly unlikely to have intended to let state court decisions define and limit the extent to which § 1983 would protect those rights. Id. at 527-28 & nn.227-30; id. at 533 & nn.273-74; see also David Achtenberg, With Malice Toward Some: United States v. Kirby, Malicious Prosecution, and the Fourteenth Amendment, 26 Rutgers L.J. 273, 298-303 (1995) (describing post-war Confederate control of the Kentucky judicial system and the use of that system to harass freedmen and Union sympathizers). In any event, there simply is no unitary body of modern law for the present Court to incorporate. Contemporary state law on the tort liability of cities is a hodgepodge that varies drastically from state to state. While most states have abolished the governmental-proprietary distinction, others have not, and some have fully or partially reinstated it. Compare supra note 224 (listing cases that have abolished the distinction), with 19 McQuillin, supra note 148, § 53.02.10 n.40 (citing cases that have reinstated it in full or part), and Mo. Ann. Stat. § 537.600 (West 2000) (reinstating governmental immunity subject to the governmental-proprietary distinction and subject to new exceptions). The dynamic incorporation approach provides no basis for choosing which “modern common law” to choose.
a practical matter, it is simply inconceivable that the current Court would adopt a standard that would make a city liable for a public utility worker’s discriminatory treatment of a customer even though that treatment clearly violated city policy, while making the city exempt from liability for a police officer’s discriminatory treatment of a suspect even though city ordinances explicitly dictated that treatment.

Instead, Monell supporters may want to argue that the exemption for governmental functions covered such a broad range of crucial municipal employees\footnote{See supra text accompanying notes 216-20.} that it should be treated as the practical equivalent of an across-the-board municipal immunity for the actions of all employees. But this approach faces serious practical obstacles. It would require the Supreme Court not only to revive the widely reviled governmental-proprietary distinction but also to expand it. In addition, while it would support Monell’s rejection of respondeat superior, it would also seem to overrule Monell’s primary holding—that cities are not entirely exempt from § 1983 suits—and to eliminate the four theories under which the Monell doctrine permits cities to be sued. There is no reason to believe that five members of the Court would be willing to take the drastic step of completely eliminating the already highly limited situations in which cities can be held liable under § 1983.\footnote{There may be three Justices who would. Chief Justice Rehnquist dissented from Monell’s overruling of Monroe v. Pape, 365 U.S. 167 (1961), and has hinted that he would be willing to return to the Monroe regime. Justices Scalia and Thomas have both indicated that they believe that even Monroe unjustifiably expanded the scope of § 1983. Crawford-El v. Britton, 523 U.S. 574, 611-12 (1998) (Scalia, J., dissenting). Replacement of two of the more liberal members of the current Court with substantially more conservative members might tip the balance. In that event, it might be the plaintiffs’ bar—rather than defense lawyers—who try to preserve the Monell doctrine by making the arguments set forth in Parts IV.A.1–4.} To reaffirm Monell, its supporters need to provide an historical basis for mitigating the harshness of that step. They must identify a nineteenth-century line of cases that rejects municipal respondeat superior yet preserves the Monell doctrine’s four alternative theories of municipal liability.

1. Nineteenth-Century Public Officer Theory

Monell’s supporters should turn to a body of nineteenth-century case law that provides striking parallels to the Monell doctrine: the liability of public officers for the torts of their subordinates. As discussed in Part III.B, the nineteenth-century governmental-proprietary distinction treated certain city-paid workers as employees of the state rather than employees of the city even though the city had selected them and had considerable supervisory power over them. In those situations, it treated the city itself as a public officer (that is, as a
higher ranking agent of the state) who had been merely delegated the
authority to select and supervise the employees on the state's
behalf.\textsuperscript{228} As a public officer, the city was not responsible for its
subordinates' torts under respondeat superior because the city was
their supervisor rather than their employer.\textsuperscript{229} However, in the
nineteenth century, a public officer or other supervisor could be held
liable for a subordinate’s wrongs under certain other theories and
these alternative theories of liability provide a striking parallel to the
Monell doctrine.\textsuperscript{230} Moreover, in their efforts to apply public officer
liability theory to municipal corporations, late nineteenth-century
courts prefigured Monell's overarching requirement that municipal
liability be tied to action by municipal policymakers.\textsuperscript{231}

2. Nineteenth-Century Theories of Public Officer Liability and
Monell's Four Routes

In the nineteenth century, public officers were generally not held
liable for the torts committed by subordinates chosen by them to assist
in the performance of their governmental functions since such
subordinates were seen as employees of the state rather than of the
officer. It was well-recognized that "[t]he rule of respondeat superior
does not apply to [public officers], because the subagents which they
are allowed or required to appoint become, by such appointment, like
themselves, agents of the government."\textsuperscript{232} However, such public
officers could be held liable under three non-respondeat superior
theories that paralleled the Monell doctrine's four routes to municipal
liability.\textsuperscript{233} First, public officers were liable if they “directed,
authorized, or co-operated in the wrong."\textsuperscript{234} Second, they were liable
if they failed to properly supervise their subordinates’ conduct.\textsuperscript{235}
Third, public officers could be held liable if they failed to exercise
ordinary care in the selection of their subordinates.\textsuperscript{236}

