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MUNICIPAL LIABILITY UNDER § 1983: TOWARD A NEW DEFINITION OF MUNICIPAL POLICYMAKER

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In *City of St. Louis v. Praprotnik*,¹ the United States Supreme Court attempted to resolve the vexing question of when acts by municipal officials or employees may trigger municipal liability under 42 U.S.C. § 1983.² The Supreme Court had hoped to put to rest questions that had troubled it since *Monell v. New York City Department of Social Services*.³ In *Monell*, the Court held that municipalities⁴ may be found liable under § 1983 only where a municipal policy or custom causes a

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¹ 485 U.S. 112, 114 (1988).

² 42 U.S.C. § 1983 (1988) provides in relevant part:

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.

³ See *Praprotnik*, 485 U.S. at 121-24 (citing *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978)).

⁴ A "municipality" for purposes of § 1983 litigation includes not only city government but also other similar local governmental entities. See, e.g., *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 n.12 (1986) (counties are subject to suit under § 1983). "Municipality" is used throughout this Article as a generic label for local government entities under § 1983.

deprivation of federal rights, but the Court did not elaborate on what constitutes municipal policy.⁵ *Praprotnik* establishes municipal policy as the directives of only those officials expressly identified by state or local law as having final policymaking authority.⁶ *Praprotnik*, however, ignores the directives set by those officials who exercise policymaking authority in fact but who are not expressly vested with that authority by state or local law.⁷ Despite the *Praprotnik* Court's intention to unify the law as to when government action implicates a municipal policy, the contrasting views expressed by circuit courts about when policymakers have delegated their policymaking authority and whether certain officials are per se policymakers demonstrate that *Praprotnik* has proven to be an unsuccessful guide.⁸

The difficulties the Supreme Court and the lower federal courts have faced in defining municipal policy stem from the need to balance what the Supreme Court has determined to be Congress's conflicting intentions in passing Section One of the Civil Rights Act of 1871, also known as the Ku Klux Act⁹ and currently codified at 42 U.S.C. § 1983. According to the Supreme Court in *Monroe v. Pape*, Congress passed the Ku Klux Act primarily to provide a federal remedy to persons

⁵ 436 U.S. at 694-95.

⁶ 485 U.S. at 124 (citing *Pembaur*, 475 U.S. at 483). There was no majority opinion in *Praprotnik* and therefore determining what *Praprotnik* established as new law is difficult. Justice O'Connor's plurality opinion, however, was adopted by a majority of the Court the following year in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989), with Justice Kennedy, who did not participate in *Praprotnik*, providing the fifth vote. The lower courts have consequently treated Justice O'Connor's plurality as if it were a majority opinion. See, e.g., *Auriemma v. Rice*, 957 F.2d 397, 400 (7th Cir. 1992). The ability of *Jett* to transform Justice O'Connor's plurality into a majority opinion, however, should not be overstated. *Jett* did not require the Court to determine who has authority to set municipal policy and therefore does not provide a detailed analysis of that question. For a discussion of what *Jett* did address, see note 110 *infra*. In addition, the municipal policy question has repeatedly fractured the Court, with no majority opinion emerging on the central issue, despite the Court addressing the issue three times in four years. See *Praprotnik*, 485 U.S. at 112; *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). Finally, the Court is in transition, with only five Justices who participated in *Praprotnik* still present: Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, and Scalia. Given the factiousness of the issue, the absence of any detailed analysis of the question in *Jett*, and the Court's turnover in the intervening period, the Court may well revisit the question of who has authority to set municipal policy with a fresh eye.

⁷ In *Praprotnik*, the Court ignored de facto policymakers not only by relying on state and local law but also by narrowly construing the delegation of policymaking authority. The Court concluded that the Civil Service Commission's deference to, and in some cases, failure to review, its appointees' discretionary decisions in individual employment actions did not constitute a delegation of policymaking authority. *Id.* at 130.

⁸ See circuit court opinions cited *infra* notes 137-77.

⁹ Ku Klux Act, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1988)). The Act was formally entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution to the United States, and for other Purposes."

deprived of federal rights where local officials were either unable or unwilling to enforce federal law.¹⁰ In *Monell*, the Court interpreted the Ku Klux Act as creating a fault-based system of liability, under which a municipality may not be held vicariously liable for the actions of its employees.¹¹ The *Monell* Court balanced these conflicting concerns by rejecting respondeat superior as a basis for municipal liability and inserting into § 1983 the requirement that the deprivation of a federal right must occur pursuant to a municipal policy or custom.¹²

The years following *Monell* saw the Supreme Court engaged in an arduous battle to define the contours of municipal policy. The stakes were high for municipalities. A relaxed vision, wherein every municipal official who exercised final authority to act on behalf of the municipality could create municipal policy, would greatly expand municipal liability. Conversely, a narrow reading, in which a municipal policy could be created only by a select few officials holding legal policymaking authority, would greatly restrict municipal liability. The Court in *City of Oklahoma City v. Tuttle*¹³ rejected the expansionist view that all municipal officials authorized to take final action have authority to set policy, by holding that a single constitutional violation by a nonpolicy-making official, that was not shown to be pursuant to an unconstitutional policy, is insufficient as a matter of law to impose liability on a municipality.¹⁴ The Supreme Court again adopted the narrow view in *Pembaur v. City of Cincinnati*,¹⁵ where it decided that municipal liability only attaches where actions are taken by an official with final authority to set the policy at issue.¹⁶

After *Pembaur*, municipalities and civil rights activists alike anxiously awaited direction as to which officials possess final authority. The Supreme Court, in *City of St. Louis v. Praprotnik*, attempted to resolve that question by relying solely on where state or local law explicitly places policymaking authority.¹⁷ *Praprotnik* therefore ignores those actions taken by municipal officials who exercise de facto policymaking authority and allows legal formalism to blind the courts to the actual policymaking structure practices in a modern municipal bureaucracy.¹⁸

¹⁰ See *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961), *overruled in part by Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978).

¹¹ *Monell*, 436 U.S. at 690-95.

¹² *Id.* at 691, 694.

¹³ 471 U.S. 808 (1985).

¹⁴ *Id.* at 821-24.

¹⁵ 475 U.S. 469 (1986).

¹⁶ *Id.* at 483-84.

¹⁷ *Praprotnik*, 485 U.S. at 124-25.

¹⁸ This formalistic definition of municipal policymaker, and the resulting restriction of mu-

Although the Supreme Court intended *Praprotnik* to close the door to further questions regarding municipal policy, it has not proven successful in doing so. Lower courts have taken opposing positions on whether municipal officials not designated by state or local law as policymakers may nonetheless be transformed into policymakers by virtue of the fact that the municipality has vested unreviewable authority to act in those officials.¹⁹ Moreover, lower courts disagree as to whether there are certain officials (e.g., mayors) who should be treated as per se policymakers, regardless of where local law purports to place policymaking authority.²⁰ Those courts that have adopted an expansive view of municipal policymakers believe a municipality should be viewed as authorizing the actions of all elected officials and of those officials whose actions the municipalities have insulated from the review of those policymakers designated by state or local law. In contrast, those courts that have taken a strict view of municipal policymakers argue that *Praprotnik* demands a narrow definition of municipal policymaker in order to maintain a fault-based system of liability and to avoid falling into the bottomless spiral of respondeat superior and its devastating impact on municipal treasuries.

This Article argues that the Supreme Court should reject the narrow view of municipal policy articulated by certain lower courts after *Praprotnik* and, in doing so, reconsider *Praprotnik*'s sole reliance on state and local law to determine policymaking authority. Section I traces the development of Supreme Court analysis on the question of

municipal liability under § 1983, is one example of the Rehnquist Court's efforts to restructure the nation's civil rights laws in order to make it more difficult for plaintiffs who allege that their civil rights have been violated to prevail. The Rehnquist Court has aggressively restricted the rights of civil rights plaintiffs. In addition to *Praprotnik*, see, e.g., *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991) (expert witness fees not recoverable by prevailing plaintiffs under 42 U.S.C. § 1988); *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-78 (1989) (42 U.S.C. § 1981 does not apply to conduct following the formation of a contract); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60 (1989) (burden of proof remains at all times with plaintiff in Title VII action who bears the burden of persuasion to show that challenged hiring practices were not justified by a legitimate business purpose). Cf. *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (no bar to adversely affected workers challenging affirmative action programs governed by consent decrees); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-11 (1989) (applying restrictive standard of review to voluntary governmental affirmative action programs and increasing burden of proof of past discrimination to justify such programs). Congress took note of the Court's rightward tilt in civil rights cases and overturned, at least in part, *West Virginia University Hospitals, Wards Cove, Patterson*, and *Martin* in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-1100. Commentators have also noted the Rehnquist Court's restructuring of civil rights actions. See, e.g., Constance B. Motley, *The Supreme Court, Civil Rights Litigation, and Deja Vu*, 76 CORNELL L. REV. 643, 648-55 (1991).

¹⁹ See *infra* notes 138-70 and accompanying text.

²⁰ See *infra* notes 171-77 and accompanying text.

municipal policy, culminating in *Praprotnik*.²¹ Section II outlines the split in the lower courts' interpretations of *Praprotnik*.²² Section III analyzes *Praprotnik* and the split in the lower courts in light of Congress's objectives in passing the Civil Rights Act of 1871, and argues that *Praprotnik* and the narrow view of municipal policymakers subvert Congress's intention to remove from local governments the power to decide which federal laws will be enforced.²³ Finally, Section IV offers a definition of municipal policy that defines municipal policymakers as elected officials, officials designated by state or local law as policymakers, and officials who are de facto policymakers by virtue of the absence of any review of their actions.²⁴ This vision of municipal policy properly balances a fault-based system of municipal liability with the compelling need to deter violations of federal rights and compensate victims of improper official action.

I. THE DEVELOPMENT OF MODERN § 1983 MUNICIPAL LIABILITY

A. Monroe Denies Municipal Liability

The starting point for an informed discussion of modern municipal liability under § 1983 is the landmark 1961 Supreme Court decision of *Monroe v. Pape*.²⁵ In *Monroe*, the complaint alleged that thirteen Chicago police officers broke into the plaintiffs' home in the early morning with neither a search nor an arrest warrant. The complaint further alleged that the police made the plaintiffs stand naked in the living room while they ransacked the house. The police then took Mr. Monroe to the police station, where they detained him on "open" charges for approximately ten hours and interrogated him about a recent murder before they released him without charges. During his detention, Monroe was never presented to a magistrate, although one was available, and was not permitted to speak with an attorney or with any family member. The plaintiffs sued the individual police officers involved and the City of Chicago under § 1983, alleging that the officers and the City had violated their constitutional rights.²⁶

The Supreme Court found that the plaintiffs had stated a cause

²¹ See *infra* notes 25-136 and accompanying text.

²² See *infra* notes 137-77 and accompanying text.

²³ See *infra* notes 178-84 and accompanying text.

²⁴ See *infra* notes 185-93 and accompanying text.

