

NOTES

A FORESEEABILITY-BASED STANDARD FOR THE DETERMINATION OF MUNICIPAL LIABILITY UNDER SECTION 1983

The Reconstruction Congress enacted the Civil Rights Act of 1871 in order to enforce the provisions of the fourteenth amendment to the Constitution.¹ Section 1 of this Act, currently codified at Title 42 United States Code, Section 1983,² provided that parties deprived of their constitutional rights by a "person" acting under color of state law or custom could bring suit in federal court for appropriate relief against the person who caused the constitutional injury.³ The statute's general language and its lack of clear legislative history⁴ has left the interpretation of section 1983's scope to the federal judiciary, and especially the Supreme Court.⁵

In 1961, ninety years after section 1983 became law, the United States Supreme Court directly addressed the statute's application to municipalities for the first time.⁶ The Court held that local government officials were "persons" as defined by section 1983,⁷ but that municipalities fell outside the statute's provisions.⁸ Just seventeen years later, however, the Court reversed this decision and found that municipalities were indeed "persons" for the purposes of section 1983.⁹

The Court limited municipal liability under section 1983, however, to situations where policy or custom directly attributable to the municipality itself caused a constitutional violation.¹⁰ Under this standard, written rules and enacted ordinances, for example, are clearly municipal policies.¹¹ If, by following these policies, a municipal employee deprives a person of a constitutional right, the aggrieved party may hold the municipality liable under section 1983.¹²

¹ The Act, 17 Stat. 13 (1871), was entitled, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution to the United States, and for other Purposes."

² 42 U.S.C. § 1983 (1982).

³ Section 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.

Id.

⁴ See *infra* notes 30-70 and accompanying text. See also *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 665-89 (1978); *Monroe v. Pape*, 365 U.S. 167, 171-87 (1961).

⁵ See *infra* notes 71-312 and accompanying text for a discussion of the judicial construction of § 1983.

⁶ *Monroe*, 365 U.S. at 187. See also *infra* note 74.

⁷ *Monroe*, 365 U.S. at 192.

⁸ *Id.* at 191.

⁹ *Monell*, 436 U.S. at 690.

¹⁰ *Id.* at 694.

¹¹ See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 632 (1980); *Monell*, 436 U.S. at 690.

¹² *Monell*, 436 U.S. at 694.

The Court has more difficulty, however, determining when municipalities may delegate official policymaking authority to municipal officials,¹³ thereby giving rise to potential section 1983 liability for the results of actions taken pursuant to policies established under such delegated authority. In addition, the Court has not clearly articulated a standard for determining when municipal liability may attach under section 1983 for constitutional deprivations resulting from actions taken pursuant to municipal custom or usage.¹⁴ The Court's two most recent decisions addressing section 1983 municipal liability have engendered no less than eight separate opinions, and not one of these opinions has mustered the support of a majority of the Court.¹⁵

Because of the division of opinion in the Supreme Court, lower courts are unsure of the elements of an action brought under section 1983.¹⁶ The Court should provide a new approach that, consistent with the language, legislative history, and judicial interpretation of section 1983, provides a clear means of determining when municipal liability will attach under section 1983. This note proposes a foreseeability-based standard that clarifies many of section 1983's unresolved issues concerning municipal liability.¹⁷ This proposed standard has two parts. The first part applies to actions taken pursuant to official municipal policies, and holds municipalities liable under section 1983 if an actual constitutional violation occurs that was a reasonably foreseeable result of the municipality's policy. The second part of the standard applies to municipal customs and usages, and finds municipal liability if actions taken pursuant to a grossly negligent municipal custom deprive a person of a constitutionally protected right. A foreseeability-based standard will help resolve the conflict and confusion which currently plagues the determination of municipal liability under section 1983.

Section one of this note traces the Court's inconsistent development of municipal liability under section 1983. The first part examines section 1983's legislative history.¹⁸ The second part traces the statute's judicial construction by examining pairs of contrasting cases.¹⁹ Each pair of cases focuses on one major aspect of the judicial interpretation of section 1983 municipal liability, and demonstrates both the Court's consistent applications of section 1983, and its inconsistencies. The final pair of cases discussed demonstrates the current lower court confusion regarding the applicable standard for determining municipal liability.²⁰

¹³ See *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1298 (1986); *id.* at 1301 (White, J., concurring); *id.* at 1304 (O'Connor, J., concurring).

¹⁴ See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985); *id.* at 829-30 (Brennan, J., concurring). See *infra* notes 386-87, 392-94 and accompanying text for a discussion of custom and usage.

¹⁵ See *Pembaur*, 106 S. Ct. at 1292, *id.* at 1301 (White, J., concurring), *id.* at 1302 (Stevens, J., concurring), *id.* at 1304 (O'Connor, J., concurring), *id.* at 1304 (Powell, J., concurring); *Tuttle*, 471 U.S. at 808, *id.* at 824 (Brennan, J., concurring), *id.* at 834 (Stevens, J., dissenting).

¹⁶ The Supreme Court's official policy standard has given rise to two conflicting interpretations of what constitutes official policy in the lower courts. Compare *Kibbe v. City of Springfield*, 777 F.2d 801, 804 (1st Cir. 1985), *cert. denied as improvidently granted*, 107 S. Ct. 1114 (1987) (*per curiam*) (inadequate training valid theory of liability); with *Grandstaff v. City of Borger*, 767 F.2d 161, 169 (5th Cir. 1985) (inadequate training does not ordinarily give rise to liability).

¹⁷ Professor Eric Schnapper first proposed a foreseeability standard for the application of § 1983 to municipal liability in a 1979 article. See Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 223, 235-37 (1979).

¹⁸ See *infra* notes 30-70 and accompanying text.

¹⁹ See *infra* notes 71-312 and accompanying text.

²⁰ See *infra* notes 293-312 and accompanying text for a comparison of *Kibbe* and *Grandstaff*.

Section two of this note presents the proposed foreseeability-based standard.²¹ The first section argues for a clear standard for determining municipal liability under section 1983.²² The second section concludes that the proposed standard is consistent with the statutory language,²³ legislative history,²⁴ judicial construction²⁵ and underlying policy basis of section 1983.²⁶

I. THE DEVELOPMENT OF MUNICIPAL LIABILITY UNDER SECTION 1983

Although all section 1983 decisions are based on the language of the statute,²⁷ the statute's age and its repeated judicial construction allow the courts to interpret the statute in a common law manner.²⁸ Therefore, while courts look to the language of section 1983, and the intent of its drafters, they also rely on public policy considerations to resolve section 1983 issues. Because Congress enacted section 1983 to effectuate the purposes of the fourteenth amendment, varying interpretations of that amendment influence these policy considerations.²⁹ Thus, courts interpreting section 1983 must review both the legislative history and existing case law in order to determine the proper scope of municipal liability under section 1983.

A. *The Legislative History of Section 1983*

1. Section 1 of the Civil Rights Act of 1871

The Reconstruction Congress originally enacted section 1983 as section 1 of the Civil Rights Act of 1871, commonly known as the Ku Klux Klan Act.³⁰ Section 1 of the Act provided that any person who, acting under color of law, subjected, or caused a person to be subjected, to the deprivation of a right secured by the laws and Constitution of the United States would be liable to the person so injured in an action brought in a federal court.³¹ Congress intended this Act to carry out the provisions of the fourteenth

²¹ See *infra* notes 313-21 and accompanying text.

²² See *infra* notes 322-47 and accompanying text.

²³ See *infra* notes 354-58 and accompanying text.

²⁴ See *infra* notes 359-63 and accompanying text.

²⁵ See *infra* notes 364-403 and accompanying text.

²⁶ See *infra* notes 404-20 and accompanying text.

²⁷ *Owen v. City of Independence*, 445 U.S. 622, 635 (1980) ("the starting point in our analysis must be the language of the statute itself").

²⁸ See Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355 (1978).

²⁹ Compare *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 685 (1978) (interpreting legislative history to allow municipal § 1983 liability), with *Monroe v. Pape*, 365 U.S. 167, 171 (1961) (interpreting legislative history to bar municipal § 1983 liability).

³⁰ Civil Rights Act of April 20, 1871, 17 Stat. 13 (1871) (also known as the "Ku Klux Klan Act").

³¹ As originally enacted, § 1 of the Civil Rights Act of 1871 read as follows:

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or

amendment.³² Although some sections of the Ku Klux Klan Act were contested hotly by members of Congress, section 1 aroused very little debate.³³

The Reconstruction Congress passed the Ku Klux Klan Act as a response to what they perceived as the states' unwillingness, or inability, to enforce their laws equally.³⁴ The Ku Klux Klan had practically usurped state law enforcement functions in some areas, with little or no interference from these states' governments.³⁵ Thus, it was not so much the actual state laws, but their unequal enforcement that prompted section 1983's passage.³⁶

circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication," and the other remedial laws of the United States which are in their nature applicable in such cases.

The Civil Rights Act of April 20, 1871, 17 Stat. 13, *quoted in Monroe*, 365 U.S. at 181-82 n.27. It is beyond the scope of this note to discuss the application of § 1983 to federal laws. This note will focus on § 1983's application to municipalities to redress deprivations of constitutionally protected rights.

³² *Monroe*, 365 U.S. at 171. The 42d Congress enacted the Ku Klux Klan Act pursuant to the power granted by § 5 of the fourteenth amendment. *Id.* See also *supra* note 1.

³³ *Monell*, 436 U.S. at 665. The Sherman amendment, proposed as § 7 of the Act, raised a great deal of debate. Section 1, in contrast, caused little debate, as evidenced by the following statements of Senator Edmunds, manager of the Bill in the Senate:

The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill [of 1866], which have since become part of the Constitution [as the fourteenth amendment].

Id. at 684 (quoting CONG. GLOBE, 42d Cong., 1st Sess. at 568 (1871)) [hereinafter GLOBE].

³⁴ The remarks of Representative Beatty of Ohio provide a good example of the mood of many members of the House:

[C]ertain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to those persons.

Monroe, 365 U.S. at 175 (quoting GLOBE, *supra* note 33, at 428).

³⁵ Senator Osborn of Florida voiced this concern:

That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have the authority under the Constitution, enact the laws necessary for the protection of the citizens of the United States. The question of the constitutional authority for the requisite legislation has been sufficiently discussed.

Monroe, 365 U.S. at 176 (quoting GLOBE, *supra* note 33, at 653).

³⁶ *Id.* Senator Pratt of Indiana stated this problem clearly:

Plausibly and sophistically it is said that the laws of North Carolina do not discriminate against them; that the provisions in favor of rights and liberties are general; that the courts are open to all; that juries, both grand and petit, are commanded to hear and redress without distinction as to color, race, or political sentiment.

But it is a fact, asserted in the report, that of the hundreds of outrages committed

Unequal enforcement of state law, and illegal activity which state authorities could not control, became so acute by 1871 that President Grant sent a message to Congress requesting action empowering the federal government to correct the evils of the Klan.³⁷ The President's message was not, however, the only indication of the severity and extent of this problem. The Senate also had received a 600-page report that detailed both Klan activities and the inability or unwillingness of some state governments to protect their citizens equally from the Klan's depravities.³⁸ Many members of Congress referred to this report in the debates concerning the Ku Klux Klan Act.³⁹ Widespread agreement existed among members of Congress that action was needed to counteract the Klan's outrageous and illegal actions.⁴⁰

The major controversy concerning section 1 of the Act was not its necessity but, rather, whether Congress could extend a federal remedy and jurisdiction into areas traditionally reserved to the states.⁴¹ Those opposed to the extension of federal power argued that the Act represented a thinly-veiled attempt to centralize further power in the federal government.⁴² The Act's proponents, however, argued that the protection of citizens' constitutional rights is a proper exercise of federal power.⁴³ The Forty-Second Congress reached a compromise and, when the Act was passed, the Congress stated that the Act was meant to effectuate the fourteenth amendment.⁴⁴ The importance of protecting and effectuating the provisions of the fourteenth amendment⁴⁵ outweighed congressional reluctance to weaken the states' rights,⁴⁶ and both houses of Congress passed section 1 as originally proposed.

upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples.

Id. at 178 (quoting *GLOBE*, *supra* note 33, at 505).

³⁷ The President was not certain that existing laws gave the executive branch sufficient power to act, hence the urgent need for such legislation. *Id.* at 172-73. President Grant's message to Congress of March 23, 1871, read:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States

Id. (quoting *GLOBE*, *supra* note 33, at 244).

³⁸ *Id.* at 174.

³⁹ See, e.g., remarks of Senator Pratt, *supra* note 36.

⁴⁰ See, e.g., remarks of Representative Beatty, *supra* note 34.

⁴¹ See, e.g., *Monroe*, 365 U.S. at 174, 178-80.

⁴² See remarks of Representative Kerr, *infra* note 54.

⁴³ See remarks of Representative Carpenter, *infra* note 47.

⁴⁴ See *supra* note 1. U.S. CONST. amend. XIV, § 5 provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

⁴⁵ See remarks of Senator Carpenter, *infra* note 47.

⁴⁶ See remarks of Representative Hoar, *infra* note 54.