The first of these theories roughly parallels Monell’s formal policy
basis for municipal liability.\textsuperscript{237} Under Monell and its progeny, cities

\begin{itemize}
\item \textsuperscript{228} See infra Part IV.A.3.
\item \textsuperscript{229} See infra Part IV.A.2.
\item \textsuperscript{230} See infra Part IV.A.2.
\item \textsuperscript{231} See infra Part IV.A.4.
\item 1 Shearman & Redfield, supra note 191, § 319, at 554; see also Wiggins v.
Hathaway, 6 Barb. 632, 635 (N.Y. App. Div. 1849) (holding that respondeat superior
does not apply to public officers because the officers and their subagents are both
agents of the government).
\item \textsuperscript{233} See supra Part 1.A.
\item \textsuperscript{234} Floyd R. Mechem, A Treatise on the Law of Public Offices and Officers § 790
(1890).
\item \textsuperscript{235} Id. § 791 (dealing with negligent oversight of the work); 1 Shearman &
Redfield, supra note 191, § 319, at 553.
\item \textsuperscript{236} 1 Shearman & Redfield, supra note 191, § 319, at 553; Mechem, supra note
234, § 791.
\item \textsuperscript{237} To a lesser extent, it parallels Monell’s custom-based theory of municipal

are liable for a city employee's unconstitutional action if that action "implements or executes" policies formally adopted by the city's lawmakers, that is, if the employee is doing what he or she has been directed to do by the city itself. In the nineteenth century, a public officer was similarly liable for the wrongful act of a subordinate if the officer "directed or authorized the wrong." In Woodcock v. City of Calais, this principle was applied to a city serving as the functional equivalent of a public officer. The court recognized that a city would ordinarily not be liable for the wrongs of a city-paid surveyor because the surveyor should be treated as the state's (rather than the city's) agent. The city was not made liable even by the fact that the mayor and city attorney had ordered the surveyor to commit the wrongful act because they were also state agents for whose conduct the city was not responsible. However, when the surveyor was "expressly 'directed' by the city government" by a "positive, formal vote" to commit the wrongful act, the surveyor became the city's agent *quo ad hoc* (with respect to this act) and the city became liable.

The Monell doctrine's next theory of liability, inadequate training or supervision, also had an analog in nineteenth-century public officer law. Like a municipality under Monell, a nineteenth-century public officer was liable for subordinates' wrongs if the officer failed to adequately "superintend their conduct." And just as the Monell doctrine requires a plaintiff to prove that the constitutional violation was caused by the city's inadequate training or supervision, so

238. Id. at 690; see supra Part II.A.
239. Ely v. Parsons, 10 A. 499, 504 (Conn. 1886); see Castle v. Duryea, 32 Barb. 480, 486 (N.Y. App. Div. 1860) (holding officer liable for injury caused by subordinate's act if he "issued the order in conformity with which the act was done"); Tracy v. Cloyd, 10 W. Va. 19, 31 (1877) (stating that public officers are liable for subordinate's wrongs if they "have directed the act to be done"); Mechem, supra note 234, § 790 (stating that officers are liable for a subordinate's conduct if they "directed, authorized, or co-operated in the wrong"); 2 Story, supra note 78, § 321 (recognizing that public officers are liable for subordinate's wrongs if they have "cooperated in or authorized the wrong"); 2 id. § 386 (stating that officers are liable for a subordinate's conduct if they "directed the act to be done or personally cooperated in the negligence").
240. 66 Me. 234 (1877).
241. Id. at 235.
242. Id. at 236.
243. Id.
244. 1 Shearman & Redfield, supra note 191, § 319, at 553.
nineteenth-century courts required plaintiffs to prove that the harm was the "consequence" of the public officer's inadequate supervision.\footnote{Dunlop v. Munroe, 11 U.S. (7 Cranch) 242, 269 (1812); see also Ford v. Parker, 4 Ohio St. 576, 582 (1855) (holding that jury must decide whether the public officer's negligent operation of his office "was, or was not, the cause" of the harm to plaintiff).}

However, in an important respect, a nineteenth-century public officer's liability for inadequate superintendence of his subordinates differed from a contemporary city's liability under the \textit{Monell} doctrine's training/supervision-based theory: Public officers were liable without a showing that the supervision was so lax as to demonstrate "deliberate indifference."\footnote{Compare \textit{Harris}, 489 U.S. at 388 (requiring deliberate indifference), with sources cited \textit{infra} note 248 (basing liability on negligence).} Although differing in the precise wording used, the nineteenth-century authorities seemed to agree that a showing of simple negligent supervision was sufficient to make the public officer liable.\footnote{Dunlop, 11 U.S. (7 Cranch) at 269 ("[H]is own neglect in not properly superintending [his subordinates]"); Schroyer v. Lynch, 8 Watts 453, 457 (Pa. 1839) (recognizing failure to exercise "reasonable care and diligence" in superintending subordinates); Mechem, \textit{supra} note 234, § 790 ("[S]o carelessly or negligently oversees, conducts, or carries on the business of his office as to furnish the opportunity for the default."); 1 Shearman & Redfield, \textit{supra} note 191, § 319, at 553 (recognizing failure to "exercise ordinary care" in supervising subordinates); 2 Story, \textit{supra} note 78, § 319a ("[G]uilty of ordinary negligence at least... in not exercising a reasonable superintendence and vigilance over [subordinates'] acts and doings."); Annotation, \textit{Of the Liability of a Principal for Injuries Done by His Agent, in the Course of His Duty As Agent—Respondeat Superior}, 1 Am. Leading Cases 619, 621 (1852) ("[N]eglect in not properly superintending the discharge of [subordinates'] duties... .").}

As one often-cited case stated, a public officer was expected to exercise "that care and diligence [in supervising subordinates] which every person of common prudence and capable of governing a family takes of his own concerns."\footnote{Schroyer, 8 Watts at 455-56.} Thus, the nineteenth-century authorities imposed inadequate supervision liability on public officers much more freely than \textit{Monell} imposes it on cities.