²⁵ 365 U.S. 167 (1961), *overruled by* *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978).

²⁶ *Monroe*, 365 U.S. at 169.

of action against the police officers but not against the City, holding that municipalities are immune from suit under § 1983.²⁷ The Court grounded its decision on an extensive analysis of the legislative history of § 1983, commonly referred to as either the Ku Klux Act of 1871 or the Civil Rights Act of 1871. In its analysis, the Court highlighted three principal aims of the Civil Rights Act that necessarily provide the background for resolving questions of § 1983 application. First, Congress intended the Act to override "any invidious legislation by the States against the rights or privileges of the citizens."²⁸ Second, the Act "provided a remedy [for the deprivation of federal rights under color of state law] where State law was inadequate."²⁹ Finally, and most importantly, the Act provided "a federal remedy where the state remedy, though adequate in theory, was not available in practice."³⁰ Put simply, Congress passed § 1983 in order to address its concern that local officials were either unable or unwilling to enforce the law on an equal basis.³¹

Having set forth the purposes of § 1983, the Court turned its attention to the intended scope of the remedy provided against local officials. Section 1983 provides a remedy against those persons "who, under color of any statute, ordinance, regulation, custom, or usage of any State" deprive someone of his or her federal rights.³² The Court construed "under color of" state law to encompass the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."³³ Applying this standard to the individual police officers, the Court had no difficulty finding that the police officers individually had acted under color of state law and therefore that plaintiffs properly stated a cause of action against them under § 1983.³⁴ The Court concluded that § 1983 should be interpreted against the background of tort liability, which makes people accountable for the natural consequences of their conduct.³⁵

²⁷ *Id.* at 192.

²⁸ *Id.* at 173 (quoting CONG. GLOBE, 42d Cong., 1st Sess., app. 268 (1871)).

²⁹ *Id.* at 173.

³⁰ *Id.* at 174.

³¹ *See id.* at 176.

³² 42 U.S.C. § 1983 (1988).

³³ *Monroe*, 365 U.S. at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)) (interpreting 18 U.S.C. § 242 (1988), which provides criminal punishment for anyone who "under color of any law, statute, ordinance, regulation, or custom" deprives any state resident of "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States"). The *Monroe* Court also relied upon *Screws v. United States*, 325 U.S. 91, 108-13 (1945) (reaffirming the construction of 18 U.S.C. § 242 provided in *Classic*). *Monroe*, 365 U.S. at 184-85.

³⁴ *Id.* at 187.

³⁵ *Id.*

Monroe, however, rejected the cause of action against the City of Chicago on the grounds that Congress did not intend municipalities to be brought within the definition of persons to whose actions § 1983 liability attached.³⁶ The Court based this decision primarily on Congress's rejection of the Sherman Amendment to the Civil Rights Act of 1871.³⁷ The Sherman Amendment would have made every county, city or parish liable for certain acts of violence committed by persons riotously assembled within its border regardless of whether the locality exercised any degree of control over the individuals who perpetrated the violence, and regardless of whether the locality had knowledge that the violence was occurring or reason to believe that the violence would be or was occurring.³⁸ The Sherman Amendment would have in effect placed an obligation upon local governments to keep the peace. According to the *Monroe* Court, Congress rejected the Sherman Amendment primarily due to concerns that the Constitution did not authorize Congress to impose obligations for the administration of state law upon local governments.³⁹

The Sherman Amendment, which would have created an unprecedented obligation to keep the peace, is much broader than § 1983, which provides a federal remedy for the violation of already existing municipal obligations not to violate the Constitution or other federal laws. Nevertheless, the *Monroe* Court used Congress's antagonistic response to the Sherman Amendment's proposal to impose municipal liability for a failure to keep the peace to conclude that Congress did not intend the word "person" in § 1983 to include municipalities.⁴⁰ After *Monroe*, a cause of action under § 1983 could only be maintained against government officials as individuals, not against them in their official capacity nor against the municipalities for which they worked.⁴¹ The result limited compensation for victims whose constitutional rights had been violated, because they could not reach the deep pockets of the government treasury.⁴²

³⁶ *Id.* at 187, 191.

³⁷ *Id.* at 188-91 & n.41.

³⁸ See *Monroe*, 365 U.S. at 188-89 n.41, for the full text of the proposed amendment.

³⁹ *Id.* at 190. The Court, however, did not decide the constitutional question of whether Congress in fact has the authority to make municipalities liable for violations of citizens' civil rights at the hands of municipal officers. *Id.* at 191. See also *Monell*, 436 U.S. at 664.

⁴⁰ *Id.* at 191. The Court makes its holding clear, stating that "[s]ince we hold that a municipal corporation is not a 'person' within the meaning of § 1983, no inference to the contrary can any longer be drawn from [previous] cases." *Id.* at 191 n.50.

⁴¹ The courts treat suits against municipal employees in their official capacities as suits against the municipality. See *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

⁴² Municipal liability, as opposed to personal liability of individual municipal officials or employees, is important for two reasons. First, municipal officials in their individual capacities are protected by qualified immunity and therefore may not be held liable if they acted in good

B. *Monell Adopts Municipal Liability Where Deprivation Occurs as a Result of a Municipal Policy*

Monroe's rejection of municipal liability under § 1983 survived for seventeen years, until the Supreme Court overruled that holding in *Monell v. New York City Department of Social Services*.⁴³ In *Monell*, the plaintiffs challenged an official policy of the Department of Social Services ("DSS") and the Board of Education of the City of New York ("Board") that forced pregnant employees to take unpaid leaves of absence before such leaves were medically necessary.⁴⁴ The complaint named DSS, its Commissioner, the Board, its Chancellor, the City of New York and its Mayor as defendants.⁴⁵ The Supreme Court found that the plaintiffs had stated a cause of action, and thus held that municipalities are "persons" under § 1983 and therefore not wholly immune from suit.⁴⁶

The *Monell* Court based its decision upon a fresh analysis of § 1983's legislative history.⁴⁷ The Court rejected *Monroe's* legislative

faith, even if, in fact, their actions were unconstitutional. See *Kentucky v. Graham*, 473 U.S. at 166-67. The municipality does not have the benefit of this defense. *Id.* Second, juries may be reluctant to find against individual defendants or may limit the award, believing the defendant unable to satisfy a large judgment. See Steve E. Comer, *Municipal Liability Under Section 1983: The Rationale Underlying the Final Authority Doctrine*, 44 VAND. L. REV. 341, 346 (1991); Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 456 (1978). While it is true that many municipalities indemnify their officials, juries are not informed of this, and many municipalities will not indemnify for intentional tortious acts. See, e.g., N.Y. GENERAL MUNICIPAL LAW § 50-1 (McKinney 1986) (city shall indemnify police officer for judgment for damages arising from any negligent act or other tort committed within the scope of employment as determined by a special panel). Qualified immunity for actions taken in good faith and the lack of indemnification for intentional torts may limit the recovery for § 1983 claimants and thus discourage them from bringing suit at all absent the possibility of municipal liability.

⁴³ 436 U.S. 658, 695-701 (1978).

⁴⁴ *Id.* at 661.

⁴⁵ *Id.* The plaintiffs sued the individual defendants solely in their official capacities. *Id.*

⁴⁶ *Id.* at 694-95.

⁴⁷ *Id.* at 665. The fact that *Monroe* stood in opposition to a line of cases upheld by the Supreme Court which established liability against local school boards under § 1983 no doubt also influenced the Court. Justice Brennan's majority opinion in *Monell* cited 23 decisions brought under § 1983 where local school boards had been defendants. *Id.* at 663 n.5. Justice Powell stated this concern directly:

This line of cases—from *Monroe* to *Kenosha*—is difficult to reconcile on a principled basis with a parallel series of cases in which the Court has assumed *sub silentio* that some local government entities could be sued under § 1983. If now, after full consideration of the question, we continued to adhere to *Monroe*, grave doubt would be cast upon the Court's exercise of § 1983 jurisdiction over school boards. . . . Since "the principle of blanket immunity established in *Monroe* cannot be cabined short of school boards," . . . the conflict is squarely presented.

history analysis of the Civil Rights Act of 1871, and instead concluded that Congress intended to bring municipalities within the ambit of § 1983.⁴⁸ The Court reevaluated its prior Sherman Amendment analysis by distinguishing between the Sherman Amendment's placement of new peacekeeping obligations upon municipalities and § 1983's creation of a federal forum for individuals seeking to enforce municipalities' already existing obligation to follow federal constitutional and statutory requirements.⁴⁹ Consequently, the Court reasoned, Congress's rejection of the Sherman Amendment should not be equated with a wholesale rejection of municipal liability under the Civil Rights Act of 1871.⁵⁰

After distinguishing § 1983 from the Sherman Amendment, the Court determined that Congress intended the term "persons" to include municipalities when it passed the Civil Rights Act of 1871.⁵¹ The Court noted both that Congress intended broad construction of the statute and that municipalities as well as natural persons could create the harms Congress designed the statute to remedy.⁵² Further, the Court noted that, by 1871, courts had firmly established the practice of treating corporations as natural persons for purposes of constitutional and statutory analysis in virtually all situations.⁵³ In addition, the Court observed that the Dictionary Act of 1871, passed nearly simultaneously with the Civil Rights Act of 1871, stated that "the word 'person' may extend and be applied to bodies politic and corporate."⁵⁴

Monell, however, opened the door to municipal liability only so far. Examining the same legislative history, the Court determined that

Id. at 710-11 (Powell, J., concurring) (citation omitted). See Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 555 & n.82 (1989).

⁴⁸ *Monell*, 436 U.S. at 690.

⁴⁹ *Id.* at 670-83 & n.21. The Court noted that the Sherman Amendment would not have affected § 1 of the Civil Rights Act, currently codified as § 1983. *Id.* at 665-66. The Court concluded that Congress would not have believed that including municipalities within § 1 of the Act would be unconstitutional, even though Congress did believe the Sherman Amendment was unconstitutional. See *id.* at 679-83.

⁵⁰ *Id.* at 683.

⁵¹ *Id.*

⁵² *Id.* at 685-86.

⁵³ *Monell*, 436 U.S. at 687.

⁵⁴ *Id.* at 688. See Dictionary Act, ch. 71, § 2, 16 Stat. 431 (1871), which provides in relevant part: "[I]n all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." The *Monroe* Court had summarily dismissed the importance of the Dictionary Act, reading it to be an "allowable" rather than a "mandatory" definition. See *Monroe v. Pape*, 365 U.S. 167, 191. The *Monell* Court explicitly rejected such a construction of the Dictionary Act. See *Monell*, 436 U.S. at 689 n.53.