Members of Congress understood section 1983's wide-ranging power,⁴⁷ but the seriousness of the Klan's outrages, coupled with the failure of local governments to deal with these outrages, had convinced Congress to act.⁴⁸ Moreover, the bill's sponsor in the House stated that courts should construe the Act "liberally and beneficently" in order to fully effectuate the fourteenth amendment's guarantees.⁴⁹ Congress intended section 1983 to deter violations of constitutional rights and, when violations occurred, to provide a federal remedy to the victim.⁵⁰ Congress recognized that if the fourteenth amendment's broad civil rights guarantees were to be available throughout the United States, neutral federal courts would have to enforce them.⁵¹

2. The Sherman Amendment to the Civil Rights Act of 1871

Because Senator Sherman did not believe that the proposed Ku Klux Klan Act would adequately protect these rights,⁵² he proposed an amendment. The Sherman amendment would have imposed a duty on all inhabitants of a municipality to protect any person from constitutional injury at the hands of a group "riotously and tumultuously assembled."⁵³

While section 1 of the Civil Rights Act of 1871 aroused relatively little controversy,⁵⁴ Senator Sherman's proposed amendment to the Civil Rights Act caused an

⁴⁷ Senator Carpenter stated this view clearly:

I think there is one of the fundamental, one of the great, the tremendous revolutions in our Government by [the fourteenth amendment] of the Constitution. It gives Congress affirmative power to protect the rights of the citizen, whereas before no such right was given to save the citizen from the violation of any of his rights by State Legislatures, and the only remedy was a judicial one when the case arose.

Monroe, 365 U.S. at 197-98 (quoting *GLOBE*, *supra* note 33, at 577).

⁴⁸ See remarks of Representative Beatty, *supra* note 34.

⁴⁹ *Owen v. City of Independence*, 445 U.S. 622, 636 (1980) (quoting *CONG. GLOBE*, 42d Cong., 1st Sess., app. 68 (1871) [hereinafter *GLOBE APP.*] at 68 (remarks of Representative Shellabarger)).

⁵⁰ See *Monroe*, 365 U.S. at 174. This remedy was to be in addition to any available state law remedy. *Id.*

⁵¹ *Id.* at 180.

⁵² See *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 684 (1978); *Monroe*, 365 U.S. at 171.

⁵³ *Monell*, 436 U.S. at 702-03 (quoting *GLOBE*, *supra* note 33, at 663). Senator Sherman hoped to involve those members of the community who were property owners in the protection of every person's civil rights by making their property "responsible for the injuries caused by the Ku Klux Klan." *Id.* at 667. This amendment was based on similar statutes in force in England and some of the New England states. There were major differences, however; the proposed amendment lacked a short statute of limitations, it imposed liability even if the municipalities had no notice of the impending riot or had no authorized police force, and it made no difference if the municipality tried to prevent or stop the riot or whether the rioters were caught. *Id.* at 667-68 & nn.17-18.

⁵⁴ The major objection to § 1 of the Act was that it was an unwarranted extension of federal power into an area of state sovereignty. *Monroe*, 365 U.S. at 178-80. For a discussion of the tension that currently exists within the Supreme Court between nationalism and federalism as they are applied through section 1983, see 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. 833, 906-08 (1986). Opponents of extending federal jurisdiction over areas traditionally reserved to the states, rather than questioning the immediate necessity, argued that it was a thinly veiled attempt to consolidate power in the central government. Representative Kerr of Indiana stated:

uproar.⁵⁵ As originally passed by the Senate, the Sherman amendment imposed individual liability and monetary damages upon inhabitants of a municipality where prohibited injuries occurred.⁵⁶ The House, however, rejected the proposed amendment.⁵⁷ When the Sherman amendment emerged from the conference committee, it mandated that courts enforce judgments first against the persons who committed the proscribed acts and, if not satisfied within two months, then against the municipal corporation itself.⁵⁸

It is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States. It is neither authorized nor expedient, and is not calculated to bring peace, or order, or domestic content and prosperity to the disturbed society of the South. The contrary will certainly be its effect.

Monroe, 365 U.S. at 179 (quoting *GLOBE APP.*, *supra* note 49, at 50). Proponents of the Act, however, while fully aware of the extension, justified it as being a proper exercise of federal power: protection of the citizens' federal constitutional rights. See remarks of Senator Carpenter, *supra* note 47. Thus, the proponents continued, pursuant to the fourteenth amendment, Congress was justified in infringing upon what previously was exclusively the states' province. See remarks of Senator Osborn, *supra* note 35. To the proponents, the importance of protecting and effectuating the provisions of that amendment outweighed any concern over weakening the states' rights. Representative Hoar stated:

The question is not whether a majority of the people in a majority of the States are likely to be attached to and able to secure their own liberties. The question is not whether the majority of the people in every State are not likely to desire to secure their own rights. It is, whether a majority of the people in every State are sure to be so attached to the principles of civil freedom and civil justice as to be as much desirous of preserving the liberties of others as their own, as to insure that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights.

Monroe, 365 U.S. at 182-83 (quoting *GLOBE*, *supra* note 33, at 334-35). Section 1 was passed by both houses of Congress as originally proposed. *Id.* at 181.

⁵⁵ See *Monroe*, 365 U.S. at 190.

⁵⁶ *Monell*, 436 U.S. at 702-03. Section 1 of the Ku Klux Klan Act was later applied to impose liability on municipal corporations under certain circumstances. See *id.* at 690.

⁵⁷ *Monroe*, 365 U.S. at 188 (citing *GLOBE*, *supra* note 33, at 725).

⁵⁸ The proposed Sherman amendment read as follows:

That if any house, tenement, cabin, shop, building, barn, or granery shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damaged by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such a suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest from any person or persons

Members of Congress agreed that the fourteenth amendment protected all inhabitants of the United States.⁵⁹ Opponents of the Sherman amendment argued, however, that the proposal sought to impose an affirmative obligation that was beyond the power of the federal government.⁶⁰ In 1871, the prevailing view of coordinate sovereignty regarded municipalities as subdivisions of the state governments which existed by the states' consent and under their dominion.⁶¹ Thus state governments could require mu-

engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

Monell, 436 U.S. at 702-03 (quoting *GLOBE*, *supra* note 33, at 663).

The relevant portions of the first conference substitute are given below:

That if any house . . . with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation . . . and in which action any of the parties committing such acts may be joined as defendants. *And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof . . .*

Id. at 703-04 (quoting *GLOBE*, *supra* note 33, at 749, 755) (emphasis added). This substitute also was defeated however, and the conference committee's final report abandoned municipal liability. The report instead called for persons with knowledge of and authority to prevent conspiracies to violate a person's constitutional rights who did not prevent such an occurrence to be liable to the injured party. This compromise ultimately was enacted as § 6 of the Act, now codified at 42 U.S.C. § 1986 (1982). *Monell*, 436 U.S. at 668-69; *Monroe*, 365 U.S. at 188-90.

⁵⁹ *Monell*, 436 U.S. at 670 & n.21, 673.

⁶⁰ *Id.* at 673. Members of Congress noted that municipalities are creations of the states and exist at their pleasure, and thus may have limitations or obligations imposed by the states. Municipalities were considered to be, in some ways, subdivisions of the states, formed in order to allow the states to govern more effectively. Municipalities, unlike states, however, were not found to be protected by the provisions of the eleventh amendment. Representative Blair stated:

[The Sherman] amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creation of the States alone . . . [H]ere it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am unable to assent to.

[T]here are certain rights and duties that belong to the States . . . [and] there are certain powers that inhere in the State governments. They create these municipalities; they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to these obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot . . . when [will] its power . . . stop and what obligations . . . might [it] not lay upon a municipality . . . [?]

Monell, 436 U.S. at 674-75 (quoting *GLOBE*, *supra* note 33, at 795). The Sherman amendment, which would have granted the federal government the power to require municipalities to keep the peace, was likened to the recently overturned power to tax state officers and thereby destroy the states. *Id.* at 675 (quoting the remarks of Rep. Blair, *GLOBE*, *supra* note 33, at 795, *citing* *Collector v. Day*, 11 Wall. 113 (1871)).

⁶¹ *Monell*, 436 U.S. at 678-79.

municipalities to raise a police force in order to protect their citizens,⁶² but the federal government had no sovereign power to do so.⁶³ Federal power was limited to preventing the states and their subdivisions from violating the provisions of the federal Constitution.⁶⁴ The distinction was drawn between Congress requiring municipalities to *act* to protect a person's constitutional rights, and Congress requiring municipalities themselves to *refrain* from violating a person's constitutional rights.⁶⁵ In short, members of Congress believed that the federal government did not have the power to require that municipalities actively protect their citizens' rights. This was not because they felt that a municipality could violate its citizens' constitutional rights, but because they viewed federal authority as limited in this area.⁶⁶

The Supreme Court has distinguished section 1 of the Ku Klux Klan Act from the Sherman amendment, finding that the latter would have imposed liability regardless of the municipality's fault, while the former would impose liability on the municipality when a municipality or municipal officer deprived or caused the deprivation of a person's constitutional rights.⁶⁷ Under section 1, liability would attach only if the action was taken under color of state law.⁶⁸ The Sherman amendment, however, could have imposed liability even in the absence of municipal action, so long as a constitutional injury had occurred within the municipality.⁶⁹ Perhaps this distinction moved some of the same members of Congress who supported section 1 of the Act to reject the Sherman amendment.⁷⁰

B. *Judicial Construction of Municipal Liability Under Section 1983*

The Supreme Court has had numerous occasions to interpret section 1983's applicability to municipalities since it first addressed the issue in 1961.⁷¹ The Court's decisions, however, have been inconsistent.⁷² To illustrate this inconsistency, the following section examines significant issues which pertain to municipal section 1983 liability in light of

⁶² *Id.* at 668.

⁶³ *Id.* at 680. The remarks of Representative Burchard make this clear:

[T]here is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by State laws, perhaps the United States courts could enforce its performance. But counties . . . do not have any control of the police . . .

Id. (quoting *GLOBE*, *supra* note 33, at 795).

⁶⁴ *Id.* at 674-75.

⁶⁵ *Id.* at 680.

⁶⁶ *Id.*

⁶⁷ *Id.* at 681 n.40.

⁶⁸ See *supra* note 31 for the text of § 1 of the Act.

⁶⁹ See *supra* note 58 for the text of the Sherman amendment and relevant portions of the first conference substitutes.

⁷⁰ *Monell*, 436 U.S. at 681 n.40.

⁷¹ The number of § 1983 municipal liability cases has increased astronomically since the Supreme Court decided *Monroe v. Pape*, 365 U.S. 167 (1961). See Howard, *The States and the Supreme Court*, 31 CATH. U.L. REV. 375, 379 (1982).

⁷² Compare, e.g., *Monell*, 436 U.S. at 694 (municipalities may be liable under § 1983) with *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (municipalities not liable under § 1983).

contrasting pairs of cases. Each pair of cases addresses the same underlying issue, yet the result reached or the analysis applied differs between the cases, demonstrating the ambiguity and confusion in the current state of the law. These inconsistencies demonstrate the tension between the Justices of the Court who favor either an expansive or limited interpretation of municipal liability under section 1983.⁷³ Often neither philosophy can summon a majority of the Justices. This note, therefore, submits that an unarticulated "middle ground," which represents a compromise between expansive and limited interpretations of section 1983, has emerged that most accurately describes current Supreme Court doctrine.

1. Determining Municipal Liability Under Section 1983: *Monroe* and *Monell*

Monroe v. Pape was the first case in which the Supreme Court directly addressed the issue of municipal liability under section 1983.⁷⁴ In that 1961 decision, the Court found that Congress had not intended for section 1983 to apply to municipalities and therefore rejected such liability.⁷⁵ For the first time, however, the Court permitted section 1983 suits against municipal officials.⁷⁶ The Court applied tort law principles in determining the liability of those officials⁷⁷ and stated that the Reconstruction Congress could not have intended that municipalities be considered "persons" subject to section 1983 liability.⁷⁸

Monroe opened the doors of the federal courts to plaintiffs who alleged that municipal officers, acting under color of law, had deprived them of their constitutional rights.⁷⁹ Interpreting section 1983's language and legislative history, including the Sherman amendment,⁸⁰ the *Monroe* Court concluded that by rejecting the Sherman amendment, Congress intended that municipalities not be liable under any provision of the Ku Klux Klan Act.⁸¹ The Court held, however, that section 1983's use of the words "under color

⁷³ See generally Brown, *supra* note 54, at 906-08 (postulating that tensions between Justices of the Court espousing nationalism and federalism has led to "official policy or custom" compromise regarding § 1983 municipal liability).

⁷⁴ *Monroe v. Pape*, 365 U.S. 167, 191 (1961). Both before and after *Monroe*, however, the Supreme Court decided many cases brought under § 1983 against school boards, including *Orleans Parish School Bd. v. Bush*, 365 U.S. 569 (1961) and *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See also *Monell*, 436 U.S. at 663 n.5.

⁷⁵ *Monroe*, 365 U.S. at 187.