The \textit{Monell} doctrine's final route to municipal liability, improper hiring, also had a rough parallel in the law of public officer liability. Nineteenth-century public officers could be held liable if they "negligently or willfully employ[ed] or retain[ed] improper persons."\footnote{Mechem, \textit{supra} note 234, § 790; see also Robertson v. Sichel, 127 U.S. 507, 514 (1888) (stating that officers are not responsible for a subordinates' wrongs absent evidence that the subordinates were incompetent or not properly selected); Cent. R.R. & Banking Co. v. Lampley, 76 Ala. 357, 365 (1884) (holding a public officer liable if he, "from carelessness or unfaithfulness, appoints incompetent or untrustworthy" subordinates); 1 Shearman & Redfield, \textit{supra} note 191, § 319, at 553 (stating that public officers are liable if they failed "to exercise ordinary care in selecting proper persons"); 2 Story, \textit{supra} note 78, § 319a (stating that public officers are liable if they fail to exercise ordinary care "at least, in not selecting persons of suitable skill"). There are examples of even more restrictive liability standards. See,}
negligence\textsuperscript{251} and thus provide no support for the \textit{Monell} doctrine's narrowing of hiring-based municipal liability to cases in which it was plainly obvious that the applicant would commit misconduct and "highly likely [that he would] inflict the particular injury suffered by the plaintiff."\textsuperscript{252} However, a few nineteenth-century authorities did restrict such liability to cases in which the hiring decision was more than simply negligent. Some suggested that inadequate hiring liability would not attach unless the public officer actually knew that the subordinate was incompetent or unfaithful,\textsuperscript{253} and unless it was reasonable to infer that giving the job to the subordinate would be likely to lead to disastrous or fatal consequences.\textsuperscript{254} One authority analogized public officer liability for retaining a known incompetent subordinate to "the principle which implicates a \textit{male fide} keeper of a vicious animal in the mischief done by it."\textsuperscript{255} Nevertheless, taken as a whole, while nineteenth-century cases provided solid support for some sort of hiring-based public officer liability, they provided only limited

\textsuperscript{251} Lampley, 76 Ala. at 365 (finding liability if appointment of an incompetent results "from carelessness or unfaithfulness"); Mechem, \textit{supra} note 234, § 790 (recognizing liability for "negligently or willfully" selecting or retaining improper persons); 1 Shearman & Redfield, \textit{supra} note 191, § 319, at 553 (acknowledging the requirement of "ordinary care in selecting proper persons"); 2 Story, \textit{supra} note 78, § 319a (recognizing the requirement of ordinary care at least in choosing subordinates).

\textsuperscript{252} Bd. of County Comm'r's v. Brown, 520 U.S. 397, 412 (1997). \textit{But see} Brissac v. Lawrence, 4 F. Cas. 153, 155 (C.C.S.D.N.Y. 1850) (No. 1888) (instructing the jury that, even if the customs collector had hired an intemperate bookkeeper and that the bookkeeper was drunk every day, the plaintiff still "must show that the [harm resulted] from that particular cause").

\textsuperscript{253} \textit{See}, e.g., \textit{Castle}, 32 Barb. at 488-89 (stating that an officer may be liable if he "know[s] the incompetency of his subordinates, [and still] purposely assigns to them a task, in the execution of which it is reasonable to infer that negligence will occur"); \textit{Schroyer}, 8 Watts at 459 (Gibson, C.J., concurring) (stating that an officer should be liable for subordinates' torts if he retained them after "they had been found unfaithful"); 1 Shearman & Redfield, \textit{supra} note 191, § 319, at 553 (recognizing that officers are liable for assigning subordinates jobs "for which they know such subordinates to be incompetent"); \textit{see also} Wiggins, 6 Barb. at 635-36 (stating that an officer is liable if "it can be proved that such deputies are notoriously unfit for the station, and thus charge the defendant with negligence in making the appointment").

\textsuperscript{254} \textit{Castle}, 32 Barb. at 488-89 ("fatal consequences"); 1 Shearman & Redfield, \textit{supra} note 191, § 319, at 553 ("disastrous consequences").

\textsuperscript{255} \textit{Schroyer}, 8 Watts at 459 (Gibson, C.J., concurring).
and ambiguous support for restricting that liability to situations demonstrating more than mere negligence.

In summary, to the extent nineteenth-century cities were treated as public officers, they were not liable under respondeat superior. They were liable if they authorized or directed the wrong, negligently supervised the wrongdoer, or negligently hired the wrongdoer. However, negligent supervision liability was clearly much broader than the Monell doctrine's version of training/supervision-based municipal liability. Similarly, nineteenth-century liability for improper hiring was probably not as narrowly confined as hiring-based liability under Monell and Brown. Thus, to the extent that nineteenth-century lawyers thought of a municipal corporation as the equivalent of a public officer, they may have expected courts to apply a somewhat watered-down version of the Monell doctrine to suits against cities under § 1983.

3. Nineteenth-Century Cities as Public Officers

It seems likely that, in cases involving governmental functions, nineteenth-century lawyers would have considered cities to be the legal equivalent of public officers. As discussed in Part III.B, the governmental-proprietary distinction was founded on the idea that employees performing so-called governmental functions were state agents or, in nineteenth-century parlance, “public officers.” This was true even if the city selected them, paid them, and supervised them. But if the employees were servants of the state, what was the functional legal status of the city that selected and supervised them?

While the question is not entirely free from doubt, it seems likely that the city was itself considered to be a public officer—simply a higher ranking one to whom the state had assigned the task of selecting and supervising the subordinate employees on the state’s behalf. Nineteenth-century cases frequently explained that the power to select such an employee was simply delegated to the city or town as a convenient way for the state to exercise its own appointment

256. In the nineteenth century, the phrase “public officer” or “independent public officer” was used to refer to state agents and was used to contrast such officials with municipal employees. See, e.g., Maximian v. Mayor of New York, 62 N.Y. 160, 169 (1875) (stating that city health commissioners are “not to be regarded as servants or agents of the [city], for whose acts or negligences [sic] it is liable, but as public or State officers”); City of Dayton v. Pease, 4 Ohio St. 80, 100 (1854) (using the phrase “public officer or agent of the state” as synonyms); 2 Dillon, supra note 120, § 772, at 884-85 (contrasting “public or state officers” on the one hand with “servants or agents of the [municipal] corporation); 1 Shearman & Redfield, supra note 191, § 253, at 469 (stating that employees performing public functions are “not agents of the [municipal] corporation, but of the ‘greater public,’ the state”).