Congress did not intend the traditional tort doctrine of respondeat superior to apply to municipal liability under § 1983.⁵⁵ Emphasizing the language of the statute, the Court noted that liability attaches under § 1983 to "any person who . . . shall subject, or cause to be subjected, any person" to be deprived of his or her constitutional rights.⁵⁶ Consequently, the Court observed that liability attaches to a municipality only when the municipality "causes" an employee to violate someone's rights.⁵⁷ The Court viewed the doctrine of respondeat superior, where liability may be predicated upon the unauthorized acts of employees, as being incompatible with the requirement that the municipality "cause" the injury.⁵⁸ In addition to § 1983's language, the Court relied upon Congress' rejection of the Sherman Amendment.⁵⁹ As previously noted, Congress rejected the Sherman Amendment, in the Supreme Court's view, because Congress did not believe it had the authority to obligate municipalities to keep the peace.⁶⁰ Accordingly, the Court reasoned that Congress must not have intended § 1983 to incorporate respondeat superior liability, because "respondeat superior would have raised all the constitutional problems associated with the obligation to keep the peace."⁶¹

In place of respondeat superior, the *Monell* Court articulated an

⁵⁵ *Id.* at 691-94. The Court expressly held that "a municipality cannot be held liable solely because it employs a tortfeasor." *Id.* at 691 (emphasis in original).

⁵⁶ *Id.* at 691 (quoting 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1988))).

⁵⁷ *Id.* at 692.

⁵⁸ *Id.* at 691-92. The Court did not explain why employing an individual and cloaking that individual with the authority of the state is not a sufficient "cause" to satisfy the statute. Commentators have suggested that the Court, rather than being concerned with the text or legislative history of § 1983, was instead concerned primarily with striking a balance between the impact of § 1983 on municipal treasuries (and the taxpayers who ultimately would shoulder the burden) and the desire to hold municipalities accountable for their actions in federal court. See George D. Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on City of Oklahoma City v. Tuttle and Pembaur v. City of Cincinnati*, 'The Official Policy' Cases, 27 B.C. L. REV. 883, 896 (1986); Gerhardt, *supra* note 47, at 557. In this light, the Court's rejection of respondeat superior is logical, as a balancing of competing interests, despite flaws in its legal analysis.

⁵⁹ *Monell*, 436 U.S. at 692-93 n.57.

⁶⁰ See *supra* notes 38-39 and accompanying text.

⁶¹ *Monell*, 436 U.S. at 693. *Monell's* reliance on Congress's rejection of the Sherman Amendment for any insight into the applicability of the doctrine of respondeat superior is questionable. The most reasonable interpretation of Congress's rejection of the Sherman Amendment is that Congress did not intend to hold municipalities vicariously liable for the acts of residents or citizens who were neither municipal officials nor employees. Interestingly, while *Monell* corrected *Monroe's* obvious error in using the Sherman Amendment rejection to determine the meaning of the word "persons," *Monell* then made the same mistake by applying the Sherman Amendment in an equally inapplicable context. *Monell's* reading of the legislative history of the Ku Klux Act of 1871 in regard to respondeat superior has met with widespread academic criticism. See, e.g., Karen M. Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP L.Q. 409, 413 n.15 (1978); Eric M. Hellise, *Monell v. Department of Social Services: One*

entirely new requirement that a municipality be held liable when a local official or employee violates an individual's federal rights only when the deprivation occurs pursuant to an official policy or a long-standing custom.⁶² The *Monell* Court provided no guidance as to what constitutes an official policy, other than by making a general comment that an official policy could be a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."⁶³ Without further explanation, the Court simply noted that *Monell* unquestionably involved an official policy, and expressly left the exploration of the full parameters of municipal liability under § 1983 open for another day.⁶⁴ In this manner, the Court embarked on an arduous journey of balancing the interests of those individuals who have had their rights violated with the interests of municipalities in maintaining fiscal integrity.

C. Tuttle Rejects Municipal Policy for Random Acts by Low-Level City Employees Not Attributable to Municipal Policymakers

The Supreme Court began setting the parameters of municipal policy in *City of Oklahoma City v. Tuttle*.⁶⁵ In *Tuttle*, an Oklahoma City

Step Forward and a Half Step Back for Municipal Liability Under Section 1983, 7 HOFSTRA L. REV. 893, 909-21 (1979); Charles A. Rothfeld, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 960-62 (1979); Randall R. Steichen, *Municipal Liability Under Section 1983 for Civil Rights Violations After Monell*, 64 IOWA L. REV. 1032, 1045-55 (1979).

Despite a shaky logical footing and extensive academic criticism, the Supreme Court has not indicated any interest in reconsidering *Monell's* rejection of respondeat superior. Justice Stevens is the only Justice to have expressed support for overruling this aspect of *Monell*. See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 148 n.1 (1988) (Stevens, J., dissenting); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 489-90 n.4 (1986) (Stevens, J., concurring in part and concurring in judgment); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 834-44 (1985) (Stevens, J., dissenting). Consequently, any discussion of municipality liability must assume as a starting point that respondeat superior does not apply.

⁶² *Monell*, 436 U.S. at 694. A municipality, therefore, will be liable where the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* The requirement of a policy or custom does not arise out of the language of the Act or even from its legislative history. In setting forth the policy requirement, the Supreme Court, in effect, created federal common law. See Gerhardt, *supra* note 47, at 544 & n.20.

⁶³ *Monell*, 436 U.S. at 690. In contrast to the lack of guidance as to what constitutes an official policy, the Court defined a custom as a practice "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* at 691 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)). This definition has remained applicable to § 1983 litigation. See, e.g., *Praprotnik*, 485 U.S. at 127; *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir.), *cert. denied*, 493 U.S. 820 (1989).

⁶⁴ *Monell*, 436 U.S. at 694-95. Neither party disputed that an official policy was implicated in the action. *Id.* at 660-62 & n.2.

⁶⁵ 471 U.S. 808 (1985). The Supreme Court had previously addressed other issues related to

police officer who had been on the force for only ten months responded alone to an all-points bulletin indicating a robbery in progress at a bar in Oklahoma City.⁶⁶ The bulletin resulted from a telephone call from an anonymous source who described the robber and reported that the robber had a gun.⁶⁷ The officer testified that when he entered the bar, Albert Tuttle, who matched the bulletin description, walked toward him and that he grabbed Tuttle by the arm and requested that he wait by the bar.⁶⁸ The officer began to question the barmaid, who testified that she told the officer no robbery had occurred. Tuttle, who had been attempting to break free from the officer's grip, finally did so and went outside, ignoring the officer's commands to halt. When the officer followed outside, Tuttle was kneeling down with his hand near his boot. The officer testified that he believed Tuttle was removing a gun from his boot, and the officer then shot and killed him. When the boot was later removed, a toy pistol fell out.⁶⁹

Tuttle's estate filed a § 1983 action against the officer and the City of Oklahoma City, alleging that the officer had deprived Tuttle of his constitutional rights and that the officer's actions had resulted from a city policy of inadequate police training.⁷⁰ The district court instructed the jury that an official policy may be inferred from "a single, unusually excessive use of force" that is "sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge."⁷¹ The jury returned a verdict against the City, which was upheld by the court of appeals.⁷²

municipal liability under § 1983. *See, e.g.,* *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (punitive damages are not available against municipalities under § 1983); *Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (traditional common law immunities may shield individual defendants, but not municipalities, from liabilities). Although the Court did not address the question of municipal policy in either of the above cited opinions, these two cases have come to stand for the proposition that a single act by a city legislature constitutes an act of official government policy, regardless of whether the legislature had so acted in the past or had any intention of repeating its action in the future. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) (citing *Owen v. City of Independence*, 445 U.S. 622 (1980) (city council passed resolution firing plaintiff without a pretermination hearing); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (city council canceled license permitting concert because of dispute over content of performance)).

⁶⁶ *Tuttle*, 471 U.S. at 810-11.

⁶⁷ *Id.* at 811.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 811-12.

⁷¹ *Tuttle*, 471 U.S. at 813.

⁷² *Tuttle v. City of Oklahoma City*, 728 F.2d 456, 461 (10th Cir. 1984), *rev'd*, 471 U.S. 808 (1985).

The Supreme Court granted certiorari and held that a single incident of unconstitutional activity by a low-level police officer does not establish municipal liability.⁷³

The Supreme Court began by reaffirming *Monell's* rejection of respondeat superior liability and its imposition of a fault-based analysis requiring that a municipal policy or custom cause the violation of an individual's federal right in order to establish municipal liability under § 1983.⁷⁴ The Supreme Court then attempted to define municipal policy.⁷⁵ The Court held that a policy "generally implies a course of action consciously chosen from among various alternatives."⁷⁶ The Court, however, further held that a municipality may be held liable only for those policies attributable to a municipal decisionmaker or policymaker.⁷⁷ The Court did not define decisionmaker or policymaker, although it rejected the possibility that the police officer in *Tuttle* could be either.⁷⁸

D. Pembaur *Enunciates the Final Authority Doctrine*

The shaping of the present doctrine as to what constitutes a municipal policy for which a municipality may be held liable began in

⁷³ *Tuttle*, 471 U.S. at 824. The Court refused to address whether the evidence supported a finding that the city had in place a program of inadequate training and that this training was the policy that led to the deprivation of Tuttle's constitutional rights. *Id.* at 121. The Court found that the jury instruction allowed the jury to find the municipality liable "even in the face of uncontradicted evidence that the municipality scrutinized each police applicant and met the highest training standards imaginable." *Id.* at 821-22. Consequently, the issue here was not when a policy of inadequate training may constitute a municipal policy, but when a single action taken by a single police officer may do so.

⁷⁴ *Id.* at 817-20.

⁷⁵ *Id.* at 820-24.

⁷⁶ *Id.* at 823.

⁷⁷ *Id.* at 821, 823.

⁷⁸ *Tuttle*, 471 U.S. at 821, 824. The Court also began to distinguish between constitutional and unconstitutional policies and the standard by which municipal liability attaches to each:

Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy may be attributed to a municipal policymaker.

Id. at 823-24. Nevertheless,

where the policy relied upon is not itself unconstitutional, considerably more proof than a single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation.