⁷⁶ *Id.* at 192. The *Monroe* complaint alleged that thirteen Chicago police officers broke into the plaintiff's home in the early morning hours, with no search or arrest warrant, and forced the entire family to stand naked in the living room while the officers ransacked the house. It further alleged that Mr. Monroe was taken to a police station, held on "open charges," interrogated concerning a murder committed two days before, and finally released without being charged. He was never brought before a magistrate, although the complaint stated that one was available, nor was he permitted a telephone call. In short, these allegations were of tortious actions so serious as to rise to the level of constitutional violations. No nexus between these actions and the City of Chicago was ever alleged, however, beyond the fact of the officers' employment by the city. *Id.* at 169-70.

⁷⁷ *Id.* at 187.

⁷⁸ *Id.* at 191.

⁷⁹ *Id.* at 192.

⁸⁰ See *id.* at 171-87.

⁸¹ *Id.* at 191. Referring to the 42d Congress's debates, the Court stated that by defeating the Sherman amendment, "[t]he response of the Congress to the proposal to make municipalities liable for actions being brought within the federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." *Id.*

of [law]" could reach the actions of municipal officers who deprive a person of a constitutional right.⁸² This interpretation gave rise to many suits against municipal officials in their "official capacity" for actions taken pursuant to municipal policy or custom.⁸³

The *Monroe* Court also employed tort doctrine⁸⁴ to interpret section 1983's language which attaches liability to a person who indirectly causes another to suffer a constitutional violation.⁸⁵ The Court stated that "[s]ection [1983] should be read against the background of tort liability that makes a [person] responsible for the natural consequences of his [or her] actions."⁸⁶ While this statement specifically referred to municipal officers who deprived individuals of their constitutional rights while acting "under color of law," it has shaped the subsequent development of actions brought under section 1983.⁸⁷

The *Monroe* Court looked to the legislative history of section 1983 in order to elucidate the aims of the Forty-second Congress.⁸⁸ The Court stated that section 1983's federal remedy supplements state remedies and, moreover, that plaintiffs need not

⁸² *Id.* at 184-87. To aid in defining when an action is taken "under color of law," and a municipal officer may thus be liable under § 1983, the Court cited its language in *United States v. Classic*, 313 U.S. 299, 325-26 (1941). The *Classic* Court stated that "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of' state law." *Monroe*, 365 U.S. at 184, citing *Classic*, 313 U.S. at 325-26.

⁸³ See Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483 (1977). In his 1977 article, written before the *Monell* decision extended § 1983 liability to municipalities, Ronald Levin argued that cases arising under § 1983 fall into two categories, which he designated as "political cases" and "constitutional tort cases." Simply stated, a "political" § 1983 case is an action brought against a municipality "alleging that its policies . . . are unconstitutional." *Id.* at 1487-88. A "constitutional tort" case is a damages action brought against an individual municipal officer for deprivation of the plaintiff's constitutional rights, whether or not the municipality has "authorized or encouraged the challenged conduct." *Id.* at 1488-89.

There are a number of implications attached to each classification. First, the plaintiff must determine which party may be sued; second, the nature of damages sought will vary; and third, the extent of relief will depend on who is sued. Generally, under political cases, both equitable and monetary remedies appropriately may be sought. But see *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) (where the Court cites "principles of equity, comity, and federalism" which must "restrain a federal court"). Only monetary damages are generally awarded in constitutional tort cases, however. Finally, a municipality's pockets are generally deeper than an individual's, and municipalities are, unlike many government officials, not accorded any qualified immunities. *Owen v. City of Independence*, 445 U.S. 622, 638 (1980). Punitive damages, however, are available only against individuals for "knowing and malicious acts." *City of Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981). Thus, a determination as to whether an action is a political case or a constitutional tort case will significantly affect many aspects of litigation.

⁸⁴ *Monroe*, 365 U.S. at 187.

⁸⁵ 42 U.S.C. § 1983 (1982) ("Everyone who . . . subjects, or causes to be subjected").

⁸⁶ *Id.* It should be noted, however, that *Monroe* was essentially a "constitutional tort" action. See *supra* note 83 for a discussion of political versus constitutional tort § 1983 actions.

⁸⁷ As a result of this statement, courts have relied on the concepts of causality and fault. See, e.g., *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985). While this approach provides a means of organizing actions and, through the use of analogy, extending the scope of § 1983, one commentator has argued that some courts have "seized upon the 'background of tort liability' catch phrase with little consideration given to the background of 1983 liability." See, e.g., Nahmod, *Section 1983 and the "Background" of Tort Liability* 50 IND. L.J. 5, 8-9 (1974). Later cases, however, have developed the tort principles of duty, causality and fault within the context of such actions. See, e.g., *Tuttle*, 471 U.S. at 822-24; *id.* at 829-32 (Brennan, J., concurring); *Parratt v. Taylor*, 451 U.S. 527 (1982); *Owen v. City of Independence*, 445 U.S. 622, 654 (1980).

⁸⁸ *Monroe*, 365 U.S. at 172-87.

exhaust state remedies before bringing suit in federal court.⁸⁹ The Court found that an important aspect of section 1983 is the existence of an independent federal remedy, which assures adequate compensation for persons deprived of constitutional rights.⁹⁰

In summary, the *Monroe* Court held that municipal officials, acting under color of law, could be held liable under section 1983.⁹¹ The Court also held that Congress could not have intended section 1983 to apply to municipalities.⁹² The Court identified two aspects of section 1983 that should guide courts in applying the statute. First, when it stated that courts should apply section 1983 with tort principles in mind, the Court did more than incorporate a vast body of law by analogy; perhaps more importantly, it established compensation and deterrence — the fundamental bases of tort law — as the goals of section 1983.⁹³ Second, the Court's interpretation of the statute's legislative history led the Court to hold section 1983 as an independent federal remedy available to victims deprived of a constitutional right by a municipal officer.⁹⁴

The *Monroe* Court's holding that municipalities were immune from suit under section 1983 led to odd results when applied to actions officially adopted by municipalities.⁹⁵ Because these bodies were immune from suit, the injured plaintiff's only recourse was to bring suit against a ranking official in his or her "official capacity."⁹⁶ These suits led the Court, in 1978, to reexamine the *Monroe* holding. In *Monell v. New York City Department of Social Services*, the Supreme Court partially reversed *Monroe* and held that municipalities are "persons" within the meaning of section 1983.⁹⁷ While the *Monell* decision permits municipal liability under section 1983,⁹⁸ the Court limited this liability to situations where a municipality itself caused the constitutional deprivation through effectuation of an official policy or custom.⁹⁹

The *Monell* Court's decision turned on a reinterpretation of the Sherman amendment debates,¹⁰⁰ and a recognition of the validity of the Dictionary Act of 1871.¹⁰¹ The

⁸⁹ *Id.* at 173-74, 183.

⁹⁰ *Id.* at 174.

⁹¹ *Id.* at 192.

⁹² *Id.* at 191.

⁹³ *Id.* at 187. See also Nahmod, *supra* note 87.

⁹⁴ *Id.* at 173-74.

⁹⁵ See *supra* note 83. In these suits, nominally against the municipal official "responsible" for the action, the named defendant changed each time the office changed hands.

⁹⁶ See *id.*

⁹⁷ *Monell*, 436 U.S. at 690 ("Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies") (emphasis in original). *Monell* involved an official policy of a local independent school board that compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The Court previously held that such a policy was unconstitutional. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). Thus, the only question was whether school boards were "persons" within the meaning of § 1983. *Monell*, 436 U.S. at 662.

⁹⁸ *Monell*, 436 U.S. at 690.

⁹⁹ *Id.* at 694. The Court stated that municipal liability would attach "when 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 [constitutional deprivation]." *Id.*

¹⁰⁰ *Id.* at 665-83.

¹⁰¹ Dictionary Act of Feb. 25, 1871, § 2, 16 Stat. 431 (1871). This Act stated that, "in 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." See *Monell*, 436 U.S. at 688.

Court's fresh analysis of the Sherman amendment debates led it to distinguish between holding a municipality responsible for its *own* actions and imposing an *affirmative* obligation on municipalities.¹⁰² The Court found that Congress rejected the federal imposition of a new obligation.¹⁰³ The Court stated that the Sherman amendment would have imposed liability regardless of whether a municipality was at fault in any way. Section 1983, however, requires government action which results in deprivation of a constitutional right before courts may grant relief under the statute.¹⁰⁴

Similar to the *Monroe* decision, tort-based policies such as fault, as well as the maxim that one must be responsible for one's own actions, were factors in the *Monell* Court's decision.¹⁰⁵ *Monell's* fault-based theory led the Court to decide that municipal liability under section 1983 would lie only when actions directed by an officially adopted municipal policy or a municipal custom caused a constitutional violation.¹⁰⁶ Thus the *Monell* Court found that a municipality may be liable under section 1983 only for its *own* violations of the Constitution.¹⁰⁷ The *Monell* Court based this "official policy" standard on section 1983's language which attaches liability when a person causes another to be subjected to a constitutional injury.¹⁰⁸ The official policy standard recognizes municipal liability in two distinct situations: when either an official municipal policy¹⁰⁹ or custom¹¹⁰ causes a constitutional deprivation. The opinion noted the difference between official municipal policies, which municipal officers adopt and promulgate,¹¹¹ and customs, which are so persistent and widespread that, even though not officially adopted, have the force of law.¹¹² The *Monell* Court further relied on section 1983's causation language to distinguish between liability for constitutional deprivations resulting from activity authorized by the municipality, either explicitly by policy or implicitly by custom, and constitutional deprivation resulting from unauthorized acts.¹¹³ Thus, the *Monell* Court

¹⁰² *Monell*, 436 U.S. at 665-83. This distinction was stated by Representative Poland: [T]he enforcing [of] a liability, existing by [municipalities'] own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever.

Id. at 680 (quoting *GLOBE*, *supra* note 33, at 794).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 681 n.40.

¹⁰⁵ See *Monroe*, 365 U.S. at 187.

¹⁰⁶ *Monell*, 436 U.S. at 690-91.

¹⁰⁷ *Id.* See *Brown*, *supra* note 54, at 896.

¹⁰⁸ *Monell*, 436 U.S. at 691-92 ("Any person who . . . cause[s] [any person] to be subjected . . . to the deprivation of any rights . . . secured by the Constitution . . . shall . . . be liable," quoting 42 U.S.C. § 1983).

¹⁰⁹ *Id.* at 690 ("Local governing bodies . . . can be sued directly under § 1983 . . . where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers").

¹¹⁰ *Id.* at 690-91 ("Local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not yet received formal approval through the body's decisionmaking channels").

¹¹¹ *Id.* at 690.

¹¹² *Id.* at 691, citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970).

¹¹³ *Id.* at 691. The Court stated: "the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Id.* at 692.

expressly rejected a *respondeat superior*¹¹⁴ basis for municipal liability.¹¹⁵ In summary, *Monell* established that courts may hold a municipality liable under section 1983 when an officially adopted policy, or a custom not formally approved but "permanent and well settled," causes the deprivation of a person's constitutional rights.¹¹⁶ Although *Monell* extended section 1983 liability to municipalities, the decision did not resolve many issues, including the scope of municipal liability.¹¹⁷

2. Development of Section 1983 Municipal Liability: Contrasts and Tensions

a. Policy and historical background in judicial interpretation: *Owen* and *Fact Concerts*

*Owen v. City of Independence*¹¹⁸ and *City of Newport v. Fact Concerts, Inc.*¹¹⁹ were two of the first cases that attempted to resolve some of the issues the *Monell* Court left for another day. In *Owen*, the Court held that a municipality could not avail itself of a good faith immunity,¹²⁰ while in *Fact Concerts* the Court held that section 1983 precluded punitive damage awards in actions against municipalities.¹²¹ The two cases relied on the Court's interpretation of congressional silence, the congressional policies behind section 1983, and the state of the common law at the time of section 1983's passage,¹²² knowledge of which was imputed to the Reconstruction Congress.¹²³ While each opinion claimed it was based on Congress's policies, two very different philosophies emerge in the opinions.¹²⁴

The 1980 case of *Owen v. City of Independence* arose out of the official actions of the Independence, Missouri, city council.¹²⁵ The city council released information which

¹¹⁴ See W. KEETON, PROSSER AND KEETON ON TORTS § 69 at 499 (5th ed. 1984) ("by reason of some relationship between A and B, the negligence of A is to be charged against B, although B has played no part in it"). *Respondeat superior* developed from early English law which considered that the master should be liable for his servants' torts. *Id.* § 69 at 500. This concept has gradually fallen from favor and the modern justification for *respondeat superior* liability is that, as a matter of policy, risk is allocated as a cost of doing business. *Id.* See also *id.* § 70 at 501-08 for a more thorough discussion of the master's liability for his servants' torts.

¹¹⁵ *Monell*, 436 U.S. at 691.

¹¹⁶ *Id.* at 694.

¹¹⁷ *Id.* at 713 (Powell, J., concurring).

¹¹⁸ 445 U.S. 622 (1980).

¹¹⁹ 453 U.S. 247 (1981).

¹²⁰ *Owen*, 445 U.S. at 638.

¹²¹ *Fact Concerts*, 453 U.S. at 267.

¹²² *Id.* at 758-71; *Owen*, 445 U.S. at 635-56.

¹²³ *Owen*, 445 U.S. at 642 (42d Congress recognized that municipal corporations commonly were held liable for damages in tort).