257. See supra note 216.
power. Similarly, when the city was given the power to control and supervise such employees and to regulate their conduct, it was seen as exercising that authority on the state's behalf. Logically speaking, cities performing governmental functions were themselves state agents, and numerous cases described them as such.

As a result, when performing governmental functions, a city's liability for its subordinates' wrongs was determined by the same rules that were applicable to all public officers. Thus, in Bailey v. Mayor of New York, the court stated that cities performing governmental functions were "entitled to all the immunities of public officers" and that therefore "the doctrine of respondeat superior [did] not apply to [them in] such cases." However, like other public officers, they could be held liable for negligent hiring, for "want of diligence in the performance of governmental functions."
selection of agents,\textsuperscript{264} or for directing the agent to commit the wrong,\textsuperscript{265} or presumably for negligent supervision.\textsuperscript{266}

4. Nineteenth-Century Cities and \textit{Monell's} "Official Policymaker" Requirement

Because cities are entities rather than natural persons, applying public officer liability to them raised the same dilemma created by \textit{Monell} itself: Because an entity can only act through agents of some sort, courts must decide which agents' conduct will be considered the conduct of the city itself.\textsuperscript{267} Nineteenth-century cases seem to have resolved that dilemma in a manner somewhat similar to the \textit{Monell} doctrine's limitation of liability to conduct by an official municipal "policymaker."

For example, in \textit{Woodcock v. City of Calais},\textsuperscript{268} the court recognized that a city would not ordinarily be liable for the wrongs of a city-paid surveyor since the surveyor should be treated as an agent of the state, rather than the city, but held the city liable because it had directed that the wrongful act be done. However, the city was liable only because its policymaking officials had formally ordered the surveyor to do the wrongful act.\textsuperscript{269} Even the fact that the mayor and city attorney had directed the surveyor to do so was not enough to make the city liable since they (like the surveyor) were state agents for whose conduct the city was not responsible.\textsuperscript{270} Instead, the city could be held liable only because the surveyor had been "expressly 'directed' [to commit the wrongful act] by the city government" acting through a "positive, formal vote."\textsuperscript{271} Thus, like the Court in \textit{Monell}, the \textit{Woodcock} court held the city liable only because the action was taken pursuant to a decision that was "officially adopted"\textsuperscript{272} by the city, that is, was made by "its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."\textsuperscript{273}

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\textsuperscript{264} \textit{Bailey}, 3 Hill at 538. \textit{But see O'Rourke v. City of Sioux Falls, 54 N.W. 1044, 1046-47 (S.D. 1893) (sustaining a demurrer to petition apparently claiming the city was guilty of negligent hiring, but treating the petition as if it was based on respondeat superior).}

\textsuperscript{265} \textit{Woodcock v. City of Calais}, 66 Me. 234, 236 (1877) (finding the city liable when the city government directed the surveyor to commit the wrong).

\textsuperscript{266} \textit{See Kittredge v. City of Cincinnati, 14 Ohio Dec. 504 (Ohio C.P. 1904) (holding that the city is not liable for regulating police officers because their control was vested in an independent board rather than in the city itself).}

\textsuperscript{267} For discussion of this dilemma, see, for example, Eric Schnapper, \textit{Civil Rights Litigation After Monell}, 79 Colum. L. Rev. 213, 217-20 (1979); Rothfeld, \textit{supra} note 79, at 940-41.

\textsuperscript{268} 66 Me. at 234.

\textsuperscript{269} \textit{Id.} at 236.

\textsuperscript{270} \textit{Id.}

\textsuperscript{271} \textit{Id.}

\textsuperscript{272} \textit{Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).}

\textsuperscript{273} \textit{Id.} at 694.
Similarly, in *Doty v. Village of Port Jervis*, the court suggested that a city could not be held liable on a negligent hiring theory unless policymaking officials were responsible for the hiring. The plaintiff's wrongful death suit alleged that the village president had hired "an incompetent, inefficient, negligent, and dangerous man, utterly unfit and incompetent to fulfill the duties" of a police officer, and that the village "had actual notice of his unfit and dangerous character." However, the court held that the village could not be held liable since the hiring had been performed by its executive officer (the president) rather than the village itself (presumably acting through its board of trustees). "The complaint asserts no negligence whatever on the part of the defendant [village] as a corporation. The appointment of the police officer was not its act, but the act of its president, over which it possessed neither control nor supervision." Thus, the *Doty* court prefigured the *Monell* doctrine's official policymaker requirement by refusing to hold the village liable for wrongful action of an executive officer whose acts could not "fairly be said to represent official policy" of the village itself.

Thus, *Monell*'s supporters can argue that nineteenth-century common law decisions on public officer liability provide a solid historical framework for the *Monell* doctrine. Those decisions rejected respondeat superior and at the same time prefigured the *Monell* doctrine's four limited routes to municipal liability as well as its requirement of action by an official policymaker.

B. Focusing on the Common Law Process: Using the Nineteenth-Century Rationales to Overturn *Monell*

That framework may, however, be built on a flawed foundation: the assumption that the enacting Congress would have expected future Supreme Courts to focus on common law decisions rather than on the common law decision-making process. Nineteenth-century lawyers and judges did not view the common law as an ironclad set of immutable specific rules, unchanging over time and engraved in stone. At the same time, they did not view common law decision making as an unrestricted license for judges to implement their personal views of the public good. Instead, they saw it as a method for applying a set of unchanging general principles to specific situations to produce concrete rules that would legitimately vary from place to place and would properly change from time to time as the world itself changed.