Id. at 824 (footnotes omitted). The Supreme Court ultimately decided that a municipality may be held liable under § 1983 when a constitutional policy is applied in an unconstitutional manner only in a limited number of "failure to train" cases. *See City of Canton v. Harris*, 489 U.S. 378, 387 (1989). Liability attaches only where the failure to train amounts to conscious indifference to the rights of people with whom the police come into contact. *Id.* at 388. Specifically, plaintiff

Pembaur v. City of Cincinnati.⁷⁹ *Pembaur* involved two Hamilton County, Ohio, deputy sheriffs who attempted to serve two capiases on a doctor's employees.⁸⁰ The doctor refused them entrance to his office even after several Cincinnati police officers arrived and advised him to allow the deputy sheriffs' entrance.⁸¹ After conferring with the county prosecutor, an assistant county prosecutor instructed the deputy sheriffs to enter and get the witnesses, which the sheriffs attempted to do.⁸² The Cincinnati police officers chopped down the door to the clinic to allow the deputy sheriff's entrance.⁸³ The deputy sheriffs then searched the clinic, without locating the individuals for whom the capiases were issued.⁸⁴ The doctor subsequently brought a § 1983 suit against the City, the County and various individual defendants, alleging that the search of his office had violated the Fourth and Fourteenth Amendments to the Constitution.⁸⁵ The Supreme Court granted certiorari to determine whether, and in what circumstances, a single decision or decisions related to one single incident, may constitute official municipal policy sufficient to establish municipal liability under § 1983.⁸⁶

In a plurality opinion authored by Justice Brennan, the Court found that the deputy sheriffs were acting pursuant to an official government policy when they forced their way into the doctor's office because their actions were authorized by the county prosecutor, a municipal policymaker.⁸⁷ *Pembaur* tantalizingly opened the door to municipal liability by expanding *Tuttle*'s definition of policy. The Court in *Tuttle* defined a policy as a deliberate choice to follow a course of action made from among various alternatives.⁸⁸ In *Pembaur*, Justice Brennan explained that an official policy encompasses not only formal, written rules, but also unwritten plans of action.⁸⁹ A policy may also

must prove that the municipality is deliberately indifferent to the need for more or different training. *Id.* at 390 & n.10. For a discussion of the evolution of Supreme Court thinking on this subject, see Anthony D. Schroeder, *City of Canton v. Harris: The Deliberate Indifference Standard in 42 U.S.C. § 1983 Municipal Liability Failure to Train Cases*, 22 U. Tol. L. Rev. 107 (1990).

⁷⁹ 475 U.S. 469 (1986).

⁸⁰ *Id.* at 472.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Pembaur*, 475 U.S. at 473-74.

⁸⁵ *Id.* at 473-74. The § 1983 violation was premised upon the Fourth Amendment prohibiting the police from searching an individual's home or business without a search warrant to execute an arrest warrant for a third person, a proposition upheld in *Steagald v. United States*, 451 U.S. 204 (1981). See *Pembaur*, 475 U.S. at 474.

⁸⁶ *Pembaur*, 475 U.S. at 477.

⁸⁷ *Id.* at 484-85.

⁸⁸ *Tuttle*, 471 U.S. 808, 823.

⁸⁹ *Pembaur*, 475 U.S. at 480-81.

exist if an action is taken once or repeatedly, as a single decision is enough to constitute an official policy, if adopted by the appropriate policymaker.⁹⁰ Moreover, a course of action established by appropriate decisionmakers can constitute an official policy even if it is tailored to a specific situation and not intended to control decisions in subsequent circumstances.⁹¹ Therefore, it follows that almost all actions taken by a municipality could be considered a policy.

While expanding *what* constitutes a policy, *Pembaur* strikes at the heart of municipal liability by narrowing *who* may enact an official policy for which the municipality may be liable. The only decisions that may subject a municipality to liability are those decisions made by someone possessing final authority to establish municipal policy with respect to the action ordered, or the subject matter in question.⁹² The scope of an individual's authority at state law, not which branch of government or what office the official holds, provides the initial step for determining whether a policymaker has final authority.⁹³ Legislative enactments may grant final authority directly, or officials who possess final authority may delegate such authority.⁹⁴ Because policymaking authority may be widely dispersed throughout the modern municipality, the jury may have to determine whether an individual official acted as a policymaker in any given situation.⁹⁵

Pembaur does not explain how to distinguish policymaking authority as defined by state and local law from policymaking authority as it is practiced through de facto delegation within a locality. A broad reading of delegation would presume policymaking authority to be delegated from the official holder of the authority to the official who actually implements policy. *Pembaur*, however, distinguishes the delegation of policymaking authority from the delegation of discretion to implement policies articulated by the policymaker.⁹⁶ If the official is merely implementing or acting pursuant to an official policy, then that exercise of discretionary functions does not, without more, constitute a policy.⁹⁷ The crucial distinction is that final policymaking authority

⁹⁰ *Id.* at 481.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 483.

⁹⁴ *Pembaur*, 475 U.S. at 483.

⁹⁵ *See id.*

⁹⁶ *See id.* at 483 & n.12.

⁹⁷ *Id.* In a footnote, the Court illustrates the distinction:

Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment

is not synonymous with final authority to act. *Pembaur* did not, however, explain how to determine when someone is a policymaker acting pursuant to a delegation of authority and when someone is a mere decisionmaker exercising discretion in implementing a policy created elsewhere.

E. *Praprotnik Relies on State Law to Determine Final Authority*

Further clarification of municipal policy came in *City of St. Louis v. Praprotnik*.⁹⁸ James Praprotnik, an architect employed by the City of St. Louis for fifteen years, had attained a mid-level management position in the St. Louis Community Development Agency ("CDA").⁹⁹ The director of the CDA required that the agency's professionals, including its architects, obtain prior approval before accepting outside work.¹⁰⁰ Praprotnik objected to and refused to follow the requirement. As a consequence of accepting outside work without approval, he received a fifteen-day suspension which the St. Louis Civil Service Commission ("Commission") overturned upon appeal.¹⁰¹ Praprotnik's job performance evaluations reflected his supervisors' unhappiness with the Commission's decision and with Praprotnik's actions in appealing the suspension.¹⁰² Although the CDA retained Praprotnik during a period of layoffs, it eventually transferred him to a new position with primarily clerical responsibilities, and finally terminated him when the CDA eliminated his new position, allegedly for budgetary reasons.¹⁰³ Praprotnik appealed each of these decisions, including his unfavorable job performance evaluations, to the Commission, which had authority to affirm or overturn employment decisions made by the director of the CDA. The Commission awarded him partial relief from his negative

would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

Id. at 483 n.12 (emphasis in original).

⁹⁸ 485 U.S. 112 (1988).

⁹⁹ *Id.* at 114.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 115. The commission also awarded Praprotnik back pay. *Id.*

¹⁰² *Id.*

¹⁰³ *Praprotnik*, 485 U.S. at 115-16.

job evaluations, but refused to address the transfer because that in itself did not involve a pay decrease and therefore was not an adverse employment decision.¹⁰⁴ The Commission also did not review his termination because by that time Praprotnik had filed a § 1983 action in federal court alleging that his First Amendment rights had been violated by actions taken in retaliation for his appeal of the fifteen-day suspension for violation of the CDA policy on outside work.¹⁰⁵ At trial, the jury found the municipality liable, implicitly determining that the actions taken by Praprotnik's supervisor and by the heads of the CDA constituted a municipal policy.¹⁰⁶ Both the district court and the court of appeals upheld that verdict.¹⁰⁷

The Supreme Court reversed, finding that Praprotnik's rights had not been violated pursuant to an official policy of the City of St. Louis.¹⁰⁸ The plurality opinion, authored by Justice O'Connor, and adopted by a majority of the Court the following year in *Jett v. Dallas Independent School District*,¹⁰⁹ broadly framed the issue and established "the proper legal standard for determining when isolated decisions by municipal officials or employees may expose the municipality itself to liability under 42 U.S.C. § 1983."¹¹⁰ Thus, rather than determining who held final authority to act pursuant to St. Louis' personnel policy in Praprotnik's transfer or firing, the Court examined where final policymaking authority lies within the St. Louis infrastructure. Relying upon *Pembaur's* reference to state law as a key source for determining final authority, the *Praprotnik* plurality transformed that reference into a rule of determination, stating that only state law may provide the answer to where policymaking authority lies.¹¹¹

The *Praprotnik* Court held that, as a matter of law, the determi-

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 116.

¹⁰⁶ *Id.* at 117.

¹⁰⁷ *Id.*

¹⁰⁸ *Praprotnik*, 485 U.S. at 131-32.

¹⁰⁹ 491 U.S. 701, 737 (1989). *Jett* addressed whether under 42 U.S.C. § 1981, a municipality may be held liable under a theory of respondeat superior. *Id.* at 705. The *Jett* Court held that respondeat superior is not available under § 1981 because § 1983 provides the exclusive damages remedy for actions against state officials brought pursuant to § 1981: *Id.* at 736-38. Consequently, the Supreme Court remanded for a determination of whether a municipal policy was implicated. *Id.* at 738. For guidance on remand, the Court briefly discussed how to determine whether an official possesses authority to set policy, and the Court adopted the standard, if not explicitly the rationale, found in *Praprotnik's* plurality opinion. *Id.* at 735-38. For a discussion of *Jett's* implications for whether Justice O'Connor's plurality in *Praprotnik* has been transformed into a majority opinion, with a caution not to read *Jett* too broadly, see note 6, *supra*.

¹¹⁰ *Praprotnik*, 485 U.S. at 114.

¹¹¹ *Id.* at 124-25.

nation of where state law places final authority for policymaking is not a question of fact for a jury.¹¹² Indeed, the Supreme Court expressed confidence "that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of local government's business."¹¹³ By removing from the jury the inquiry into where actual authority is held and replacing it with a legal question for the court, the Court elevates legal formalism to constitutional practice. Applying local law to *Praprotnik*'s facts, the Supreme Court reversed, finding that only the Commission was authorized by law to create policy in the employment area and that the Commission had not delegated its authority to the CDA.¹¹⁴ Consequently, no employment actions taken by any CDA official, including its Director, could, in and of itself, expose the City of St. Louis to § 1983 liability.¹¹⁵

Recognizing that special problems can arise when plaintiffs allege that policymakers identified by state law delegated final authority, the *Praprotnik* plurality offered two principles to guide lower courts in determining where policymaking authority lies.¹¹⁶ First, the Court embraced the notion that plaintiffs have the opportunity to prove that widespread common practices constitute "customs."¹¹⁷ Second, the Court noted the distinction between final decisions and final *policy* decisions.¹¹⁸ The Court explained that courts should not treat a subordinate official as holding final policymaking authority when the municipality's policymakers retain the right to review that official's deci-

¹¹² *Id.* at 126.

¹¹³ *Id.* at 125.

¹¹⁴ *Id.* at 129.

¹¹⁵ *See id.* at 130. The Court did not make a holding particular to the facts in the case presented, but indicated that the court of appeals on remand could hear further arguments consistent with the opinion. *See id.* at 131-32.

¹¹⁶ *Praprotnik*, 485 U.S. at 126-27. Among the special problems created by delegation is the possibility that lawful policymakers could delegate their authority solely to insulate themselves from § 1983 liability. The Court noted that such manipulation would defeat the purposes of § 1983. *Id.* at 126.

¹¹⁷ *Id.* at 127 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)).

¹¹⁸ *Id.* at 127. The court stated that "when an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id.* at 127.

¹¹⁹ *Id.* "[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's decision for conformance with *their* policies." *Id.* (emphasis in original). *Praprotnik* does not address whether policymaking authority is delegated when the policymaker does not retain the authority to review decisions taken by those officials not specifically authorized by local law to set policy. The Circuits have split on this issue. *See infra* notes 138-70 and accompanying text.

sions.¹¹⁹ Consequently, unless a custom is proven,¹²⁰ the conduct generally will not constitute a policy unless "the authorized policymakers approve a subordinate's decision and the basis for it."¹²¹

In *Praprotnik*, although the Commission retained the right to review personnel decisions of the CDA's Director, it chose not to exercise that right when it declined to hear Praprotnik's appeal of his transfer and termination.¹²² Nevertheless, the Court found that the record did not establish that the adverse job actions against Praprotnik were performed pursuant to an official policy.¹²³ In effect, then, the Court allowed St. Louis's policymakers, the Commission, to insulate the municipality from liability by retaining the right to review but not exercising that right.