¹²⁴ The *Fact Concerts* Court sought to restrict municipal liability under § 1983, pointing to factors of municipal finances. 453 U.S. at 271. The Court noted that, while the purpose of punitive damages is to deter future misconduct, it would be inequitable to visit "retribution . . . upon the shoulders of blameless or unknowing taxpayers." *Id.* at 267, 268. The *Owen* majority stated that a damages remedy is a "vital component of any scheme for vindicating cherished constitutional guarantees," finding that "[e]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen*, 445 U.S. at 651, 654. The *Owen* Court noted that because the public enjoys the benefits of government, the public, rather than an injured party, should bear the burden when that government causes a constitutional injury. *Id.* at 655. For a discussion of the tensions that underlie these decisions, see Brown, *supra* note 54, at 906-08.

¹²⁵ *Owen*, 445 U.S. at 628-29.

alleged, among other things, that Police Chief Owen had misappropriated police department property for his own use, that drugs and money had disappeared from his office, and that traffic tickets had been "fixed."¹²⁶ After receiving the city council's authorization, the city manager discharged Owen without explanation.¹²⁷ Owen brought suit against the City of Independence, the City Manager, and the members of the city council in their official capacities, alleging that he had been discharged without due process of law.¹²⁸ Although the city counselor had assured the members of the city council that their actions would not result in liability for either the city or the council,¹²⁹ the Supreme Court held otherwise.¹³⁰

The *Owen* majority relied on its examination of the Ku Klux Klan Act's legislative history,¹³¹ the state of the common law in 1871,¹³² and public policy¹³³ to conclude that Congress, in its silence, did not intend to provide a good faith immunity exception to municipal liability under section 1983.¹³⁴ The Court first noted that section 1983's expansive language¹³⁵ and absence of express limitations on liability do not evidence congressional intent to immunize municipalities for their officers' good faith actions.¹³⁶ The Court stated, however, that a tradition of immunity was so firmly established in 1871 case law that courts have imputed congressional acceptance of these immunities.¹³⁷ The Court examined the background of municipal tort liability and found that, in 1871, municipalities were not immune from suits arising from conduct that implemented discretionary decisions.¹³⁸

Finally, after examining the policy basis for section 1983, the Court declined to grant a good faith immunity.¹³⁹ The Court isolated two important public policy purposes underlying the statute: compensation for the past abuse of constitutional rights, and deterring future constitutional deprivations.¹⁴⁰ In addition, the Court found that the principle of "equitable loss-spreading"¹⁴¹ should join municipal fault in distributing the

¹²⁶ *Id.* at 627-28.

¹²⁷ *Id.* at 628-29.

¹²⁸ *Id.* at 630.

¹²⁹ *Id.* at 629 n.6.

¹³⁰ *Id.* at 638.

¹³¹ *Id.* at 635-36.

¹³² *Id.* at 638-50.

¹³³ *Id.* at 650.

¹³⁴ *Id.* at 638. The Court stated "we can discern no 'tradition so well grounded in history and reason' that would warrant the conclusion that in enacting [§ 1983] . . . Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers." *Id.* at 650.

¹³⁵ *Owen*, 445 U.S. at 637. The Court was likely referring to § 1983's language stating that "Every person who" causes constitutional injury is to be held liable. See 42 U.S.C. § 1983 (1982).

¹³⁶ *Id.* at 637-38.

¹³⁷ *Id.* See, e.g., *Procunier v. Navarette*, 434 U.S. 555 (1978) (qualified immunity for prison officials and officers); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity for prosecutors in initiating and presenting the State's case); *Pierson v. Ray*, 386 U.S. 547 (1967) (absolute immunity for judges).

¹³⁸ *Owen*, 445 U.S. at 649-50 ("a municipality has no 'discretion' to violate the Federal Constitution").

¹³⁹ *Id.* at 651 ("How 'uniquely amiss' it would be . . . if the government itself . . . were permitted to disavow liability for the injury it has begotten.").

¹⁴⁰ *Id.* at 650-51.

¹⁴¹ *Id.* at 657 ("No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

costs of official misconduct.¹⁴² The Court also noted that a good faith immunity may deprive the victim of a constitutional injury of adequate compensation.¹⁴³

Mr. Justice Powell wrote a dissenting opinion¹⁴⁴ which stressed the importance of federalism and limited section 1983 municipal liability.¹⁴⁵ The Powell dissent stated that the *Owen* decision virtually created strict municipal liability under section 1983.¹⁴⁶ The opinion also pointed out a number of factors which counsel in favor of extending a good faith immunity to municipalities: substantial municipal tort immunity under nineteenth century common law,¹⁴⁷ "basic fairness,"¹⁴⁸ and concern for the public fisc.¹⁴⁹

Less than one year later, in the 1981 decision of *City of Newport v. Fact Concerts, Inc.*, the Court concluded that Congress, in its silence, did not intend that municipalities would be liable for punitive damage awards under section 1983.¹⁵⁰ The Court's opinion relied on many of the same factors cited by the *Owen* majority,¹⁵¹ such as congressional silence,¹⁵² historical background, and public policy.¹⁵³ The majority in *Fact Concerts*,¹⁵⁴ however, also relied on many factors cited by the *Owen* dissent,¹⁵⁵ namely the background of municipal tort "immunity" in 1871,¹⁵⁶ concepts of blameworthiness,¹⁵⁷ and concern for the municipal fisc.¹⁵⁸ The *Fact Concerts* Court did, however, reiterate that section 1983's main goals are deterrence of and compensation for constitutional deprivations.¹⁵⁹

We believe that today's decision . . . properly allocates these costs among the three principals in . . . the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public."). The *Owen* Court based this statement on the evolution of tort law over the past century. *Id.* The preceding statement is quite similar to Professor Keeton's rationale for *respondeat superior* liability. See W. KEETON, *supra* note 114, § 69 at 500.

¹⁴² *Owen* 445 U.S. at 657.

¹⁴³ *Id.* The Court stated that a damages remedy is a "vital component" of the Act because other immunities would leave victims of municipal malfeasance remediless. *Id.* at 651. See *supra* note 137.

¹⁴⁴ Justice Powell wrote the dissenting opinion in *Owen*, joined by Chief Justice Burger, and Justices Stewart and Rehnquist. See *supra* notes 145-49 and accompanying text for a discussion of the *Owen* dissent.

¹⁴⁵ *Owen*, 445 U.S. at 665 (Powell, J., dissenting).

¹⁴⁶ *Id.* (Powell, J., dissenting).

¹⁴⁷ *Id.* at 676 (Powell, J., dissenting).

¹⁴⁸ *Id.* at 669 (Powell, J., dissenting).

¹⁴⁹ *Id.* at 670 (Powell, J., dissenting).

¹⁵⁰ 453 U.S. 247 (1981).

¹⁵¹ See *supra* notes 131-34 and accompanying text; *Fact Concerts*, 453 U.S. at 258-71.

¹⁵² *Fact Concerts*, 453 U.S. at 258. The Court found that "members of Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and they likely intended these common-law principles to obtain, absent specific provisions to the contrary . . ." *Id.*

¹⁵³ *Id.* at 259. The Court stated that it must consider "both the policies that [an immunity] serves and its compatibility with the purposes of § 1983 . . ." before recognizing an immunity under the statute. *Id.*

¹⁵⁴ Justice Blackmun wrote the majority opinion, joined by Chief Justice Burger, and Justices Stewart, White and Powell.

¹⁵⁵ See *supra* notes 145-49 and accompanying text for a discussion of the *Owen* dissent.

¹⁵⁶ *Fact Concerts*, 453 U.S. at 259; *Owen*, 445 U.S. at 676 (Powell, J., dissenting).

¹⁵⁷ *Fact Concerts*, 453 U.S. at 267 ("an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort"); *Owen*, 445 U.S. at 669 (Powell, J., dissenting).

¹⁵⁸ *Fact Concerts*, 453 U.S. at 271; *Owen*, 445 U.S. at 670 (Powell, J., dissenting).

¹⁵⁹ *Fact Concerts*, 453 U.S. at 268.

The crux of the *Fact Concerts* opinion, however, was the Court's reasoning that a municipality could not have the malicious intent required for punitive damages to attach.¹⁶⁰ The Court distinguished between holding a municipality liable for constitutional deprivations that result from the effectuation of its official policies, and holding a municipality liable for the "knowing and malicious" acts of a municipal official.¹⁶¹ The *Fact Concerts* Court noted that when an official acts pursuant to an officially adopted municipal policy, he or she often will be accorded a good faith immunity;¹⁶² the municipality, however, may be held liable under section 1983.¹⁶³ If an official acts unilaterally, and maliciously deprives an individual of his or her constitutional rights, in contrast, that official will not be accorded a good faith immunity and may be held personally liable under section 1983.¹⁶⁴ Thus the Court found that only the actual wrongdoer should be punished, and the victim of a constitutional injury accorded an avenue of redress in either instance.¹⁶⁵

In summary, the Court in both *Owen* and *Fact Concerts* relied on common law principles to give meaning to the language of section 1983.¹⁶⁶ Both opinions relied on section 1983's legislative history and language, the state of the common law in 1871, and public policy grounds to give meaning to Congress's silence on the issues of a good faith municipal immunity and the award of punitive damages against municipalities under section 1983.¹⁶⁷ The philosophies underlying the two opinions, however, appear to have been quite different.¹⁶⁸ The *Owen* opinion stated that "equitable loss-spreading" should join fault in determining liability, thus potentially opening municipalities to broad section 1983 liability.¹⁶⁹ The *Fact Concerts* opinion took the opposite approach and limited the permissive scope of damage awards by finding municipal malice impossible thus precluding the award of punitive damages.¹⁷⁰ One opinion sought to broaden municipal liability, while the other limited it.¹⁷¹ Both opinions, however, stressed that compensation for past constitutional violations and the deterrence of future deprivations of constitutional rights are the twin goals of section 1983.¹⁷²

¹⁶⁰ *Id.* at 267.

¹⁶¹ *Id.* at 263, 267. The Court called liability for punitive damages the inequity of visiting retribution "upon the shoulders of blameless or unknowing taxpayers . . ." for acts of a "knowing and malicious" government official. *Id.* at 267. The dissent, however, took exception with the majority's exculpation of "blameless or unknowing taxpayers" stating, "when the elected representatives of the people adopt a municipal policy that violates the Constitution, it seems perfectly reasonable to impose punitive damages on those ultimately responsible for the policy — the citizens." *Id.* at 274 (Brennan, J., dissenting).

¹⁶² See *supra* note 137 and accompanying text for a discussion of § 1983 immunities.

¹⁶³ See *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 650, 694 (1978).

¹⁶⁴ *Fact Concerts*, 453 U.S. at 267.

¹⁶⁵ *Id.* at 263.

¹⁶⁶ See *supra* notes 132–38 and accompanying text and notes 150–59 and accompanying text concerning common law principles and § 1983 municipal liability.

¹⁶⁷ See *supra* notes 131–34 and accompanying text and note 150 and accompanying text concerning congressional silence.

¹⁶⁸ See *supra* note 124 and accompanying text contrasting the philosophies of the *Owen* and *Fact Concerts* opinions.

¹⁶⁹ See *supra* notes 141–43 and accompanying text for a discussion of "equitable loss-spreading."

¹⁷⁰ See *supra* notes 160–61 and accompanying text for a discussion "municipal malice."

¹⁷¹ See *supra* note 124 and accompanying text.

¹⁷² See *supra* notes 140 and 159 and accompanying text for a discussion of the Court's assessment of the purposes behind § 1983.

b. The "affirmative link" or "causal connection" requirement: *Rizzo* and Polk County

Both *Owen* and *Fact Concerts* concerned constitutional deprivations clearly caused by official municipal policies.¹⁷³ In many other cases, however, plaintiffs allege that action less directly attributable to the municipality or its officials has "caused" a constitutional deprivation.¹⁷⁴ As a result, the Supreme Court requires proof of an "affirmative link" between the alleged constitutional injury and an official municipal policy or custom in order to trigger municipal liability under section 1983.¹⁷⁵

The requirement of an affirmative link between the alleged constitutional deprivation and an official municipal policy derives from the Supreme Court's 1976 decision in *Rizzo v. Goode*.¹⁷⁶ The *Rizzo* plaintiffs alleged a pattern of frequent constitutional rights violations by the Philadelphia police.¹⁷⁷ The plaintiffs also alleged that departmental procedure tended to discourage civilians from filing complaints and minimized the consequences of police misconduct.¹⁷⁸ The district court found no departmental policy concerning the alleged police misconduct, although it agreed that the plaintiffs had proved numerous instances of police misconduct.¹⁷⁹ The Supreme Court stated that the absence of such a policy, or so-called "affirmative link," between the demonstrated police misconduct and the decisionmaking officials relieved the defendants of liability under section 1983.¹⁸⁰

Some lower courts have read *Rizzo's* "affirmative link" or "causal connection" requirement to require a clearly stated or officially adopted policy before liability under section 1983 attaches.¹⁸¹ Other courts simply require proof of gross negligence before

¹⁷³ In *Owen* the city council adopted a resolution to release the information to the press and authorized the city manager to "take all direct and appropriate action." *Owen*, 445 U.S. at 628-29. The Newport City Council's actions resulted in a substantial loss to a state licensed concert promoter. *Fact Concerts*, 453 U.S. at 249-52.