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274. 52 N.Y.S. 57 (Sup. Ct. 1898).
275. Id.
276. Id. at 59; cf. Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84, 106 S. Ct. 12 (1986) (stating that a city would not be responsible for the conduct of a sheriff who had final authority to select deputies unless the sheriff also had final authority to set the criteria for hiring).
The lawyer-members of the Forty-Second Congress would most likely have expected future federal courts to use this common law process to determine the proper scope of municipal respondeat superior under § 1983. They would not have expected the courts to transplant nineteenth-century rules of respondeat superior into a twenty-first-century world, but would instead have expected the courts to apply the fundamental principles behind respondeat superior to the realities of twenty-first-century municipal employee relationships. That process provides a powerful argument that Monell should be overruled and municipal respondeat superior restored.


Nineteenth-century lawyers and judges understood and admired the flexibility of the common law. They saw flexibility as "[t]he great excellence of the common law," as its "peculiar boast," and as its "chief attribute." They recognized that this flexibility made it possible for common law rules to vary to accommodate variations in geographic or demographic conditions and to change to adapt to changes in society.

278. The common law process is not simply another version of the dynamic incorporation approach. See supra note 225. Dynamic incorporation would require the Court to examine an external source—existing state and federal common law decisions on municipal respondeat superior in ordinary tort cases—and to adopt the result of that examination as the scope of respondeat superior for § 1983. The common law process requires the Court to itself examine the rationales behind respondeat superior and to decide what scope was best justified by those rationales. It is the difference between setting a local bank's prime interest rate by simply adopting CitiBank's published rate and setting it by having the bank officers independently review designated economic factors. The two approaches may lead to the same result, but they do so through different thought processes.

279. See, e.g., Rensselaer Glass Factory v. Reid, 5 Cow. 587, 628 (N.Y. 1825) (expressing admiration for the flexibility of the common law).

280. Johnson v. Baird, 3 Blackf. 182, 189 (Ind. 1833); see also Burton v. Curyea, 40 Ill. 320, 326 (1866) (describing adaptability as one of the common law's "excellencies"); John Norton Pomeroy, The True Method of Interpreting the Civil Code, 4 W. Coast Rep. 1, 110 (1884) ("The distinguishing element of the common law, and one of its highest excellencies, is its elasticity, its power of natural growth and orderly expansion.").

281. Hurtado v. California, 110 U.S. 516, 530 (1884); see also Norway Plains Co. v. Boston and Me. R.R., 67 Mass. (1 Gray) 263, 267 (1854) ("The distinguishing element of the common law, and one of its highest excellencies, is its elasticity, its power of natural growth and orderly expansion.").


283. See, e.g., Boyer v. Sweet, 4 Ill. (3 Scam.) 120, 121 (1841) (noting that common law rules vary from place to place because rules "suited to a highly refined and luxurious people... may be very ill adapted to a community differently situated"); Ketelson v. Stilz, 111 N.E. 423, 424-25 (Ind. 1916) (stating that common law rules must be modified due to local circumstances); Morgan v. King, 30 Barb. 9 (N.Y. Gen. Term 1858), rev'd on other grounds, 35 N.Y. 454 (1866) (same); People v. Randolph, 2 Park. Crim. Rep. 174, 179 (N.Y. Sup. Ct. 1855) (recognizing that common law rules vary
However, while common law rules were changeable, the underlying principles of the common law were not. As one often-cited case put it, the much-admired flexibility of the common law did not lie “in the change of great and essential principles, but in the application of old principles, to new cases, and in the modification of the rules flowing from them, to such cases as they arise: so as to presume [sic] the reason of the rules, and the spirit of the law.”

The courts repeatedly stated that the common law consisted of essential principles, the application of which to our circumstances, would result in a modification or entire change of some of its rules, which are nothing more than the result of the application of general principles to particular facts. The principle is essentially the same under all circumstances, but the rule, or result of its application, will vary with the facts to which it is applied, or the conditions under which the application is made.

Thus, while common law rules might change, they did so because the common law process required courts to apply unchanging principles to changing world conditions.

The resulting flexibility of the common law process did not give judges an unconstrained license to impose their own view of the public interest. Instead, it required the judges to make a reasoned approach from place to place depending on the “climate and the population” of the locations in which it is applied.

284. See, e.g., Utermehle, 1 App. D.C. at 368-69 (recognizing that the common law can expand and adapt to “the changing needs and circumstances of a complex civilization”); Burton, 40 Ill. at 326 (stating that the common law can adapt to “new emergencies as they arise in the rapid development of modern society”); Ketelson, 111 N.E. at 425 (noting that common law rules are “continually changing and expanding with the progress of society”); Williams v. Miles, 94 N.W. 705, 708 (Neb. 1903) (acknowledging that common law rules are “modified from time to time as changed conditions and new states of fact require”); Rensselaer Glass Factory, 5 Cow. at 628 (noting that the common law can adapt “to the ever-varying condition of human society”).

285. Boyer, 4 Ill. (3 Scam.) at 121 (noting that while common law rules may vary depending on circumstances, the “great leading principles” are “never departed from”); J.C. Wells, A Treatise on the Jurisdiction of Courts 208 (1880) (recognizing that the chief distinction is between the principles and the rules resulting from them—the former being held immutable, unless especially repealed, while the latter are subject to circumstantial modification).

286. Rensselaer Glass Factory, 5 Cow. at 628.

287. Randolph, 2 Park. Crim. Rep. at 178; see also Ketelson, 111 N.E. at 424-25; Williams, 94 N.W. at 708 (stating that the common law consists, “not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow”); Morgan, 30 Barb. at 9 (recognizing that states adopted the “essential principles” of the common law and application of those principles often required modification or change of common law “rules”).