Justice Brennan, in his concurrence, attacked the plurality's strict reliance on state law and narrow view of delegation as unrealistic and warned that municipalities could use the Court's narrow rule to insulate themselves from liability for most official actions.¹²⁴ Viewing state law as the starting point rather than the sole source of policymaking authority, Justice Brennan would have the fact finder determine where actual authority resides.¹²⁵ Justice Brennan explained that when state law is unclear, or when real and apparent authority diverge, it is necessary to determine where final authority lies by looking at the facts.¹²⁶ Without such an evaluation of the facts, Justice Brennan maintained, municipalities could avoid § 1983 liability by placing legal authority in one body and actual authority in another.¹²⁷ Thus, according to Justice Brennan, the plurality's construction of § 1983 creates a "gaping hole" through which many valid claims of civil rights deprivations may fall, thereby insulating municipalities from § 1983 liability.¹²⁸

¹²⁰ See *Praprotnik*, 485 U.S. at 130. The Court indicates that although general delegations of discretionary decision making do not constitute delegation of policymaking authority, "it would . . . be a different matter if a series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware." *Id.*

¹²¹ *Id.* at 127.

¹²² See *id.* at 116, 129.

¹²³ See *id.* at 129.

¹²⁴ *Id.* at 132 (Brennan, J., concurring).

¹²⁵ *Praprotnik*, 485 U.S. at 143 (Brennan, J., concurring). Justice Brennan notes that in *Pembaur*, the Court had relied on testimony that the county sheriff's office routinely forwarded questions to the county prosecutor in finding that statements by the county prosecutor constituted a municipal policy. *Id.* See also *Pembaur*, 475 U.S. 469, 485 (1986). Even though state law did not place such authority in the prosecutor's office, the Court found that an official policy was implicated.

¹²⁶ *Praprotnik*, 485 U.S. at 143-44 (Brennan, J., concurring).

¹²⁷ *Id.* at 144 (Brennan, J., concurring).

¹²⁸ *Id.*

Although the plurality had addressed the special problems delegation authority creates,¹²⁹ Justice Brennan maintained that the plurality's suggested guidelines were inadequate to resolve the issues that would inevitably arise due to an inflexible adherence to state statutory law.¹³⁰ Justice Brennan correctly points out that Congress did not intend the Civil Rights Act of 1871 to encompass only egregious violations of constitutional rights as the plurality's opinion seems to suggest.¹³¹ Further, Congress did not intend it to apply only after violations occur so often that they are labeled permanent and well settled and therefore constitute a custom.¹³² From Justice Brennan's criticism of the plurality's opinion, it appears that the plurality's vision of municipal policy allows municipalities to avoid § 1983 liability in all but the most extreme cases simply by insulating their policymakers from day-to-day decisionmaking.

In sum, the Supreme Court has adopted a formalistic vision of municipal liability under § 1983. Municipal liability only attaches when a person's federal rights are violated by a municipal official or employee acting pursuant to an official municipal policy or a well-settled municipal custom, and the policy or custom caused the violation of the federal rights. The touchstone of municipal liability, and the focus of this Article, is the official policy requirement. Although the Supreme Court has broadly interpreted a policy to be a deliberate choice to take some course of action, whether written or unwritten, regardless of whether intended to meet a particular situation or to control future decisions,¹³³ the Court has restricted the policies that are attributable to the municipality by restricting which officials may adopt policies that create liability under § 1983.¹³⁴ Specifically, under the Supreme Court's current interpretation of § 1983, municipalities are liable only for those policies adopted by officials with final authority to enact policy in that given area.¹³⁵ Furthermore, courts must rely solely on state and

¹²⁹ *Id.* at 126-27 (opinion of O'Connor, J.).

¹³⁰ *Id.* at 144 & n.6 (Brennan, J., concurring).

¹³¹ *Praprotnik*, 485 U.S. at 144 n.6 (Brennan, J., concurring). Justice Brennan quotes from the plurality's opinion for the proposition that "egregious attempts by local governments to insulate themselves from liability" may be thwarted by the "custom" doctrine, which allows liability for widespread practices that are permanent and well-settled, even if those practices do not amount to a policy. *Id.* See also *id.* at 127 (opinion of O'Connor, J.).

¹³² See *id.* at 114 (Brennan, J., concurring).

¹³³ *Pembaur*, 475 U.S. 469, 481 (1986); *Tuttle*, 471 U.S. 808, 823 (1985).

¹³⁴ See generally *Praprotnik*, 485 U.S. at 121-23 (who is a final policymaker).

¹³⁵ *Id.* at 124-25.

local law to determine which municipal officials are vested with final policymaking authority.¹³⁶

II. LOWER COURTS SPLIT ON HOW TO APPLY *PRAPROTNIK*

After *Praprotnik*, Justice Brennan's prophecy of a "gaping hole"¹³⁷ in § 1983 liability has only partially materialized. While certain courts have been content to apply *Praprotnik* mechanically, and in some instances even further narrow its restrictive view of municipal liability, other courts have refused to follow *Praprotnik* to this end, searching for creative ways to circumvent *Praprotnik*'s potentially harsh result. The battle over *Praprotnik* and the future of municipal liability has taken place largely over the questions of when a delegation of authority to act may be transformed into a delegation of policymaking authority and whether there are certain municipal officials (i.e., elected officials) who should be treated as per se policymakers.

A. Delegated Policymaking Authority

The Supreme Court has not yet directly settled the issue of whether municipalities may convert an ordinary decisionmaker into a policymaker by delegating unreviewable authority to act to the decisionmaker. The Court in *Praprotnik* indicated that there is no delegation of policymaking authority when an official's discretionary decisions are constrained by policies not of that official's making or when those decisions are subject to review by other officials.¹³⁸ Unanswered is whether delegation of policymaking authority occurs when the official with delegated power is constrained only in name, not in fact, by policies made by another, because there is no right to review that official's discretionary decisions. Some courts have found that a complete delegation of authority to act may transform a municipal official into a policymaker.¹³⁹ Other courts consider the retention of power to

¹³⁶ *Id.*

¹³⁷ *Id.* at 144 (Brennan, J., concurring).

¹³⁸ *Id.* at 127, 130.

¹³⁹ *Jantz v. Muci*, 976 F.2d 623, 630-31 (10th Cir. 1992) (school district not liable under § 1983 for employment decision by school principal because district school board's retention of the authority to review principal's decisions amounted to an incomplete delegation of authority); *Martinez v. City of Opa-Locka*, 971 F.2d 708, 714-15 (11th Cir. 1992) (city liable under § 1983 for employment decision by city manager who is a policymaker due to statute prohibiting review of such decisions by city commission); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1481 (3d Cir. 1990) (city not liable under § 1983 for actions by subordinates of police commissioner, because they were not policymakers due to the commissioner's ultimate control); *Mandel v. Doe*,

review irrelevant to the determination of whether a delegation of policymaking authority has occurred and, instead, examine only the type of authority delegated—policymaking or authority to act.¹⁴⁰ The opposing positions are best viewed by comparing the Seventh Circuit's treatment of the issue in *Auriemma v. Rice*¹⁴¹ with that of the Eighth Circuit in *Williams v. Butler*.¹⁴²

In *Auriemma*, the Seventh Circuit dismissed a § 1983 action against a municipality, which alleged grievous racial and political discrimination, finding that although the decisions that deprived the individuals of their federal rights were made by executive officials, policymaking authority was vested by state law in the legislative branch.¹⁴³ *Auriemma* is striking because the court reached this result even though the legislature did not have the power to review the decisions of the executive branch.¹⁴⁴ When Fred Rice became Superintendent of the Chicago Police Department, he reshuffled the senior

888 F.2d 783, 794 (11th Cir. 1989) (city not liable under § 1983 for action of physician's assistant who is policymaker because he functions with no review except to the extent he requests review); *Crowder v. Sinyard*, 884 F.2d 804, 829 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990) (city liable under § 1983 for acts of police chief because of complete delegation of policymaking authority to him); *Starrett v. Wadley*, 876 F.2d 808, 819 (10th Cir. 1989) (county liable under § 1983 for employment decision by sheriff where no review of decision available, but not subject to such liability for sheriff's harassment of plaintiff which extended beyond his policymaking authority); *Williams v. Butler*, 863 F.2d 1398, 1402-03 (8th Cir. 1988) (*en banc*) (plurality opinion), *cert. denied*, 492 U.S. 906 (1989) (city liable under § 1983 for employment decision by municipal judge who is policymaker due to absolute delegation and lack of avenues for review of such decision); *Parker v. Williams*, 862 F.2d 1471, 1478 (11th Cir. 1989) (county liable under § 1983 for employment decision by sheriff, who is a policymaker because he had unreviewable authority to make such decisions).

¹⁴⁰ See *Auriemma v. Rice*, 957 F.2d 397, 400-01 (7th Cir. 1992) (city not liable under § 1983 for political and racially discriminatory employment practices of sheriff who had unreviewable authority to make such decisions, where city ordinances banned such discrimination); *Johnson v. Hardin County*, 908 F.2d 1280, 1286-87 (6th Cir. 1990) (county not liable under § 1983 for medical decisions by county jailer even though he has complete "custody, rule and charge" of the jail and all persons in it and unreviewable authority to make decisions governing medical care for prisoners, where statute provided that local legislature was vested with authority to enact ordinances and issue regulations in regard to medical care at the jail, even through relevant ordinances or regulations had never been adopted); *Crowley v. Prince George's County*, 890 F.2d 683, 685-86 (4th Cir. 1989) (county not liable under § 1983 for police chief's retaliatory termination of employee even though chief possessed total and unreviewable authority to make personnel decisions, where county charter provided that personnel decisions would be based on merit and fitness and banned discriminatory personnel actions, and when county charter provided that city council shall provide by law for a personnel system).

¹⁴¹ 957 F.2d at 397.

¹⁴² 863 F.2d at 1398.

¹⁴³ *Auriemma*, 957 F.2d at 401.