¹⁷⁴ See, e.g., *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986) (liability based on County Prosecutor's telephoned remarks establishing municipal policy); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (liability founded on city's gross negligence in failure to train police officers adequately).

¹⁷⁵ *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Rizzo v. Goode*, 423 U.S. 362, 371 (1976).

¹⁷⁶ *Rizzo*, 423 U.S. at 371.

¹⁷⁷ *Id.* at 366.

¹⁷⁸ *Id.* at 372.

¹⁷⁹ *Id.* at 368. *Rizzo* involved a number of consolidated actions that alleged a "pattern of frequent police violations" of the constitutional rights of Philadelphia residents and "evidence of departmental procedure [that] indicated a tendency to discourage the filing of civilian complaints and to minimize the consequences of police misconduct." While nominally against the mayor and high-ranking members of the police department, the suit was actually against the City of Philadelphia, by way of these officials in their "official capacity." The plaintiffs asserted that these conclusions of fact, as found by the district court, were evidence of a policy on the part of the defendants to violate the constitutional rights of the plaintiff classes. The district court disagreed and the Supreme Court held that because of the lack of such a policy, there was "no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners — express or otherwise — showing their authorization or approval of such misconduct . . ." *Id.* at 366-375. See generally Levin, *supra* note 83 (discussing "official capacity" suits). *Rizzo* was decided two years before the *Monell* decision extended § 1983 liability to municipalities. Thus, the plaintiffs' only avenue of recovery under the statute as it was then construed was via an "official capacity" suit against municipal officials responsible for supervising and promulgating policy.

¹⁸⁰ *Rizzo*, 423 U.S. at 371.

¹⁸¹ See, e.g., *Grandstaff v. City of Borger*, 767 F.2d 161, 170 (5th Cir. 1985); *Milligan v. City of Newport News*, 743 F.2d 227, 229 (4th Cir. 1984); *Sanders v. St. Louis County*, 724 F.2d 665, 667

municipal liability may attach under section 1983.¹⁸² Finally, still other courts have read *Rizzo* for the principle that, under section 1983, supervisors do not have a duty to supervise municipal employees.¹⁸³ At a minimum, however, *Rizzo* requires (1) an official policy or unofficial but widespread custom, (2) attributable to the municipality, either explicitly or implicitly, (3) that is a sufficient "affirmative link" to the alleged constitutional deprivation, before municipal liability will attach.¹⁸⁴

Polk County v. Dodson,¹⁸⁵ decided three years after *Monell*,¹⁸⁶ reiterated the *Rizzo* Court's requirement of a causal connection between the municipality's official policy and the plaintiff's constitutional deprivation.¹⁸⁷ In *Polk County*, the plaintiff, a county prisoner, alleged that a county policy discouraging frivolous lawsuits infringed his due process rights.¹⁸⁸ The Court stated that the plaintiff's claim failed to state that an unconstitutional policy caused his alleged constitutional deprivation.¹⁸⁹ The Court stated that the county policy was not, in itself, unconstitutional.¹⁹⁰ The Court found, therefore, that the plaintiff had no cause of action under section 1983 because none of his constitutionally protected rights had been violated.¹⁹¹

In summary, both the *Rizzo* and *Polk County* decisions require a causal connection between a municipality's official policy or custom and a plaintiff's constitutional injury in order to establish liability under section 1983.¹⁹² The decisions do not, however, require that the policy itself be unconstitutional for section 1983 liability to attach,¹⁹³ although dicta in *Polk County* suggested that possibility.¹⁹⁴ The Court's affirmative link requirement derives from tort principles.¹⁹⁵ The application of tort principles to municipal liability under section 1983 has prompted further questions.

(8th Cir. 1983); *Czurlanis v. Albanese*, 721 F.2d 98, 108 (3d Cir. 1983); *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir. 1983); *Powe v. City of Chicago*, 664 F.2d 639, 643 (7th Cir. 1981).

¹⁸² See, e.g., *Voutour v. Vitale*, 761 F.2d 812, 820 (1st Cir. 1985); *Wellington v. Daniels*, 717 F.2d 932, 937-38 (4th Cir. 1983); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981); *Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979).

¹⁸³ See, e.g., *Dick v. Watonwan County*, 738 F.2d 939, 943 (8th Cir. 1984) (must be policy for county liability, failure to supervise insufficient to establish such liability); *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982) (must be at least *implicit* authorization by municipal policymaker to establish liability).

¹⁸⁴ *Rizzo*, 423 U.S. at 371.

¹⁸⁵ 454 U.S. 312 (1981).

¹⁸⁶ *Monell*, 436 U.S. at 690.

¹⁸⁷ *Polk County*, 454 U.S. at 326 (quoting *Monell*, 436 U.S. at 694).

¹⁸⁸ *Id.* at 315.

¹⁸⁹ *Id.* at 326.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* Some lower courts have seized upon this language to require a "constitutionally forbidden rule or procedure" before a municipality may be liable under § 1983. See *Rizzo*, 423 U.S. at 362. Lower courts have stated this principle as a requirement that "[a]t a minimum a plaintiff must show that the [policymaking] official at least *implicitly* authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Hays v. Jefferson County*, 668 F.2d 869, 874 (4th Cir. 1982). See also *Dick v. Watonwan County*, 738 F.2d 939, 943 (8th Cir. 1984). The Court has not determined yet whether an official municipal policy or custom must itself be unconstitutional or whether a policy or custom need only cause a constitutional deprivation before § 1983 liability will attach. See *Tuttle*, 471 U.S. at 824 n.7; *id.* at 833 n.8 (Brennan, J., concurring).

¹⁹² *Polk County*, 454 U.S. at 326; *Rizzo*, 423 U.S. at 371.

¹⁹³ See, e.g., *Tuttle* 471 U.S. at 824 n.7; *id.* at 833 n.8 (Brennan, J., concurring).

¹⁹⁴ *Polk County*, 454 U.S. at 326.

¹⁹⁵ *Id.* at 326. See also generally W. KEETON, *supra* note 114, §§ 41-45 (proximate cause).

c. *The Role of Negligence in Section 1983 Municipal Liability: Parratt and Daniels*

In the 1981 decision of *Parratt v. Taylor*, the Court stated that intent is not an element of section 1983 actions.¹⁹⁶ In the two recent decisions of *Daniels v. Williams*¹⁹⁷ and *Davidson v. Cannon*,¹⁹⁸ however, the Court partially overruled *Parratt* and narrowed liability for governmental negligence under section 1983. These cases involved alleged fourteenth amendment due process violations. In the most recent decision, four members of the Court strongly advocated application of a higher standard of negligence under section 1983.¹⁹⁹

Parratt v. Taylor was the first case to permit a negligence action under section 1983.²⁰⁰ The Court noted two elements essential to any section 1983 action: (1) the person alleged to have violated the plaintiff's constitutional rights must have acted under color of state law, and (2) the complained of conduct must have violated the plaintiff's constitutional rights.²⁰¹ Recognizing that the Court never found that section 1983 contains an intent requirement,²⁰² the Court cited the legislative history of the Act²⁰³ and the *Monroe* decision²⁰⁴ for the principle that "neglect" in the enforcement of state laws was one of the evils that motivated the passage of section 1983.²⁰⁵

Two decisions, handed down in 1986 on the same day, refocused the Court's attention on actions brought under section 1983 which allege negligent deprivation of an interest derived from the due process clause of the fourteenth amendment. In *Daniels v. Williams*,²⁰⁶ the Court specifically overruled *Parratt v. Taylor*²⁰⁷ to the extent that *Parratt* held that a mere lack of due care by a state official may deprive an individual of life, liberty, or property under the fourteenth amendment.²⁰⁸ The *Daniels* Court stated that

¹⁹⁶ 451 U.S. 527, 534 (1981).

¹⁹⁷ 106 S. Ct. 662 (1986).

¹⁹⁸ 106 S. Ct. 668 (1986).

¹⁹⁹ *Davidson*, 106 S. Ct. at 671 (Brennan, J., dissenting); *id.* at 671 (Blackmun, J., dissenting, joined by Marshall, J.); *id.* at 677-78 (Stevens, J., concurring).

²⁰⁰ *Parratt*, 451 U.S. at 528-29. *Parratt* involved a complaint against prison officials who allegedly negligently misplaced a state prison inmate's hobby materials. The prisoner brought suit under § 1983 alleging that he had been deprived of property without due process of law in violation of his fourteenth amendment rights. *Id.* at 530-31.

²⁰¹ *Id.* at 535.

²⁰² *Id.* at 534.

²⁰³ *Id.* at 534-35.

²⁰⁴ *Id.* at 535.

²⁰⁵ *Id.* at 534-35. The Court, however, went on to find that although the conduct had been under "color of state law," it did not constitute a denial of due process because adequate state procedural safeguards existed. *Id.* at 544. The Court noted that unless somehow limited, "every alleged violation which may have been inflicted by a state official acting 'under color of law' [would become] a violation of the Fourteenth Amendment cognizable under § 1983." *Id.* Four justices joined in concurring opinions, three limiting the decision to deprivation of property. *Id.* at 544-46 (Stewart, White & Blackmun, JJ., concurring). Justice Powell, concurring in the result, asserted that there was no "uniform answer" to the intent question, but that close attention should be paid to the "nature of the particular constitutional violation in determining whether intent is a necessary element of such a violation." *Id.* at 547-48 (Powell, J., concurring).

²⁰⁶ 106 S. Ct. 662 (1986).

²⁰⁷ 451 U.S. 527 (1981).

²⁰⁸ *Daniels*, 106 S. Ct. at 665. The Court further stated that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together

mere negligence on the part of a state official cannot violate the due process clause of the fourteenth amendment.²⁰⁹ The dissenting opinions in *Daniels'* companion case, *Davidson v. Cannon*, however, raise the possibility that a higher degree of negligence, such as gross negligence, could implicate the provisions of the due process clause and rise to the level of a fourteenth amendment violation.²¹⁰ The Court, however, has not yet addressed what standard will apply in cases arising under other constitutional provisions.

3. The Dual Nature of Section 1983 Actions — Official Policy and Municipal v. Individual Liability: *Pembaur* and *Tuttle*

Two of the Supreme Court's most recent decisions concerning section 1983 municipal liability attempt to clarify the Court's official policy or custom requirement.²¹¹ *Pembaur v. City of Cincinnati*²¹² and *City of Oklahoma City v. Tuttle*²¹³ reflect different theories of liability, even though each case alleged a tortious deprivation of constitutional rights by municipal police officers.²¹⁴ *Pembaur's* plurality opinion appears to rest on a theory of

in society" *Id.* at 666. The Court found that injuries suffered by a prisoner when he fell over a pillow which a prison official negligently left on a prison stairway did not state a claim under § 1983. *Id.* at 663.

²⁰⁹ *Id.* at 665.

²¹⁰ See *Davidson v. Cannon*, 106 S. Ct. 668, 671 (1986) (Brennan, J., dissenting); *id.* at 673 & n.2 (Blackmun, J., dissenting). The *Davidson* case, decided the same day as *Daniels*, applied the *Daniels* holding to a more difficult situation, which lead three justices to dissent and Justice Stevens to concur only in the judgments of both cases. In *Davidson*, a prison inmate, after being threatened by a fellow inmate, sent a note reporting the situation to a prison official. No official took action in response to the note, and two days later the plaintiff was attacked by the other inmate and seriously injured. Stating that "[t]he guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials," the Court relied on *Daniels* to hold that the "protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." *Id.* at 670-71.

The dissenters argued, however, that recklessness or abuse of governmental power could rise to a level serious enough to violate the due process clause. *Id.* at 671 (Brennan, J., dissenting). Justice Blackmun stated, "[i]n some circumstances, the risk of injury is so high that the government's failure to make efforts to avoid the injury is unacceptable, even if the omission still might be categorized as negligence." *Id.* at 673 n.2 (Blackmun, J., dissenting). The Justice continued, "[a] deprivation must contain some element of abuse of governmental power, the 'touchstone of due process is protection of the individual against arbitrary action of government'". *Id.* at 673 (Blackmun, J., dissenting) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). Justice Blackmun concluded, "[w]hen officials have actual notice of a prisoner's need for physical protection, administrative negligence can rise to the level of deliberate indifference to or reckless disregard for that prisoner's safety." *Id.* at 675 (Blackmun, J., dissenting). See also *Layne v. Vinzant*, 657 F.2d 468, 471 (1st Cir. 1981); *West v. Rowe*, 448 F. Supp. 58, 69 (N.D. Ill. 1978).

Justice Stevens' concurrence distinguished the three types of constitutional protections found in the due process clause. Justice Stevens stated that "a complaint does not state a valid . . . § 1983 claim if it does not include a challenge to the fundamental fairness of the State's procedures . . ." and that, therefore, when adequate state procedural means are available for redress, no liability under § 1983 exists. *Id.* at 678-79 (Stevens, J., concurring).

²¹¹ See *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690 (1978).

²¹² 106 S. Ct. 1292 (1986).

²¹³ 471 U.S. 808 (1985).