288. See, e.g., Burton, 40 Ill. at 326 (stating that common law decision making “should be confined to the new application of settled principles” rather than the creation of rules that are inconsistent with “maxims lying at the foundation of our law”). In the context of § 1983, these constraints are crucial to the legitimacy of the Court’s exercise of common law decision-making power. The enacting Congress had
effort to apply unchanging, previously established principles to the circumstances of a changing society. And as part of that effort, because the common law was "founded in reason," its judges were required to recognize that *cessante ratione, cessat et ipsa lex,* that is, that "where the reason of the rule ceases the rule also ceases." Moreover, if an examination of the previously existing rule demonstrated that it had never been supported by fundamental principles, the rule could be rejected even without a change in conditions.

As a result, the members of the Forty-Second Congress would not have expected the twenty-first-century Supreme Court to treat particular nineteenth-century respondeat superior doctrines as "iron-clad rules," forged "in such inflexible form as to make them absolute rules of decision throughout all time." Instead, they would have expected the Court to treat the rationales for respondeat superior as settled principles and then to apply those principles by asking whether, in light of twenty-first-century conditions, they supported continued recognition of the governmental-proprietary distinction and expansion of its scope to cover all city workers.
2. The Common Law Process and the Governmental-Proprietary Distinction

As discussed in Part III.B, the governmental-proprietary distinction was seen as identifying certain city-paid workers who nonetheless should be treated as employees of the state rather than the municipality. The city's lack of responsibility for their torts was the necessary result of the conclusion that the city was not their employer; and that conclusion rested on application of the control and reciprocity rationales, that is, on the belief that the state rather than the city controlled the workers and that their work was performed for the benefit of the state as a whole rather than for the benefit of the city.

Thus, the unchanging principles were that an employer's respondeat superior responsibility "grows out of, is measured by, and begins and ends with his control of the servant," and that "he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." To implement the Forty-Second Congress's expectation, a court should use the common law process to apply those principles to contemporary relations between cities and their employees and to determine whether the reasons for the governmental-proprietary distinction's rule have ceased to exist.

Such a court would be hard-pressed to argue that the control rationale could justify treating twenty-first-century city-paid workers as state rather than city employees. Whatever may have been the case in the nineteenth century, cities—not states—hire city employees.

295. See supra Part III.B.
296. See supra notes 83-90, 105-10 and accompanying text.
297. Callahan v. The Burlington & Mo. River R.R. Co., 23 Iowa 562, 564 (1867) (quoting Parsons, supra note 87, at 88) (referring to the quoted language as "the principle" that sets the limit of doctrine); see also, e.g., Palmer v. City of Lincoln, 5 Neb. 136, 142 (1876) (noting that control is the "reason of the rule" of respondeat superior); Clark v. Fry, 8 Ohio St. 358, 378 (1858) (asserting that respondeat superior is "founded on the [employer's] power of control and direction").
298. Hall v. Smith, 130 Eng. Rep. 265, 267 (C.P. 1824) (stating that "respondeat superior is bottomed on this principle"); see Cardot v. Barney, 63 N.Y. 281, 287 (1875) (stating that there was "substantial agreement of judges [that the language quoted in the text accurately stated] the reason of the rule making masters liable for the acts of their servants"). See generally Huey v. Richardson, 2 Del. (2 Harr.) 206 (1837) (noting that respondeat superior is based on the principle that those who expect to benefit from servants' acts are liable for the injuries they cause); Cardot, 63 N.Y. at 281 (same); Hickock v. Trs. of the Vill. of Plattsburgh, 15 Barb. 427 (N.Y. Gen. Term 1853) (discussing liability based on malfeasance of agents); Sawyer v. Corse, 38 Va. (17 Gratt.) 230 (1867) (discussing respondeat superior in relation to mail carriers).
enter into collective bargaining agreements with their unions, set their salaries, regulate their conduct, discipline them, lay them off, and discharge them. The Court itself implicitly recognized that modern municipalities control their employees when it set forth standards for deciding which city official had final policymaking authority over personnel decisions. Like the water commissioners in Bailey v. Mayor, modern city workers are controlled by the city; and, at least so far as the control rationale dictates the results, they should be treated as city employees.


302. See, e.g., City of St. Louis v. Praprotnik, 485 U.S. 112, 114-17 (1988) (describing the city regulation of outside employment, city employee evaluation procedures, city restructuring of positions, city transfers of employees, and procedures for appealing such decisions to the city civil service commission); Pembaur, 475 U.S. at 483 n.12 (recognizing that the county's board of commissioners sets employment policies for deputies either directly or by delegating that authority to a county official); Edwards v. City of Goldsboro, 178 F.3d 231, 238-39 (4th Cir. 1999) (describing the city's decision to restrict a police officer's outside employment and the city procedures for appealing such decisions to the city civil service commission).

303. See, e.g., Bogan, 523 U.S. at 46-47 (describing city disciplinary proceedings against a city employee); Owen, 445 U.S. at 625 & n.2 (describing a city manager's authority to suspend or demote employees).

304. See, e.g., Bogan, 523 U.S. at 47 (describing a mayor and city council's action to lay off 135 employees by eliminating their positions); Stotts, 467 U.S. at 566 (describing a city's layoff policy for its firefighters); Owen, 445 U.S. at 625 & n.2 (describing a city manager's authority to lay off employees). But see, e.g., Boston Firefighter Union Local 718 v. Boston Chapter, NAACP Inc., 468 U.S. 1206, 1207 (1984) (Blackmun, J., dissenting) (describing state legislative intervention to prevent layoffs).