¹⁴⁴ *Id.* The Seventh Circuit defined executive authority as authority to act or authority to implement policy. *Id.* at 399. Legislative authority, on the other hand, is authority to set policy. *Id.*

ranks of the department by promoting thirteen African-American officers, nine white officers, and three Hispanic officers, by demoting no African-American officers, twenty-five white officers and one Hispanic officer, and by eliminating six jobs.¹⁴⁵ At the time, Rice justified this major reorganization solely by stating that the newly promoted officers made him feel more "comfortable."¹⁴⁶ Later, he added that he wanted officers who accepted his management style.¹⁴⁷ A number of the demoted officers sued the City of Chicago¹⁴⁸ under § 1983, alleging that Rice demoted them because of their race and politics, and that Rice's actions as Superintendent of Police constituted a policy.¹⁴⁹

The Seventh Circuit limited its inquiry to determining who had final authority under state and local law to set employment policy for the City of Chicago.¹⁵⁰ The Chicago City Council, as the municipal legislature, had determined the City's relevant employment policy when it passed local ordinances to prohibit racial and political discrimination.¹⁵¹ In addition, Chicago was under an injunction, pursuant to a consent decree, barring political considerations for certain jobs, including those held by plaintiffs.¹⁵² As a result, the Seventh Circuit held that the Superintendent did not possess final policymaking authority in this area because he did not have the authority to violate the local ordinances or the injunction.¹⁵³ The Police Superintendent, although possessing sole authority over personnel decisions within the police department, still exercised only executive authority to act, as he was statutorily required to manage the department consistent with city ordinances, state laws, and police board regulations.¹⁵⁴ The statutory absence of any mechanism for the City Council to review the personnel actions taken by the Superintendent of Police did not transform him into a policymaker.¹⁵⁵ The Seventh Circuit therefore allowed the City

¹⁴⁵ *Id.* at 398.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ The plaintiffs also sued Rice in his individual capacity. That suit was separated and the question of Rice's individual liability was addressed in *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990) (en banc), cert. denied, 111 S. Ct. 2796 (1991).

¹⁴⁹ *Auriemma*, 957 F.2d at 398. Moreover, the complaint alleged that the Mayor of Chicago approved the personnel changes, and that the mayor's ratification constituted a policy. *Id.* at 399-400. See also *Auriemma v. City of Chicago*, 747 F. Supp. 465, 466-68 (N.D. Ill. 1990), *aff'd*, 957 F.2d 397 (7th Cir. 1992), for a fuller statement of facts alleged in the complaint.

¹⁵⁰ *Auriemma*, 957 F.2d at 399.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 401.

¹⁵⁴ *Id.*

¹⁵⁵ See *Auriemma*, 957 F.2d at 399-400.

of Chicago to avoid § 1983 liability by distinguishing executive officials with total and unreviewable authority to act and to make a final decision from legislative officials designated by state and local law as policymakers with the authority to adopt rules for the conduct of government.¹⁵⁶

The treatment of *Praprotnik* and the municipal policymaker doctrine in *Auriemma* stand in stark contrast to the Eighth Circuit's analysis of the same issues in *Williams v. Butler*.¹⁵⁷ In *Williams*, the Eighth Circuit found that where an official designated by state law to make policy did not retain authority to review decisions, the municipal official with delegated authority to act became a policymaker within the guidelines of *Praprotnik*.¹⁵⁸ Debbie Williams, a municipal court clerk, witnessed William Butler, an elected municipal judge for the City of Little Rock traffic court, deliberately destroy traffic tickets.¹⁵⁹ Williams notified the police of Butler's actions, and, when Butler learned of her action, he fired her.¹⁶⁰ Williams then filed a § 1983 action alleging that her First Amendment rights had been violated.¹⁶¹

The Eighth Circuit addressed the issue of whether it could hold the city liable under § 1983 for a municipal judge's unconstitutional discharge of a court clerk.¹⁶² The court began its analysis by articulating the "very fine" difference between a delegation of policymaking authority and a mere delegation of authority to act.¹⁶³ According to the court, this difference depends upon how much authority the delegat-

¹⁵⁶ *Id.* at 401.

¹⁵⁷ 863 F.2d 1398 (8th Cir. 1988) (en banc) (plurality opinion), *cert. denied*, 492 U.S. 906 (1989).

¹⁵⁸ *Id.* at 1402. The Eighth Circuit valiantly maintained this position through two remands ordered by the Supreme Court. *See id.* at 1399. Initially, the Eighth Circuit affirmed the § 1983 liability established by a jury verdict in the District Court. *Williams v. Butler*, 746 F.2d 431, 434 (8th Cir. 1984). On rehearing, the Eighth Circuit affirmed the District Court's decision by an equally divided court in *Williams v. Butler*, 762 F.2d 73 (8th Cir. 1985) (en banc). The Supreme Court granted the City's petition for certiorari and immediately vacated the judgment of the en banc court and remanded the case to be decided in light of *Pembaur*, 475 U.S. 1105 (1986). On remand the Eighth Circuit once again affirmed the District Court. *Williams v. Butler*, 802 F.2d 296, 302 (8th Cir. 1986) (7-5 decision) (en banc) (municipal judge exercised final policymaking authority rather than simply discretion to hire and fire). Again the Supreme Court vacated and remanded, this time with directions to reconsider in light of *Praprotnik*, 485 U.S. 931 (1988). On remand, the Eighth Circuit again affirmed the District Court's holding. 863 F.2d 1398, 1403 (8th Cir. 1988). This time, the Supreme Court denied the City's petition for certiorari. 492 U.S. 906 (1989).

¹⁵⁹ *Williams*, 863 F.2d at 1399.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 1403.

¹⁶³ *Id.* at 1402.

ing policymaker retains.¹⁶⁴ The court stated that *Praprotnik*'s message is that municipal liability does not result from incomplete delegations of authority, but may result from an absolute delegation.¹⁶⁵

The Court then explained why Butler clearly enjoyed an absolute delegation of authority which resulted in municipal liability under § 1983. He had been given "*carte blanche* authority" to hire and fire his clerks, and the clerks had no internal appellate procedures available to challenge adverse employment decisions.¹⁶⁶ The court emphasized that, as a result of the broad delegation in employment matters within his court, no other policymaker constrained Butler's actions.¹⁶⁷ The court noted that in this litigation, the City originally maintained that Butler had sole control of employment decisions in the municipal court.¹⁶⁸ The court concluded that Butler's final policymaking authority concerning employment decisions in his court properly exposed the City to liability under § 1983.¹⁶⁹

The Supreme Court has yet to address the irreconcilable differences between *Aurienma* and *Williams*. In *Praprotnik*, the designated policymaker retained the power to review the decisions of the nonpolicymakers.¹⁷⁰ The Supreme Court did not decide, however, whether the absence of the right to review necessarily creates a policymaker. The Supreme Court may find the right to review that existed in *Praprotnik* important in determining whether policymaking authority has been delegated and thus eventually support the view that an absence of the right to review creates a policymaker, as exemplified by *Williams*. Conversely, the Supreme Court may treat the power to review as irrelevant,

¹⁶⁴ *Williams*, 863 F.2d at 1402.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Williams*, 863 F.2d at 1403.

¹⁷⁰ *Praprotnik* appears to stand for the proposition that if a policymaker retains the right to review, but does not exercise that right, policymaking authority has not been delegated. See *Praprotnik*, 485 U.S. 112, 127 (1988); see also *Williams*, 863 F.2d at 1402 (incomplete delegation does not give rise to liability under § 1983). This result is necessary if the Court is serious about preventing principles of respondeat superior from slipping into the analysis through the back door. Municipal policymakers cannot in fact review every decision by every municipal employee. If that were to occur, municipal government would grind to a halt. On the other hand, there is a risk that municipal policymakers may try to absolve the municipality of liability by refusing to review controversial decisions. One option here is to heed the common sense warning of one court, which observed that a failure to review will not always be countenanced: municipal policymakers may not purposely refuse to exercise their right to review an order to insulate themselves from liability. See *Hammond v. County of Madera*, 859 F.2d 797, 802 (9th Cir. 1988) (holding that a board of supervisors' summary approval proceedings constituted reckless disregard of constitutional rights).

restricting the analysis solely to where state law explicitly places policymaking authority, the approach exemplified by *Auriemma*.

B. *Per Se* Policymakers

Federal law is also unsettled as to whether there are certain elected officials who, by virtue of their office, are *per se* policymakers.¹⁷¹ A strict interpretation of *Praprotnik* and *Pembaur* has led several courts to conclude that there are no *per se* policymakers.¹⁷² These courts note that *Pembaur* and *Praprotnik* seem to caution that certain officials may be policymakers in one area but not in another, and therefore that the court must determine whether the official possesses policymaking authority in the area in question.¹⁷³ The key question, therefore, is not what office the official holds or how much power an official possesses, but whether that official possesses policymaking authority in the area in question.¹⁷⁴ If local law demonstrates that an elected official, regardless of the office, does not in fact possess policymaking authority in an

¹⁷¹ Although the Supreme Court has not directly addressed this issue, it did surface briefly in *Praprotnik*. Justice Stevens, in a dissenting opinion, attempted to portray *Praprotnik* as presenting the question whether the City of St. Louis could be held liable for actions taken by its mayor, claiming that the record demonstrated that "perhaps the mayor" had been involved in the decisionmaking. 485 U.S. at 158-61 (Stevens, J., dissenting). Justice Stevens would have imposed liability because the mayor is a "high official" and actions by high officials are a "kind of 'statement'" about how similar decisions will be carried out, in contrast to actions by lower officials which "lack the potential of controlling governmental decisionmaking" and are not "perceived as the actions of the city itself." *Id.* at 171. Justice O'Connor's plurality opinion, however, did not include any reference in its facts to the mayor's involvement in the decisionmaking, and thus did not address the issue of elected officials. The plurality opinion did reject Justice Stevens's distinction between high and low officials as a universal basis for determining § 1983 liability as "too imprecise" and nothing more than an attempt to apply respondeat superior through the back door. *Id.* at 125 n.2. Justice Brennan, in his concurrence, stated that the record did not support the conclusion that the mayor had been involved, and thus did not address whether there are officials for whose actions liability should attach simply because of the nature of their office. *Id.* at 142 n.2 (Brennan, J., concurring).

¹⁷² See *Auriemma v. Rice*, 957 F.2d 397, 400 (7th Cir. 1992) (mayor is not a policymaker in personnel area, despite being an elected official, where neither state nor local law specifically vests mayor with policymaking authority in personnel area); *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 637-38, *reh'g denied*, 942 F.2d 798 (11th Cir. 1991) (mayor not a policymaker in area of land planning and zoning, despite being elected official, where mayor's veto of legislative ordinances and resolutions in land planning and zoning could be overridden by the city council); *Johnson v. Hardin County*, 908 F.2d 1280, 1286-87 (6th Cir. 1990) (elected county jailer not a policymaker because local law did not vest jailer specifically with authority to set medical policy for jail); *Worsham v. City of Pasadena*, 881 F.2d 1336, 1339-41 (5th Cir. 1989) (mayor not a policymaker in personnel area because mayor's personnel decisions are appealable to the city council).

¹⁷³ See cases cited *supra* note 172. See also *Praprotnik*, 485 U.S. at 127; *Pembaur*, 475 U.S. at 483 n.12.