²¹⁴ See *infra* notes 216-40 and accompanying text for a discussion of *Pembaur*. See *infra* notes 241-92 and accompanying text for a discussion of *Tuttle*.

municipal liability, while *Tuttle* finds the plurality opinion applying an individual liability analysis.²¹⁵

In the 1986 case of *Pembaur v. City of Cincinnati*,²¹⁶ the Supreme Court grappled with the "official policy" standard it articulated in *Monell*.²¹⁷ *Pembaur* involved a fourth amendment search and seizure violation claim which arose out of the actions of a number of municipal police officers attempting to serve a pair of capiases.²¹⁸ The case turned on the question of how "official policy" could be established when authority had been delegated.²¹⁹ The plurality held that the county prosecutor's telephoned instructions to the police to "go in and get them" constituted official county policy, thus incurring county liability for the police officers' acts.²²⁰

The plurality opinion, authored by Justice Brennan, found that when a municipal decisionmaker has the final authority to establish municipal policy and that policy results in a constitutional deprivation, a court may hold the municipality liable under section 1983.²²¹ The Brennan opinion stated that either a legislative enactment, or a policy articulated by an authorized official sufficed to meet the official policy standard.²²² The plurality reasoned that the decision of a policymaker with final authority to choose a course of conduct from a number of alternatives that ultimately results in a constitutional deprivation is no different than a policy adopted by a city council.²²³ Justice Brennan

²¹⁵ See *supra* note 83 for a discussion of municipal/political case liability versus individual/constitutional tort actions.

²¹⁶ 106 S. Ct. 1292 (1986).

²¹⁷ *Monell*, 436 U.S. at 694.

²¹⁸ *Pembaur*, 106 S. Ct. at 1294. *Pembaur* involved police officers who attempted to serve two capiases on a doctor's employees and were denied entrance to the doctor's office. The officers made a number of phone calls to successively higher ranking municipal officials, finally contacting the County Prosecutor who instructed them to "go in and get them." When the officers were unable to force the door, they chopped it down with an axe and entered. Although two individuals were detained, they were not the employees named in the capiases. *Id.* at 1294-97.

²¹⁹ *Id.* at 1297. The Supreme Court granted certiorari in order to determine whether the County Prosecutor's telephoned instructions constituted official county policy, thus making the county liable under § 1983. *Id.* *Pembaur* resulted in a plurality opinion written by Justice Brennan, joined by Justices Marshall and Blackmun, three separate concurrences by Justices White, Stevens and O'Connor, and a dissent written by Justice Powell, joined by Chief Justice Burger and Justice Rehnquist.

²²⁰ *Pembaur*, 106 S. Ct. at 1301.

²²¹ *Id.* at 1299. The Fifth Circuit first articulated this "final authority" standard in *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). Other circuits have also adopted this standard. See, e.g., *Voutour v. Vitale*, 761 F.2d 812, 823 (1st Cir. 1985); *Marchese v. Lucas*, 758 F.2d 181, 188-89 (6th Cir. 1985); *Sanders v. St. Louis County*, 724 F.2d 665, 668 (8th Cir. 1983); *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983); *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir. 1983); *Hays v. Jefferson County*, 668 F.2d 869, 874-75 (6th Cir. 1982); *Black v. Stephens*, 662 F.2d 181, 191 (3d Cir. 1981); *Turpin v. Maillet*, 619 F.2d 196, 200-01 (2d Cir. 1980). The Fifth Circuit, however, recently overturned the standard in *Bennett v. City of Slidell*, a decision that already has attracted a good deal of comment. 728 F.2d 762 (5th Cir. 1984) (*en banc*), *rev'g in part* 697 F.2d 657 (5th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985). See, e.g., *McKinley, Municipal Liability for Police Misconduct*, 49 TEX. B.J. 20 (1986); *Linn & Morell, Section 1983: The Changing Contours of Local Government Liability*, 58 FLA. B.J. 557 (1984); Note, *Bennett v. City of Slidell: New Guidelines for Municipal Liability for Civil Rights Violations*, 4 DET. C.L. REV. 959 (1984); Note, *Municipal Liability Under 42 U.S.C. § 1983: Bennett v. City of Slidell*, 45 LA. L. REV. (1985).

²²² *Pembaur*, 106 S. Ct. at 1300.

²²³ *Id.* The opinion compared the decisions officially adopted by the city councils in *Owen v. City of Independence*, 445 U.S. 622, 628-29 (1980) and *City of Newport v. Fact Concerts*, 453 U.S.

stressed that a municipality thus may be liable for a single decision by a policymaker, or a single action resulting from that policy, if a person is deprived of a protected right.²²⁴

Applying this "final authority" standard to the facts in *Pembaur*, the plurality found that under Ohio law, the county prosecutor may establish county policy in legal matters, such as the manner in which the police may serve capias.²²⁵ Thus, the plurality reasoned that the prosecutor's instructions over the telephone to "go in and get them" established the county's policy.²²⁶ Because the Court subsequently held that policy unconstitutional,²²⁷ Justice Brennan stated, the effectuation of these instructions violated Dr. Pembaur's constitutional rights.²²⁸

In concurring opinions both Justices O'Connor and White stated that the "final authority" standard was too broad. These Justices reasoned that this standard could expand the scope of municipal liability beyond that envisioned in the *Monell* opinion.²²⁹ Neither of the Justices, however, articulated a standard consistent with *Monell* for determining when a municipal official had established a municipal policy.²³⁰ Justice White distinguished *Pembaur* from a situation where the prosecutor's instructions violated the current controlling law.²³¹ In that situation, the violation would give rise only to individual liability because the controlling law would limit an individual officer's authority. In *Pembaur*, however, Ohio law did not establish the illegality of the officers' entry at the time of the incident and this precluded individual liability.²³² Justice Stevens, in contrast, argued for expanding section 1983 municipal liability to include *respondeat superior* liability in order to effect the "broad remedial purpose of the statute."²³³

Justice Powell's dissent argued that an official policy standard should focus on two factors: the nature of the decision reached or the action taken, and the process by which the decision was reached or the action was taken.²³⁴ Furthermore, according to Justice

247, 250-52 (1981) — that resulted in constitutional deprivations — with the facts in *Pembaur*. See *supra* notes 118-72 and accompanying text for a discussion of *Owen* and *Fact Concerts*. Because Ohio state law gave the County Prosecutor the authority to establish county policy in legal matters, the opinion found that in each of these cases an officially adopted municipal policy caused a deprivation of constitutional right. *Pembaur*, 106 S. Ct. at 1300-01.

²²⁴ *Pembaur*, 106 S. Ct. at 1298.

²²⁵ *Id.* at 1301.

²²⁶ *Id.*

²²⁷ See *Stegald v. United States*, 451 U.S. 204 (1981).

²²⁸ *Pembaur*, 106 S. Ct. at 1300.

²²⁹ See *id.* at 1304 (O'Connor, J., concurring); *id.* at 1302 (White, J., concurring).

²³⁰ *Id.* at 1304 (O'Connor, J., concurring); *id.* at 1301-02 (White, J., concurring).

²³¹ *Id.* at 1302 (White, J., concurring). The Justice further stated that "[n]ot every act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality." *Id.* at 1301 (White, J., concurring).

²³² *Id.* at 1295 (White, J., concurring).

²³³ *Id.* at 1303-04 (Stevens, J., concurring). Justice Stevens stated that at the time § 1983 was originally enacted, the doctrine of *respondeat superior* was applied to municipalities. *Id.* (Stevens, J., concurring). Justice Stevens referred to four articles critical of the Court's "official policy" standard that argue for *respondeat superior* liability under § 1983. See, Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMPLE L.Q. 409 (1978); Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935 (1979); Note, *Municipal Liability Under Section 1983 for Civil Rights Violations After Monell*, 64 IOWA L. REV. 1032 (1979); Note, *Monell v. Department of Social Services: One Step Forward and a Half Step Back for Municipal Liability Under Section 1983*, 7 HOFSTRA L. REV. 893 (1979).

²³⁴ *Pembaur*, 106 S. Ct. at 1308-09 (Powell, J., dissenting).

Powell, an official policy should be a "rule of general applicability."²³⁵ The dissent contended that the plurality's reasoning was circular, official policy being made by "policymakers" and policymakers establishing official policy.²³⁶ By focusing on the nature of the policymaker's decision and the process by which it was reached, Justice Powell argued, mere *ad hoc* decisions would be distinguished from true municipal policies.²³⁷ Applying this reasoning to the facts of the case, the dissent found that the municipality had adopted no rule of general applicability, suitable to all similar situations.²³⁸ In addition, Justice Powell's opinion stated that the "off the cuff manner" of the prosecutor's decision did not indicate an extended deliberation or a formal decisionmaking process that would evidence the adoption of an official policy.²³⁹ The dissent concluded, therefore, that the county prosecutor's instructions could not have established an official county policy.²⁴⁰

Unlike *Pembaur*, where the Court attempted to resolve the major issue of who may establish official policy,²⁴¹ the 1985 case of *City of Oklahoma City v. Tuttle* presented the Supreme Court with a narrow question.²⁴² In *Tuttle*, the issue was whether a municipal policy may be inferred from a single isolated incident.²⁴³ The *Tuttle* plaintiff sued both

²³⁵ *Id.* at 1309 (Powell, J., dissenting). The dissent's standard is similar to that recently articulated by the Fifth Circuit in *Bennett*. See *supra* note 221.

²³⁶ *Id.* at 1308 (Powell, J., dissenting) ("policy is what policymakers make, and policymakers are those who have authority to make policy").

²³⁷ *Id.* at 1309 (Powell, J., dissenting).

²³⁸ *Id.* (Powell, J., dissenting).

²³⁹ *Id.* at 1310 (Powell, J., dissenting).

²⁴⁰ *Id.* (Powell, J., dissenting). Furthermore, the dissent took exception with a finding of a constitutional deprivation, noting that in Ohio the Sixth Circuit had held that a *capias* was sufficient authority to enter a building. It was not until four years after the events in Dr. Pembaur's office that the Supreme Court held that a search warrant must be obtained in such situations. Thus, the dissent argued that there had been no violation of the Constitution at the time of the events in question. *Id.* at 1305 (Powell, J., dissenting).

²⁴¹ See *supra* notes 216-40 and accompanying text for a discussion of *Pembaur*.

²⁴² 471 U.S. 808 (1985).

²⁴³ *Id.* at 814; *id.* at 827 (Brennan, J., concurring). Lower courts, however, have distinguished *Tuttle* when numerous police officers are involved in a "single incident." See, e.g., *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985), *cert. denied as improvidently granted*, 107 S. Ct. 1114 (1987); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985). Both courts agreed that *Tuttle's* single incident rule was not implicated when many police officers were involved in the incident at issue. See *infra* notes 267-77 and accompanying text for discussion of the single incident rule. *Grandstaff*, 767 F.2d at 170; *Kibbe*, 777 F.2d at 805-06. Each court allowed municipal liability to be inferred under § 1983. The *Grandstaff* court relied on a police department policy or custom of dangerous recklessness. 767 F.2d at 170. The *Kibbe* court found inadequate training as a basis for municipal liability. 777 F.2d at 804.

The suit in *Grandstaff* arose from the actions of the entire night shift of the Borger, Texas, police department. A high-speed automobile chase ultimately led all five units of the Borger police department onto a ranch in pursuit of a driver who allegedly had fired upon officers after refusing to stop. *Grandstaff*, the foreman of the ranch, attempted to investigate the commotion and he was killed in full view of his family by a barrage of police gunfire as he stepped out of his pickup truck. *Grandstaff*, 767 F.2d at 165. The court found that "[t]he City and officers insist, to this day, that they are free of fault and deserve no blame There is not a single word in this record about any effort at any time by the City of Borger to avoid police failure or abuse." *Id.* at 166.

In *Kibbe*, up to twenty Springfield, Massachusetts police officers were involved in an automobile chase through the city that ultimately resulted in the death of Clinton Thurston, the driver of the pursued car. Three different officers fired shots at the car, and the final round caused Thurston's

the city and an individual police officer under section 1983, alleging that their actions deprived the decedent of his constitutional rights.²⁴⁴ The *Tuttle* plaintiff argued that under *Monell* the city should be liable for gross negligence in failing to train its police officers adequately.²⁴⁵ Furthermore, this inadequate training could be inferred from a single, unusually excessive use of force by a police officer, as in this case, where a robbery suspect was shot and killed.²⁴⁶ A majority of the Court refused to infer official municipal policy from a single incident involving a municipal officer without policymaking authority — such as a low-level police officer.²⁴⁷ Both the plurality²⁴⁸ and concurring²⁴⁹ opinions relied on the *Monell* Court's statement that a municipality may be liable only for its own actions.²⁵⁰ Citing *Monell's* fault requirement²⁵¹ and the statute's causation requirement,²⁵² both opinions concluded that municipal liability under section 1983 requires more than an employment relationship.²⁵³ Instead, the plaintiff must prove that the municipality itself, through an official policy or custom, caused the constitutional violation.²⁵⁴

Justice Brennan identified four elements as essential to recovery under section 1983.²⁵⁵ *Tuttle's* concurring opinion stated that a plaintiff must show that (1) a person, (2) acting under color of state law, (3) subjected the plaintiff, or caused the plaintiff to be subjected, (4) to the deprivation of a protected right.²⁵⁶ The plurality and concurring opinions differed as to which element of the section 1983 cause of action *Tuttle* impli-

death. At trial, the plaintiff introduced evidence that Springfield police officers were not trained adequately in proper pursuit procedures. Indeed, one of the pursuing officers testified that "his training on stopping a car consisted of being told to move up behind it, put on his lights and siren, and hope the suspect pulls over." *Kibbe*, 777 F.2d at 807.