305. See, e.g., Pembaur, 475 U.S. at 483 n.12 (recognizing that a county's Board of Commissioners has authority to fire deputy sheriffs or to delegate that authority to a county official); Owen, 445 U.S. at 625 & n.2 (describing a city manager's authority to remove employees). Of course, at least as to non-home-rule cities, the state legislature can limit a city's freedom to take some of these actions; but that is true as to all employers except where federal law provides otherwise. Similarly, while some city employees may need to have state licenses or may need to meet state-imposed requirements, the same is true of, for example, privately employed lawyers, doctors, nurses, and pharmacists—not to mention, in a few states, barbers and florists. The imposition of such requirements has never been thought to eliminate employers' respondeat superior liability. The fact that the state may require a license to be an engineer does not convert all engineers into state employees.

306. See Pembaur, 475 U.S. at 483 n.12.

307. 3 Hill 531, 543-44 (N.Y. Sup. Ct. 1842).

308. This does not necessarily mean that there are no locally selected officials who should be treated as state employees. Where state law clearly and unequivocally treats particular officials as part of the state government and vests control in state rather than local government, those officials should be treated as servants of the state rather than the locality that selects them. Thus, elected state judges are likely to be considered state employees even if they are elected by the voters of a particular county. See, e.g., McMillian v. Monroe County, 520 U.S. 781, 794 (1997) (stating that Alabama sheriffs are policymakers for the state rather than the county from which
Applying the reciprocity rationale leads to the same result. Under that rationale, respondeat superior liability is imposed on those who "expect[] to derive advantage from an act which is done by another for [them]," and the expected beneficiaries of a modern city worker's efforts are the city and its inhabitants. Of course, good work by a city worker—like good work by any public or private employee—may produce positive externalities and those externalities may benefit persons who are not city inhabitants. But if the production of incidental benefits to outsiders was enough to exempt they are elected). In identifying such officials, courts should continue to apply the underlying principles discussed in the text. See, e.g., W. Coll. of Homeopathic Med. v. City of Cleveland, 12 Ohio St. 375, 379 (1861) (a nineteenth-century analog recognizing that tortfeasors may sometimes be acting "as officers of the state, though elected by the people of the county").


310. See, e.g., City of Overland Park Kan., Adopted 2004 Annual Budget (2004) ("MISSION STATEMENT: We, the employees of the City of Overland Park, Kansas, believe that our primary mission is to maintain and enhance a high quality of life for residents") (on file with author); City of Akron, Transitioning to the Twenty-First Century: Report to the Mayor by the Task Force Studying the Akron Police Department, at http://www.ci.akron.oh.us/News_Releases/2000/020200.html (2000) (Police department's "mission is to serve the community of Akron"); City of Blue Springs, Mo., Welcome to the Blue Springs Police Department, at http://www.bluespringsgov.com/Police_Dep/t/police_mainpage.htm (last visited Feb. 12, 2005) ("The mission of the Blue Springs Police Department is to provide the highest quality of police services to the Blue Springs community."); City of Los Angeles, City of Los Angeles Personnel Department, at http://www.lacity.org/per (last visited Feb. 12, 2005) (showing Personnel Department motto as "[m]eeting the needs of the City with the most talented people"); L.A. Fire Dep't, Los Angeles Fire Department Official Seal, at http://www.lafd.org/seal.htm (last visited Feb. 12, 2005) (describing the Los Angeles Fire Department's "central purpose" as "protecting its people"). A few nineteenth-century governmental-proprietary distinction cases seem to have relied on a fictional dichotomy between the interests of the city as a corporation and the interest of its inhabitants. See, e.g., Fisher v. City of Boston, 104 Mass. 87, 93 (1870) (explaining that the prevention of fires "is an object which affects the interest of all the inhabitants of the city, but then stating that it is not advantageous to the "town in its corporate capacity"); Hafford v. City of New Bedford, 82 Mass. (16 Gray) 297, 302 (1860) (contrasting interests in city in its corporate capacity with the "general welfare of the inhabitants or of the community"); Maximilian v. Mayor of New York, 62 N.Y. 160, 168 (1875) (contrasting the interests of the corporation and the interests of "individuals as members of the community"). However, the cases suggest no meaningful difference between the two sets of interests, and give no hint as to why employees whose work benefited the city's citizens should be treated as employees of the state while those whose work benefited the city's treasury should be treated as employees of the city.

311. See, e.g., Workman v. Mayor of New York, 179 U.S. 552, 585 (1900) (Gray, J., dissenting) (noting that fire departments are established not only to protect property within city limits but also to protect property outside the city limits to which the fire might spread); Jewett v. City of New Haven, 38 Conn. 368, 373-74 (1871) (describing extraterritorial effects of fires); Williams, supra note 174, § 71, at 114-15 (suggesting that the reason that towns are not liable for road defects and cities are is that roads in towns primarily serve persons passing through while roads in cities primarily serve the city's inhabitants).
employers from respondeat superior liability, such liability would cease to exist entirely.312

Finally, like control and reciprocity, the nineteenth-century “warranty rationale” contravenes the argument that city workers should be treated, for respondeat superior purposes, as state employees. The rationale was based on the principle that one who “holds out his agent as fit to be trusted . . . thereby, in effect, warrants his fidelity and good conduct,”313 and was tied to the principle that employers are liable because they selected the wrongdoer.314 But a contemporary city selects its own workers315 and is the entity that holds them out as “fit to be trusted.”316 The city gives them badges bearing the city’s name and puts them in vehicles bearing the city’s logo.317 It publicly disciplines them and just as publicly awards them commendations.318 After all, the public knows Los Angeles’s and Chicago’s Police Departments as the “LAPD” and “Chicago’s Finest,” not as the “Cal PD,” and “Illinois’s Best.”