¹⁷⁴ *Worsham*, 881 F.2d at 1340.

area, then that official is not a policymaker when taking actions in that area.¹⁷⁵

A strict interpretation of *Praprotnik* has not been universal. Some courts have deemed elected officials to be per se policymakers by virtue of the office they hold rather than the specific authority vested in them.¹⁷⁶ Elected officials often hold "virtually absolute sway over the particular tasks or areas of responsibility" and therefore often are the final authority of municipal power, if not the statutory policymaking authority.¹⁷⁷ As the ultimate repositories of power in a municipality, elected officials actions, however authorized, should be viewed as official municipal policies.

The Supreme Court has not addressed whether certain officials, by the nature of their office, may be properly labeled policymakers without reference to any express delegation of policymaking authority. *Praprotnik*'s reliance on state law and its directive to examine whether policymaking authority has been vested in any given area, while not encompassing this result, does not preclude a finding that certain officials should be viewed as having been vested with policymaking authority for all of their actions.

III. THE UNDERMINING OF § 1983 BY A FORMALISTIC VISION OF MUNICIPAL POLICYMAKERS

As discussed in Section I of this Article, the Supreme Court has adopted a formalistic vision of who are municipal policymakers by identifying policymakers based solely on where state and local law expressly place policymaking authority. This approach undermines § 1983's purpose of providing a federal remedy to ensure that local

¹⁷⁵ See, e.g., *Worsham*, 881 F.2d at 1340 (mayor's decisions appealable to city council); *Starrett v. Wadley*, 876 F.2d 808, 819 (10th Cir. 1989) (sheriff's actions exposed county to § 1983 liability for employment decision but not harassment).

¹⁷⁶ See *Gobel v. Maricopa County*, 867 F.2d 1201, 1207-09 (9th Cir. 1989) (citing *Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985) (elected county sheriff) (county attorney may be the type of elected county official whose policy decisions automatically constitute county policy); *Crane v. Texas*, 759 F.2d 412, 428-30 (5th Cir.), *aff'd in part and rev'd in part*, 766 F.2d 193 (per curiam), *cert. denied*, 474 U.S. 1020 (1985) (district attorney). In *Blackburn*, although the First Circuit had found that Massachusetts law expressly placed policymaking authority in the elected county sheriff, the court also noted that "the Sheriff was the county official who was elected by the County's voters to act for them and to exercise the powers created by state law. Accordingly, the Sheriff's strip search policy was Plymouth County's policy." 771 F.2d at 571 (emphasis in original). In *Crane*, the Fifth Circuit held that, "because the ultimate authority for determining County *capias* procedures reposed in the District Attorney, an elected County official, his decisions in that regard must be considered official policy attributable to the County." 759 F.2d at 430.

¹⁷⁷ *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980).

government officials do not violate federal rights. The Court's reliance on state and local law allows municipalities to escape liability for the actions taken by those officials exercising de facto policymaking authority, despite the absence of an express authorization to do so in the law. The failure to identify de facto policymaking authority and the municipalities' corresponding ability to insulate themselves from § 1983 liability thwart the remedial purposes of § 1983.

A. *Congress Enacted § 1983 to Eliminate Unequal Enforcement of Federal Law*

Adopted in the face of widespread violence by the Ku Klux Klan, the Civil Rights Act of 1871 addressed the inability or unwillingness on the part of local officials to stop the violence and protect the African-Americans upon whom the Klan was perpetrating its violence. Congress feared that local governments were either unable or unwilling to enforce the law on an equal basis, and thus, that minorities were being denied the rights guaranteed by the U.S. Constitution and the recently enacted Thirteenth and Fourteenth Amendments. As a result, Congress enacted § 1983 (Section 1 of the Civil Rights Act of 1871) to create a federal remedy for those persons whose rights had been violated by officials acting under color of state law. The primary purpose of § 1983 is to allow federal courts to prevent local governments from determining when and which federal laws will be enforced. Section 1983 accomplishes this goal by compensating the victims of official abuses and deterring municipalities from future abuses. Section 1983, however, creates municipal liability only when the municipality caused the deprivation of federal rights. Congress therefore created a fault-based system of liability rather than one that extended unlimited or vicarious liability to municipalities. As a result, the Supreme Court has soundly rejected the application of respondeat superior. Given that a municipality can only act through its agents (its officials and employees), once the Supreme Court rejected respondeat superior, the pressing question became for which actions by which officials is the municipality liable.

B. *Rigid Reliance on Formalistic Definition of Policymaker Subverts § 1983's Goals*

The Supreme Court answered the question as to when a municipality may be held at fault by creating the requirement that the municipal official or employee is acting pursuant to a municipal policy.¹⁷⁸

¹⁷⁸ A municipality may also be held liable for a custom, which is a practice which is "perma-

A municipal policy may only be created by the actions of those officials who have final authority over policymaking in any given area. Defined by reference to where local law places policymaking authority, final authority is a question to be determined by the court rather than by the jury.¹⁷⁹ Where policymaking authority reposes, therefore, is not resolved by determining who had the final authority to take the actions alleged to have deprived a person of his or her federal rights, but instead by who had the final authority to set general policy in that area. If the official with the authority to set the policy is not the official who took the actions alleged to have caused the deprivation of rights, then the actions were not taken pursuant to a municipal policy and the municipality is not liable under § 1983.

The Supreme Court has recognized that a municipal official who possesses final policymaking authority may delegate that authority to another official and thus create a policymaker not expressly identified by local law. Where this delegation is done formally, it is easy to identify where final authority rests. The difficulties arise where there are informal or implied delegations of policymaking authority. The Supreme Court has narrowly construed these delegations of authority and has admonished trial courts not to confuse a delegation of policymaking authority with a delegation of decisionmaking authority to act. In other words, an official may have been delegated final authority to act in any given situation without having been given final authority to set policy in that area. If an official's decisions are constrained in any way by a policy not of that official's making, then the official may be exercising a discretionary authority to act but is not a policymaker. For the decisions of that official to become official municipal policy, the authorized policymakers must ratify the decision by approving not only the decision but its basis.

The application of these principles has resulted in bizarre results where courts have followed a rigid reliance on the placement of policymaking authority in the law and have refused to entertain any possibility of an informal delegation of policymaking authority. In effect, the "gaping hole" prophesied by Justice Brennan has materialized,

ment and well settled." *Monell*, 436 U.S. 658, 691 (1978) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)). Nevertheless, this still leaves wide gaps in municipal liability. A custom would not apply to single unconstitutional actions taken and not intended to be repeated in the future, or which were tailored to specific situations. Nor would a custom apply to the first actions taken which would eventually become a custom but which, initially, could not be viewed as such.

¹⁷⁹ Whether final policymaking authority has been delegated, however, may be a question for the jury. See *Crowder v. Sinyard*, 884 F.2d 804, 829 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990) (court upheld jury's decision that police chief was policymaker).

and, as a result, § 1983 liability has been denied in situations crying out for a federal remedy. For example, no municipal liability has been found where a mayor and a police chief were alleged to have practiced a pattern of intentional racial discrimination against twenty-five senior police officers, because neither the mayor nor the police chief were considered policymakers.¹⁸⁰ Instead, the local city council was viewed as the policymaking authority for the city in the area of employment discrimination because the council had passed an ordinance blanketly banning racial discrimination. Consequently, in *Auriemma v. Rice*, the Seventh Circuit held that although the mayor and the police chief possessed final authority to make personnel actions and the council had no authority to review those actions, and even though the mayor is an elected official, the boilerplate anti-discrimination ordinance prevented the city from being held liable for the discriminatory actions taken.¹⁸¹

Lower courts have also refused to find informal delegations of policymaking authority even where the policymaker as identified by state law has failed to articulate any policy to govern the actions taken by the decisionmakers and has no authority to review actions taken by the decisionmakers.¹⁸² For example, in *Johnson v. Hardin County*, the Sixth Circuit held that a county jailer, an elected official with total authority over all persons in the custody of the jail, is not a policymaker when taking actions regarding the medical treatment of prisoners. Instead, the court found that the local legislature was the policymaker because it had the power to enact ordinances and issue regulations regarding the county jail. The court found no informal delegation of the legislature's policymaking authority to the county jailer, despite the fact that the legislature had no power to review individual actions taken by the jailer, and even though the local legislature had not enacted any ordinances or issued any regulations related to the policy area of issue, leaving the jailer with no guidance from the supposed policymaker.¹⁸³

The formalistic reliance on state law to determine policymaking authority and the restrictive view of delegation of authority have allowed municipalities, intentionally or unintentionally, to insulate themselves from § 1983 liability by divorcing final policymaking authority from final authority to act. In the future, clever municipalities will

¹⁸⁰ See *Auriemma v. Rice*, 957 F.2d 397, 401 (7th Cir. 1992). See *infra* notes 143-56 and accompanying text for a discussion of the case.

¹⁸¹ *Id.*

¹⁸² See, e.g., *Johnson v. Hardin County*, 908 F.2d 1280, 1286-87 (6th Cir. 1990); *Crowley v. Prince George's County*, 890 F.2d 683, 685-86 (4th Cir. 1989).

¹⁸³ See *Johnson*, 908 F.2d at 685-87.

place final policymaking authority in city councils, which will pass appropriate legislation prohibiting the types of activities which could give rise to § 1983 liability such as racial discrimination. The final authority to act, however, will be placed outside the city council, with those decisions being unreviewable by the city council—the policymaking authority. In this manner, the municipalities can insulate their policymakers, and therefore the municipality, from liability.¹⁸⁴ As all municipalities have an obvious financial interest in reducing liability for damages under § 1983, municipalities will be motivated to take these steps even if the municipality is well-intentioned in its regard to the upholding of federal rights. By so encouraging this behavior, the sole reliance on state and local law to determine policymaking authority turns on its head § 1983's original purpose of requiring local governments to enforce the law equally. Instead, local governments are allowed to choose which laws to enforce by restricting which official actions municipalities will be liable for in federal court.

IV. A PROPOSAL FOR REDEFINING MUNICIPAL POLICYMAKER

The primary objective of § 1983 is to compel local officials to uphold the law uniformly, an objective which is met through § 1983's twin purposes of compensating victims whose federal rights have been violated and deterring future unlawful conduct by municipal officials. Section 1983 is an effective mechanism for controlling local officials only when liability attaches to those actions for which the municipality is capable of exercising some meaningful degree of control—actions which the municipality could prevent from occurring or prevent from becoming final. The rigid formalism of the current definition of municipal policy, by taking the distinction between authority to act and authority to set policy to its logical extreme, fails to impose liability for actions taken by many officials over whom the municipality should be exercising control.