²⁴⁴ *Tuttle*, 471 U.S. at 811–12. Officer Julian Rotramel had been a member of the Oklahoma City police force for only ten months when he shot and killed Albert Tuttle outside a bar in Oklahoma City. Rotramel had responded to a call indicating that an armed robbery was in progress at the bar. A barmaid testified that when Rotramel entered the bar she told him that no robbery had occurred. While Rotramel attempted to ascertain the facts, he tried to stop Tuttle, who fit the description of the alleged robber, from leaving the bar. Tuttle broke away, however, and ignored the officer's commands to "halt." Rotramel testified that when he followed him outside, Tuttle was crouching and reaching into or near his boots. The officer again ordered Tuttle to "halt," but when Tuttle began to come out his crouch, Rotramel fired, believing that Tuttle had removed a gun from his boot. When Tuttle's boot was removed later at the hospital, a toy gun fell out of it. *Id.* at 810–11. Tuttle later died and his widow brought suit against the City of Oklahoma City. *Id.* at 811.

²⁴⁵ *Id.* at 812–13. Plaintiff also argued that the city was grossly negligent in its failure to supervise, review, or discipline its police officers. *Id.*

²⁴⁶ *Id.* at 813. The district court judge instructed the jury, "a single, unusually excessive use of force may be 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." *Id.*

²⁴⁷ *Id.* at 823–24; *id.* at 832–33 (Brennan, J., concurring).

²⁴⁸ Justice Rehnquist wrote the plurality opinion, joined by Justices Burger, White and O'Connor. Justice Powell did not take part in the decision.

²⁴⁹ The concurring opinion, authored by Justice Brennan, was joined by Justices Marshall and Blackmun.

²⁵⁰ *Tuttle*, 471 U.S. at 818; *id.* at 831 (Brennan, J., concurring).

²⁵¹ *Id.* at 818, 824; *id.* at 831 (Brennan, J., concurring).

²⁵² *Id.* at 818, 823–24; *id.* at 829–30 (Brennan, J., concurring).

²⁵³ *Id.* at 818; *id.* at 831 (Brennan, J., concurring).

²⁵⁴ *Id.* at 817, 823–24; *id.* at 829–31 (Brennan, J., concurring).

²⁵⁵ *Id.* at 829 (Brennan, J., concurring).

²⁵⁶ *Id.* (Brennan, J., concurring).

cated.²⁵⁷ The opinions also diverged on the question of whether a single incident which results in a constitutional deprivation could ever give rise to municipal liability under section 1983.²⁵⁸ Justice Rehnquist's plurality opinion emphasized that municipal policies must be the result of "conscious choice,"²⁵⁹ presumably made by municipal policymakers. Furthermore, a course of conduct rather than a single incident was required before a court might infer municipal custom.²⁶⁰ Justice Brennan's concurring opinion, in contrast, emphasized the need for proving the municipality's causation of the injury²⁶¹ and invoked foreseeability as a relevant standard.²⁶²

Justice Rehnquist addressed the issue of whether Officer Rotramel acted under color of state law.²⁶³ He observed that a policy is established only by conscious choice,²⁶⁴ and that it is unlikely that a municipality would consciously choose to inadequately train police officers.²⁶⁵ Justice Rehnquist did not, however, mention the role custom could have played in Officer Rotramel's actions. He stated only that proof of a single incident of unconstitutional conduct was not sufficient to trigger municipal liability unless accompanied by proof that the incident was caused by an unconstitutional policy attributable to the municipality.²⁶⁶ The plurality opinion concluded that if proof of an unconstitutional policy is not shown, more than a single incident of unconstitutional action is required to establish a municipality's fault and the connection between a municipal policy and the constitutional injury.²⁶⁷

Justice Brennan's concurring opinion, in contrast, emphasized the causation element of a section 1983 cause of action. Justice Brennan stated that a single incident of unconstitutional behavior could give rise to municipal liability if the plaintiff proved the municipal policy or custom which caused the injury.²⁶⁸ Justice Brennan stated that if an official municipal policy or custom causes a constitutional violation, then the municipality itself is at fault and should be liable under section 1983.²⁶⁹ When a constitutional deprivation is not the result of such an official policy, Justice Brennan found, the city could not have prevented the incident and is, therefore, not at fault.²⁷⁰ Justice Brennan divided

²⁵⁷ For a discussion of the causation element of a § 1983 claim, see *supra* notes 278-79 and accompanying text.

²⁵⁸ See *Tuttle*, 471 U.S. at 823-24, *id.* at 831 (Brennan, J., concurring).

²⁵⁹ *Id.* at 823. See also *infra* note 278.

²⁶⁰ *Tuttle*, 471 U.S. at 823-24.

²⁶¹ *Id.* at 831 (Brennan, J., concurring).

²⁶² *Id.* (Brennan, J., concurring).

²⁶³ *Id.* at 823-24.

²⁶⁴ *Id.* at 823.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 823-24.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 833 n.8 (Brennan, J., concurring) ("If a municipality takes actions . . . that cause the deprivation of a citizen's constitutional rights, section 1983 is available as a remedy.").

²⁶⁹ *Id.* at 829-31 (Brennan, J., concurring). The concurrence disagreed with the plurality's implicit requirement of proof of more than one violation of a constitutional right before a municipality may be liable under § 1983. Justice Brennan specifically noted that "[a] § 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims . . ." *Id.* at 832 (Brennan, J., concurring).

²⁷⁰ *Tuttle*, 471 U.S. at 831 (Brennan, J., concurring) ("In such a case, [when the misbehavior was attributable to other factors for which the city is not responsible], the city itself may well not bear any part of the fault for the incident; there may have been nothing that the city could have done to avoid it.").

the causation element of section 1983 into two parts: an action taken by a municipality as opposed to a municipal employee's unilateral action, and proof that this municipal action caused the deprivation of a protected right.²⁷¹ Under this analysis, the concurrence found that a municipality's procedures for training its police officers were bona fide policies for the purposes of the first part of the test.²⁷² Justice Brennan concluded, however, that the lower court's instructions had made it possible for the jury to disregard the second element of the test.²⁷³ Justice Brennan's concurrence stated, therefore, that liability could not attach because the lower court had not required proof of a causal connection between the municipality's policy of training and the constitutional deprivation.²⁷⁴ Inferring such a policy or custom from a single incident would be tantamount to *respondeat superior* liability, stated Justice Brennan.²⁷⁵ But, he stated, section 1983 is as available to the first victim of a policy or custom which causes a constitutional violation as it is for subsequent victims.²⁷⁶ In addition, Justice Brennan's opinion noted that the foreseeability, and thus avoidability, of a victim's injury as a result of a municipal policy or custom was a sound basis for imposing section 1983 liability.²⁷⁷

The two opinions' different emphases may explain their division over two issues raised in dicta by the plurality: whether a municipality's training program for its police officers constitutes an "official policy" as envisioned by *Monell*,²⁷⁸ and whether an otherwise constitutional policy could give rise to municipal liability under section 1983.²⁷⁹ Justice Rehnquist's plurality found that, generally, it was doubtful that a constitutional policy such as police training procedures, could ever give rise to municipal liability under section 1983.²⁸⁰ Justice Rehnquist contrasted *Monell's* clearly unconstitutional policy of requiring maternity leaves regardless of physical condition²⁸¹ with the more "nebulous" police training procedures alleged in *Tuttle*.²⁸² Justice Brennan's concurring opinion, however, stated that it is irrelevant whether a policy is constitutional or unconstitutional.²⁸³ Instead he looked to the question of causation.²⁸⁴ Finally, Justice Stevens, in his

²⁷¹ *Id.* at 829-30 (Brennan, J., concurring).

²⁷² *Id.* (Brennan, J., concurring).

²⁷³ *Id.* at 832-33 (Brennan, J., concurring).

²⁷⁴ *Id.* (Brennan, J., concurring).

²⁷⁵ *Id.* at 831 (Brennan, J., concurring).

²⁷⁶ *Id.* at 832 (Brennan, J., concurring).

²⁷⁷ *Id.* at 831-32 (Brennan, J., concurring).

²⁷⁸ *Tuttle*, 471 U.S. at 823. The Court stated that the term "policy generally implies a course of action consciously chosen from among various alternatives, it is therefore difficult . . . to accept the submission that someone pursues a 'policy' of 'inadequate training' unless evidence . . . proves . . . that the policymakers deliberately chose a training program which would prove inadequate." *Id.* See also *id.* at 829 (Brennan, J., concurring) ("In this case, the municipal policies involved were the set of procedures for training and supervising police officers.").

²⁷⁹ *Id.* at 824 n.7 ("We express no opinion on whether a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can ever meet the policy requirement of *Monell*."); *id.* at 833, n.8 (Brennan, J., concurring) ("I do not understand, nor do I see the necessity for, the metaphysical distinction between policies that are themselves unconstitutional and those that cause constitutional violations.").

²⁸⁰ *Tuttle*, 471 U.S. at 823.

²⁸¹ For a discussion of *Monell*, see *supra* notes 97-117 and accompanying text.

²⁸² *Tuttle*, 471 U.S. at 822-23.

²⁸³ *Id.* at 833 n.8 (Brennan, J., concurring). See also *supra* note 279.

²⁸⁴ *Id.* at 833 n.8 (Brennan, J., concurring) ("If a municipality takes actions . . . that cause the deprivation of a citizen's constitutional rights, section 1983 is available as a remedy.").

dissenting opinion, argued that *respondeat superior*, rather than the Court's "official policy" standard, should be applied to municipal liability under section 1983.²⁸⁵

In summary, a majority of the *Tuttle* Court agreed that an official municipal policy or custom cannot be inferred from a single isolated incident involving a single low-level police officer.²⁸⁶ Furthermore, a majority agreed that section 1983 liability attaches only when a municipality itself is at fault by causing a constitutional deprivation through its own policy or custom.²⁸⁷ The *Tuttle* Court divided, however, over defining official policy and sufficient cause under section 1983.²⁸⁸ Justice Rehnquist viewed conscious choice as an essential element of policy²⁸⁹ and stated that when the policy is not in itself unconstitutional, it may not provide a sufficient basis for municipal liability.²⁹⁰ The concurring opinion of Justice Brennan, however, relied on causation as the accurate measure of fault.²⁹¹ If a municipality's official policy or custom causes a constitutional violation, argued Justice Brennan, the municipality ought to be liable under section 1983 regardless of whether the policy itself is unconstitutional.²⁹²

The Court's disagreement over the definition of official policy and causation under section 1983 has led to confusion in the lower courts.²⁹³ The two contrasting cases of *Kibbe v. City of Springfield*²⁹⁴ and *Grandstaff v. City of Borger*²⁹⁵ are excellent illustrations of the lower courts' division concerning municipal liability under section 1983. In *Kibbe*, the Court of Appeals for the First Circuit found inadequate police training a valid "affirmative link" to the plaintiff's constitutional injury.²⁹⁶ In *Grandstaff*, however, the Fifth Circuit stated that such inadequate training was ordinarily *not* the moving force behind a constitutional violation.²⁹⁷ Both circuits agreed that *Tuttle's* single incident rule was not implicated when many police officers were involved in the incident at issue.²⁹⁸

²⁸⁵ *Id.* at 841 (Stevens, J., dissenting). Justice Stevens relied on the historical background of municipal liability in 1871 and the stated purposes of § 1983 — deterrence of future constitutional violations and compensation for past deprivations — to buttress his contention that *respondeat superior* liability should be applied to municipalities. The Justice also noted that a major part of the disagreement between the plurality and concurring opinions was over the proper definition of the term "policy." Justice Stevens noted that the term was not a part of the language of § 1983, but had come to be a part of § 1983 jurisprudence through the Court's decision in *Monell*. The Justice concluded that the Court's debates over the correct interpretation of "policy" would only further muddy the already roiled waters of municipal liability under § 1983. *Id.* at 841-42 (Stevens, J., dissenting).

²⁸⁶ See *supra* notes 247-54 and accompanying text.

²⁸⁷ See *supra* notes 251-53 and accompanying text.

²⁸⁸ Compare *supra* notes 259-60 and accompanying text (requiring conscious choice; more than a single incident to attach liability), with *supra* notes 268-70 and accompanying text (emphasizing causation; single incident sufficient to attach liability in some cases).

²⁸⁹ *Tuttle*, 471 U.S. at 8823. See *supra* notes 264-67 and accompanying text.

²⁹⁰ *Id.* at 823 n.7. See *supra* note 267 and accompanying text.

²⁹¹ See *supra* notes 268-70 and accompanying text.

²⁹² See *supra* note 269 and accompanying text.

²⁹³ Compare, e.g., *Kibbe*, 777 F.2d 801 (1st Cir. 1985) (inadequate police officer training may give rise to § 1983 municipal liability) with *Grandstaff*, 767 F.2d 161 (5th Cir. 1985) (inadequate police officer training usually will not give rise to § 1983 municipal liability).

²⁹⁴ 777 F.2d 801 (1st Cir. 1985).