Thus, the three rationales provide mutually reinforcing reasons to recognize municipal respondeat superior while rejecting the rules that treated many city-paid workers as state employees. Under the common law decision-making process, the lack of reasons for these rules abrogates them, either because the reasons for the rules have ceased to exist319 or because it has now become apparent that the rules

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312. In any event, the “extraterritorial benefit” argument simply cannot explain the governmental-proprietary distinction. While a city firefighter’s “governmental” failure to properly fight a fire might have extraterritorial impacts, so might the city water commissioners’ “proprietary” failure to properly construct a dam. Compare Jewett, 38 Conn. at 373-74 (holding firefighting to be governmental), with Bailey v. Mayor of New York, 3 Hill 531 (N.Y. Sup. Ct. 1842) (holding construction of a dam to be proprietary).
313. 2 Story, supra note 78, § 452.
314. See supra note 95.
315. See supra note 299 and accompanying text. Of course, the authority to hire employees is often dispersed among various city officials and the identity of the hiring authority may vary depending on the type of city government. Nonetheless, the authority rests within the city’s various officials rather than the state’s.
316. The fourth nineteenth-century rationale for respondeat superior, the legal unity of principal and agent, neither supported nor undermined the governmental-proprietary distinction. The idea that principal and agent were a single legal unity was seen, even in the nineteenth century, as a legal fiction. New Orleans, Jackson & Great N. R.R. Co. v. Bailey, 40 Miss. 395, 453 (1866). It expressed the legal effect of a master-servant relationship but, except in extreme cases, provided no help in determining who was best treated as a servant’s master.
319. See generally Pierre v. Fontenette, 25 La. Ann. 617 (1873) (where a rationale ceases to exist, the rule should no longer be applied); Dulany v. Wells, 3 H. & McH.
“had never been founded on reason.” If the Court is to be faithful to the common law decision-making process—the process that the enacting Congress would have expected the Court to follow—the Monell doctrine should be overruled.

CONCLUSION

The conflicting arguments set forth in Part IV are not simply exercises in bilateral law office history in which each of the contending advocates selects and quotes favorable historical evidence, ignoring context, and omitting contrary data. They are both legitimate, methodologically sound arguments: They reach conflicting results not because they use (or ignore) different data, nor because they differ in how they evaluate the reliability of that data, but because they ask different questions. Both arguments assume that the enacting Congress understood nineteenth-century common law, and both assume that Congress would have expected future courts to apply that common law to decide issues of municipal liability under § 1983. But Monell’s supporters focus on nineteenth-century common law decisions, while Monell’s opponents focus on the nineteenth-century common law decision-making process. Monell’s supporters ask what result would be reached if the current Court applied nineteenth-century common law doctrine to issues of municipal liability under § 1983, while Monell’s opponents ask what result would be reached if the Court applied the nineteenth-century common law method to those issues.

Factually, the answers to those two questions are different. Theoretically, fidelity to the enacting Congress’s expectations suggests that the latter question should be decisive. But realistically, the advocates cannot know which question a yet-to-be-chosen Justice will

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20 (Md. 1790) (same); Clark v. Mikell, 3 S.C. Eq. (3 Des.) 168 (App. Ct. 1809) (same); see also generally People v. Randolph, 2 Park. Crim. Rep. 174, 177 (N.Y. 1855) (“[W]here the reason of the rule ceases the rule also ceases.”).

320. Ketelson v. Stilz, 111 N.E. 423, 425 (Ind. 1916) (“[I]t logically followed that when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof, that rule likewise ceased.”); accord Funk v. United States, 290 U.S. 371 (1933).

321. Professor Alfred Kelly introduced the phrase “law-office” history to refer to “the selection of [historical] data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.” Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1965 Sup. Ct. Rev. 119, 122 n.13. Such history “use[s] evidence wrenched from its... historical context” and “select[s] those materials designed to prove the thesis at hand, suppressing all data that might impeach the desired historical conclusions.” Id. at 126.
choose to answer. 322 “And that,” as Robert Frost said of another choice, “[will make] all the difference.” 323

322. The Court as a whole has sometimes considered one question dispositive and sometimes the other. Compare, e.g., Heck v. Humphrey, 512 U.S. 477, 483-86 (1994) (incorporating prior-favorable-termination requirement into certain § 1983 actions because it was a requirement for the most analogous common law cause of action), and City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981) (“One important assumption underlying the Court’s decisions in this area is that members of the 42nd Congress were familiar with common-law principles . . . and that they likely intended these common law principles to obtain, absent specific provisions to the contrary.”), with Anderson v. Creighton, 483 U.S. 635, 644-45 (1987) (stating that § 1983 immunity determinations should be made “in light of the ‘common law tradition[s]’” but should not be “slavishly derived from the often arcane rules of the common law”), Malley v. Briggs, 475 U.S. 335 (1986) (applying the “objective reasonableness” standard to § 1983 cases), Smith v. Wade, 461 U.S. 30, 34 (1983) (stating that common law rules should be “modified or adapted as necessary to carry out the purpose and policy of” § 1983), and Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982) (creating a form of immunity unknown to the common law because “the public interest may be better served” by the new standard). Existing individual Justices have been similarly inconsistent. Compare, e.g., City of Oklahoma City v. Tuttle, 471 U.S. 808, 834 (1985) (Stevens, J., dissenting) (arguing that the Court should incorporate nineteenth-century common law rules into § 1983), with Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting) (suggesting that Congress expected older, generally phrased statutes such as § 1983 to be interpreted “by developing legal rules on a case-by-case basis in the common-law tradition”). See also Burns v. Reed, 500 U.S. 478, 497-98 (1991) (Scalia, J., concurring in part and dissenting in part) (stating that a § 1983 immunity can never be recognized unless it existed at common law in 1871); Anderson, 483 U.S. at 644-45 (stating that § 1983 immunity determinations should be made “in light of the ‘common-law tradition[s]’” but should not be “slavishly derived from the often arcane rules of the common law”). But see Crawford-El v. Britton, 523 U.S. 574, 611-12 (1998) (Scalia, J., dissenting) (arguing that because Monroe v. Pape was wrongly decided, the Court should feel free to engage in “the essentially legislative activity” of creating a sensible remedial scheme and equally free to ignore “the common law embodied in the statute”).