The growth of the modern municipality into a large bureaucracy with ever-growing responsibilities, particularly in the country's large urban areas, created a tremendous number of officials and employees with final authority to act and a tremendous need for high-ranking officials to delegate authority—both authority to set policies and to take action. By considering solely where state law purports to put

¹⁸⁴Note that nonpolicymakers can still be held liable for unconstitutional actions, but the deep pocket of the municipality will not be available to remedy the plaintiff's injury. See, e.g., *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 2796 (1991) (police superintendent held personally liable for some discriminatory actions).

policymaking authority, and refusing to consider where actual policymaking authority resides in a municipality, the courts have eliminated from consideration for municipal liability under § 1983 an enormous number of actions taken by municipal officials. Consequently, with much reduced municipal liability, victims are less often able to reach municipal treasuries for compensation, and the authorized policymakers will not have the financial incentives or prospective liability to spur increased watchfulness over those countless officials who are given de facto policymaking authority in the modern municipal bureaucratic structure.

A proposal for redirecting the focus of § 1983 liability to allow § 1983 to influence the actions of local officials should encompass those officials over whom municipalities are able to exert a meaningful degree of control. The Supreme Court, however, is well settled on the basic approach to municipal liability under § 1983. Liability will only attach when local officials act pursuant to a municipal policy or custom. Moreover, after *Pembaur* and *Praaprotnik*, it appears clear that a municipal policy is any deliberate choice of action taken by an official with final authority to enunciate a municipal policy. As the definition of *what* is a policy is broad, while the definition of *who* may enact one is narrow, efforts at expanding municipal liability should focus on the conception of who may enact municipal policy. This Article suggests that municipal policymakers, those officials with final authority to set policy, should comprise the following three groups of municipal officials: (1) elected officials; (2) officials or employees expressly vested with policymaking authority by local law; and (3) de facto policymakers. The final group, the de facto policymakers, include those officials or employees who possess authority to take final action which is not reviewable by any elected official or municipal official vested by state law with policymaking authority, as well as those officials who take actions which are not reviewed by the official designated by local law or the policymaker when that official chooses not to exercise their power to review. This proposed definition of municipal policymakers fulfills not only § 1983's goals of deterring local officials from failing to guarantee the rights of federal law to all and providing compensation to victims of official abuse, but also maintains the Supreme Court's oft-repeated intention to maintain § 1983 as a fault-based system of liability.

A. *Elected Officials*

Elected local officials are the essence of local government in a democratic society. They are the repositories of the municipality's

power, and citizens vest them with authority to act on the municipality's behalf and to chart the municipality's overall course of action. Elected officials are clearly the masters/employers rather than the servants/employees in a municipality. Thus, the Supreme Court's rejection of respondeat superior does not preclude municipalities from being held liable for the acts of their elected officials. Moreover, while appointed officials are accountable to some other municipal official, ultimately to an elected official, for their position, elected officials owe their position only to the people. Generally, elected officials are not accountable on a day-to-day basis to anyone in the municipal structure and may be removed before their term expires only in the most extreme circumstances. The sweeping power which these attributes give to elected officials indicates that they should be viewed as per se policymakers.

B. *Officials Designated by Local Law*

In addition to elected officials, municipal policymakers should include those officials in whom state or local law has officially vested policymaking authority in a given area. These are the officials designated by *Praprotnik* as policymakers,¹⁸⁵ and their inclusion here is straightforward. A municipality must act through its agents. If local law designates certain officials as having final responsibility for setting the municipality's policies, then the policies of those officials are properly considered the policies of the municipality. Municipalities cannot avoid the dictates of their own laws.

C. *Officials with Delegated Policymaking Authority*

The final category of officials who should be classified as municipal policymakers are the de facto policymakers, those officials or employees who have, in practice, been delegated policymaking authority. De facto delegation can occur in two ways. First, the municipality may give an official or employee unreviewable authority to act. Second, the de jure policymaker or elected official may refuse to exercise the power to review the actions taken pursuant to internal appellate procedures. The Supreme Court recognizes that de jure policymakers do delegate their policymaking authority, although it has not encouraged a broad reading of delegation.¹⁸⁶ Rather than embrace the concept of de facto policymaking, the Court in essence has limited delegation to those

¹⁸⁵ *Praprotnik*, 485 U.S. 112, 124-25 (1988).

¹⁸⁶ *Id.* at 127.

instances where policymaking is expressly rather than impliedly delegated. As long as a de jure policymaker retains the power to make general policy pronouncements, no delegation has occurred.

Courts interested in restricting municipal liability have seized upon the *Praprotnik* plurality's distinction between express and implied delegation. Consequently, a local legislature could be held to have not delegated policymaking authority to executive branch officials in the area of personnel decisions when the legislature retains the power to enact ordinances reiterating constitutional requirements prohibiting racially discriminatory hiring practices,¹⁸⁷ or when the municipality's charter itself includes such a blanket prohibition.¹⁸⁸ Courts interested in expanding municipal liability, however, have followed the lead of Justice Brennan's concurrence in *Praprotnik* and have found policymaking authority delegated where total authority to act, unreviewable by de jure policymakers, is delegated, even where de jure policymakers may retain authority to enact broad policy statements.¹⁸⁹

Any attempt to expand the concept of implied delegation to those situations where de jure policymakers fail to exercise their power to review, however, is restrained by the acceptance by not only Justice O'Connor's plurality but also Justice Brennan's concurrence in *Praprotnik* that when a policymaker retains the power to review the decisions of those empowered to act, whether or not that power is exercised, policymaking authority has not been delegated. It is true that Justice Brennan did not acknowledge that there may be situations where policymakers in practice never invoke their authority to review, and thus that the "subordinate's decision is in effect the final municipal pronouncement on the subject."¹⁹⁰ Although Justice Brennan suggests that where the de jure policymaker refuses to review a decision of a subordinate official, the question of municipal policy should go to the jury, he nonetheless concurred in *Praprotnik's* judgement despite being faced by a municipal policymaker's refusal as a matter of practice to review the decisions which caused the deprivation of a federal right.¹⁹¹

¹⁸⁷ See *Auriemma*, 957 F.2d at 397, 401. See also *supra* notes 143-56 and accompanying text for a discussion of the case.

¹⁸⁸ See *Crowley v. Prince George's County*, 890 F.2d 683, 686 (11th Cir. 1989), discussed *supra* note 140.

¹⁸⁹ See cases cited *supra* note 140.

¹⁹⁰ *Praprotnik*, 485 U.S. at 145.

¹⁹¹ In *Praprotnik*, the plaintiff had alleged, among other things, that his constitutional rights had been violated by being transferred to a job below his qualifications with primarily clerical responsibilities, but without a decrease in pay. The St. Louis Civil Service Commission had a

This proposal, therefore, offers a more expansive view of municipal liability than is presented by the two dominant views on the Supreme Court. A broad vision of implied delegation of policymaking authority and consequently a broad reading of de facto policymakers will force municipalities to take responsibility for those actions over which it can reasonably be expected to control. It is this broad reading, and not Justice Brennan's more limited Approach, that will eliminate the "gaping hole" in municipal liability which presently exists. Consequently, where the municipality determines that an official's actions will not be susceptible to review by any other city official, then that official's actions are in fact authorized by de jure policymakers and that official is properly characterized as a policymaker. Thus, when a mayor and a police chief are given complete authority over personnel decisions, and those decisions are reviewable only in court and not by any other municipal official or body, then the mayor and police chief have sole control to determine the course of action taken by the municipality and the city is properly conceived as setting policy through them. This should be true even if the city council retains the power to enact ordinances but has no authority to review the mayor's actions to determine if they are in conformance with the ordinances,¹⁹² and especially so if the council retains only the power to enact ordinances but does not act.¹⁹³ If local city councils are viewed as the only potential policymaker in this situation, then the ordinances themselves may be challenged but every personnel action taken by an executive branch official which is not taken directly pursuant to an ordinance is not cognizable under § 1983 against municipalities because the executive branch official is not a policymaker.

A municipality should also be held liable whenever a de jure policymaker chooses not to exercise existing internal appeal procedures after the alleged victim requests the available review. In that situation, the municipality cannot insulate itself from liability by vesting the power to review in a de jure policymaker and then having that policymaker simply refuse to review the decision of the subordinate officials. In its application, a conscious refusal to review is no different from the municipality vesting unreviewable authority to act. Thus, *Praprotnik* should have been decided differently, because the Civil

standing practice never to review transfers that did not involve pay decreases and thus did not review the plaintiff's transfer. 485 U.S. at 115-16. See notes 104-05 and accompanying text.

¹⁹² This was the situation in *Auriemma*, 957 F.2d 397. See *supra* notes 143-56 and accompanying text.

¹⁹³ Cf. *Johnson v. Hardin County*, 908 F.2d 1280, 1287 (6th Cir. 1990), discussed *supra* note 141.

Service Commission, the designated policymaker, refused to entertain the plaintiff's appeal pursuant to an existing internal appellate procedure. The municipality had effectively insulated an entire class of job actions—transfers—from § 1983 liability. By refusing to review certain decisions, however, the municipality had in effect authorized those actions. Bringing these decisions under the umbrella of § 1983 liability will force municipalities to expend more resources reviewing the decisions of its subordinate officials, or to face the consequences of that refusal to do so. This is appropriate as liability is created only for those actions which the municipality may control, for those actions which are neither random nor unauthorized.

Including *de facto* policymakers in the definition of municipal officials with final authority to set policy not only accurately portrays the power structure of the municipality, it also better serves the goals of § 1983. Congress enacted § 1983 to provide a federal remedy against local officials unwilling or unable to enforce federal law. If the power to delegate is not recognized, however, and *de facto* policymakers rejected, municipalities will have the authority to determine the scope of § 1983 liability and thus to determine which federal rights it will enforce. For example, local councils may enact ordinances blanketly prohibiting employment discrimination, and then vest complete and unreviewable authority to implement this ordinance in the mayor. Alternatively, the council could retain the power to review in theory but never exercise that power. Under the restricted view of delegation, the municipality may disclaim any acts taken by the mayor or anyone else in violation of this ordinance as not being authorized by a municipal policymaker. Such a result turns § 1983 upside down, allowing municipalities to determine which and when federal rights may be vindicated in federal court, which is precisely the result Congress attempted to eliminate when it passed § 1983 in 1871.

CONCLUSION

Municipal liability exists under § 1983 only when a municipal official or employee deprives an individual of a federal right pursuant to an official municipal policy. The Supreme Court has restricted municipal liability by adopting a formalistic view of which municipal officials may take actions considered to be municipal policies. The current definition of municipal policy reduces opportunities for municipal liability and thwarts § 1983's remedial purposes. First, by allowing municipalities to insulate municipal policymakers by eliminating their right to review decisions made by those officials with authority to

act, municipalities are able to determine which actions taken by which officials will subject the municipality to liability. This stands in stark contrast to Congress's intention in enacting § 1983 of providing a federal remedy to individuals injured by a local official's inability or unwillingness to enforce the law on an equal basis. Second, by reducing municipal liability to the actions taken by only a select few officials, the Supreme Court has reduced the fiscal incentives for municipal officials to ensure that actions are taken in accordance with federal law. A definition of policymakers that includes elected officials, as well as both de jure and de facto policymakers, more accurately reflects the actual distribution of policymaking authority in the modern municipality and maintains § 1983 as a fault-based system of liability.