²⁹⁵ 767 F.2d 161 (5th Cir. 1985).

²⁹⁶ 777 F.2d at 804.

²⁹⁷ 767 F.2d at 169.

²⁹⁸ *Kibbe*, 777 F.2d at 805; *Grandstaff*, 767 F.2d at 171.

and both courts inferred municipal liability under section 1983.²⁹⁹ The *Grandstaff* court found a police department policy or custom of dangerous recklessness,³⁰⁰ while the *Kibbe* court identified inadequate training as the basis for municipal liability.³⁰¹

Because of the Fifth Circuit's uncertainty over the recent *Tuttle* decision, the *Grandstaff* court declined to rely on inadequate training as the basis for section 1983 liability.³⁰² The court found that it could not determine what conscious choices on the part of the city policymaker would be sufficient to satisfy the *Tuttle* Court's causal requirement.³⁰³ In addition, the court stated, "[w]e doubt that a finding of 'gross' negligence in [police] training will always be the ticket to municipal liability."³⁰⁴ Significantly, the Fifth Circuit sought to balance its new, more restrictive official policy standard, articulated in *Bennett v. City of Slidell*,³⁰⁵ and the Supreme Court's somewhat contradictory and confusing opinion in *Tuttle*. The *Grandstaff* court established its balance by requiring that the moving force behind the deprivation be a demonstrated policy of dangerous recklessness.³⁰⁶

In contrast to the Fifth Circuit, the *Kibbe* court found an "affirmative link" between a policy of inadequate training and resort to harmful police methods.³⁰⁷ The First Circuit distinguished *Kibbe* from *Tuttle* on three grounds.³⁰⁸ First, the court argued that when many police officers are involved, as in *Kibbe*, the court can draw inferences regarding municipal policies — unlike *Tuttle*, where a single inexperienced officer fired a single round.³⁰⁹ The *Kibbe* court found that the chain of events in the instant case was not the sort of "single incident" the *Tuttle* Court addressed.³¹⁰ Second, the *Kibbe* court found that the jury had sufficient evidence to find that the police department's gross negligence in training caused the premature use of deadly force against the decedent.³¹¹ Finally, the *Kibbe* court concluded that inadequate training *can* be an "affirmative link" between the alleged constitutional deprivation and the municipality.³¹²

II. A FORESEEABILITY-BASED STANDARD WILL CLARIFY THE SCOPE OF MUNICIPAL LIABILITY UNDER SECTION 1983

Lower courts urgently need a clear standard for determining municipal liability under section 1983. The Supreme Court's attempts to fashion a compromise between municipal immunity and *respondeat superior* liability³¹³ clearly has created a great deal of

²⁹⁹ *Kibbe*, 777 F.2d at 805; *Grandstaff*, 767 F.2d at 171.

³⁰⁰ *Grandstaff*, 767 F.2d at 170. See also *supra* note 243.

³⁰¹ *Kibbe*, 777 F.2d at 804. See also *supra* note 243.

³⁰² *Grandstaff*, 767 F.2d at 169–70.

³⁰³ *Id.* at 169.

³⁰⁴ *Id.*

³⁰⁵ 728 F.2d 765 (5th Cir. 1984). See *infra* note 314 for a discussion of *Slidell*.

³⁰⁶ 767 F.2d at 170.

³⁰⁷ *Kibbe*, 777 F.2d at 804.

³⁰⁸ See *id.* at 804–06.

³⁰⁹ *Id.* at 805.

³¹⁰ *Id.* at 805–06.

³¹¹ *Id.* at 809.

³¹² *Id.* at 804. The court stated, "[w]e base our conclusion on the belief that properly trained officers would avoid certain techniques as inappropriate for some circumstances." *Id.*

³¹³ See Brown, *supra* note 54, at 906–08 for a discussion of factors that led to this compromise. The Court based its requirement that an official policy cause the constitutional deprivation on a reading of § 1983 and its legislative history that was, in its view, "consistent with holding a municipality liable for its *own* violations of the Fourteenth Amendment." *Tuttle*, 471 U.S. at 818 (quoting

confusion and uncertainty in this area.³¹⁴ Although the Supreme Court requires a causal link between a municipality's official policy or custom³¹⁵ and a plaintiff's constitutional injury,³¹⁶ the Court's opinions provide relatively little guidance on how lower courts may correctly construe this causal connection requirement. Hence, the lower courts have established differing standards for imposing section 1983 municipal liability.³¹⁷

This note proposes a standard based on whether a municipality's policies or customs could foreseeably deprive a person of a constitutional right.³¹⁸ This standard clarifies

Monell, 436 U.S. at 683) (emphasis in *Tuttle*). *Monell's* "official policy or custom" standard was also a compromise between continuing the municipal immunity of *Monroe*, with its inconsistent result of many "official capacity" suits and *respondeat superior* liability. Official capacity suit judgments rendered against municipal officials, interestingly, were usually paid out of municipal treasuries or by municipal insurance policies when such judgments resulted from actions taken pursuant to a municipal policy which caused a constitutional deprivation. *Respondeat superior* liability, however, would have resulted in municipal liability solely on the basis of the employment relationship existing between the municipality and its employees. See W. KEETON, *supra* note 114, § 70 at 501. Thus a municipality would be liable for any constitutional violations visited by any municipal employee while acting under color of law, whether furthering municipal policy, acting pursuant to municipal custom, or acting on the vagaries of a whim.

³¹⁴ E.g., compare *Kibbe*, 777 F.2d at 805-06 (inadequate police officer training a valid affirmative link to establish municipal liability) with *Grandstaff*, 767 F.2d at 169 (inadequate police officer training not the "ticket to municipal liability"). Even proponents of the official policy standard realized that it would be difficult to define and apply. See Levin, *supra* note 83, at 1540. The Supreme Court, as reflected in *Pembaur's* disparate opinions, itself is divided deeply as to the proper parameters of its requirement. Currently, the most widespread standard applied by the lower courts is the "final authority" standard, first articulated by the Fifth Circuit in *Briscoe v. Familias Unidas*, 619 F.2d 391 (5th Cir. 1980). See *supra* note 221. This standard, similar to the one proposed by Justice Brennan in the plurality opinion in *Pembaur*, states that "in those areas where a city officer is the final authority or ultimate repository of [city] power his official conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the [city] may be held responsible under section 1983." *Schneider v. City of Atlanta*, 628 F.2d 915, 920 (5th Cir. 1980) (quoting *Monell*, 436 U.S. at 690). Although this standard has been adopted by many of the circuits, see *supra* note 221, the Fifth Circuit recently overturned the "final authority" standard and articulated a new one. See *Bennett v. City of Slidell*, 728 F.2d 765 (5th Cir. 1984) (en banc). The new Fifth Circuit definition of "official policy" has two parts. *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984), *aff'd in part, rev'd in part, remanded*, 739 F.2d 993 (5th Cir. 1984) (en banc) (per curiam). In the *Webster* decision the court stated:

Official policy is:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policymaking authority; or
2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted or promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge must be attributable to the governing body of the municipality or to an official to whom that body had delegated policymaking authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Id.

³¹⁵ *Monell*, 436 U.S. at 694.

³¹⁶ *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Monell*, 436 U.S. at 694; *Rizzo v. Goode*, 423 U.S. 362, 377 (1976).

³¹⁷ See *supra* notes 221 and 314 for a discussion of the two different official policy standards adopted by the courts of appeals.

³¹⁸ Professor Eric Schnapper first identified foreseeability as the crucial factor in municipal

both the *Rizzo* Court's causal connection requirement and the *Monell* Court's official policy or custom standard by providing a means to determine whether an officially adopted municipal policy, or an implicit municipal custom caused the plaintiff's constitutional deprivation. The essential element of this standard is municipal awareness of official policies and pervasive custom.

The proposed foreseeability standard equates responsibility for the results of actions taken pursuant to municipal policies or customs with municipal policymakers' knowledge of, and thus ability to control, these policies and customs. The proposed standard has two prongs: the standard would find municipal liability under section 1983 when either an official municipal policy is the reasonably foreseeable cause of a deprivation of constitutional right, or when a municipality through gross negligence allows action taken pursuant to a pervasive, but unadopted, municipal custom to cause a constitutional deprivation. Thus, a municipality will be held liable under section 1983 only for its *own* violations of constitutional right,³¹⁹ violations which the municipality should have foreseen and prevented. The proposed foreseeability standard has two prongs. Because official municipal policy is by definition established by municipal policymakers,³²⁰ knowledge of municipal policies is a certainty. Customs, however, emerge through usage³²¹ and are not necessarily established by policymaking officials. Under the proposed standard, a court will hold a municipality liable for actions taken pursuant to municipal custom only when municipal policymaking officials have either actual or constructive knowledge of that custom. By finding section 1983 liability for customs only when the plaintiff shows gross negligence, municipalities can avoid liability by exercising reasonable care to keep abreast of municipal customs. Injured persons are, therefore, provided an avenue of redress when municipal officials fail to exercise even slight care and neglect to oversee and control harmful municipal customs.

A. *The Need for a Clear Standard*

A majority of the Supreme Court Justices have agreed that municipalities may be held liable under section 1983 when an official municipal policy or custom subjects a person, or causes a person to be subjected, to the deprivation of a constitutional right.³²² The Court, however, has had a great deal of difficulty achieving a consensus concerning the parameters of the *Monell* "official policy" standard.³²³ As a result, the lower courts have been unsure when municipal liability should attach under section 1983.³²⁴ Conse-

liability. See Schnapper, *supra* note 17, at 235 ("The most plausible construction of the cause clause is that it includes official policies which entail an unreasonable foreseeable risk of causing a constitutional violation.").

³¹⁹ See *Tuttle*, 471 U.S. at 818.

³²⁰ But see the multiple decisions in *Pembaur*, 106 S. Ct. at 1293, 1301 (White, J., concurring), 1302 (Stevens, J., concurring), 1304 (O'Connor, J., concurring), and 1305 (Powell, J., dissenting) (Supreme Court Justices' debate concerning the definition of official policy). See also *supra* notes 216-40 and accompanying text for a discussion of *Pembaur*.

³²¹ WEBSTER'S NEW UNABRIDGED DICTIONARY 449 (1983 2d ed.). See also *Monell*, 436 U.S. at 691 & n.56 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970); *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369 (1940) for their discussions of the role of custom in state law), and BLACK'S LAW DICTIONARY 347 (1979, 5th ed.).

³²² *Monell*, 436 U.S. at 690. See *supra* notes 97-117 and accompanying text.

³²³ See generally *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

³²⁴ See *supra* notes 293-312 and accompanying text.

quently, the circuits follow different standards regarding what constitutes *Monell's* official policy and who may establish this policy.³²⁵ Three separate issues, central to the application of the *Monell* Court's standard, remain to be clarified. The first is the definition of "official policy," second the role of municipal custom, and third the role of the Court's "affirmative link" or "causal connection" requirement in section 1983 municipal liability.

1. What Is "Official Policy" and Who Establishes It?

The Supreme Court's lack of consensus in *Pembaur*³²⁶ clearly indicates how difficult it has been to apply the "official policy" standard articulated by the *Monell* Court.³²⁷ A policy officially adopted by a municipality's governing board, such as the policies at issue in *Owen v. City of Independence* and *City of Newport v. Fact Concerts*, certainly fits the Court's standard.³²⁸ The difficulty lies in determining liability when an official policy has been established in a less clear-cut fashion, such as when an official with delegated authority established a municipal policy. Although six Justices of the *Pembaur* Court agreed that the county prosecutor's telephoned instructions to police officers constituted official county policy consistent with *Monell*,³²⁹ four separate opinions differed as to the proper means for determining how courts should recognize official policy in future cases, with none of the opinions achieving a majority.³³⁰

The lower courts have also had a great deal of difficulty in applying the official policy standard to situations where a municipal officer promulgated the policy in question. For example, the Fifth Circuit recently abandoned the "final authority" standard which it had itself articulated — and which other circuits had adopted³³¹ — only to articulate a stricter standard.³³² In the 1984 case of *Bennett v. City of Slidell*, the Fifth Circuit replaced its "final authority" standard with a two-part test that requires either formal municipal action which expressly delegates policymaking authority to a municipal officer, or municipal conduct or practice which encourages or acknowledges the officer's policymaking role.³³³ Other appellate courts, however, continue to adhere to the final authority standard.³³⁴ This standard holds that the conduct and decisions of a municipal officer who is the "final authority or ultimate repository of [municipal] power" represents official policy for which the municipality may be held liable under section 1983.³³⁵ It is clear, therefore, that conflict exists both within the Supreme Court and among the circuit courts concerning who may establish official municipal policy.

³²⁵ See *supra* notes 221 & 314 and accompanying text.

³²⁶ See *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986) (five opinions, none achieving a majority, disputed the proper application of the official policy standard).

³²⁷ *Monell*, 365 U.S. at 694. See also *supra* note 99.

³²⁸ See *supra* note 173.

³²⁹ *Pembaur*, 106 S. Ct. at 1293; *id.* at 1301 (White, J., concurring); *id.* at 1302 (Stevens, J., concurring); *id.* 1304 (O'Connor, J., concurring).

³³⁰ See *supra* notes 221-33 and accompanying text.

³³¹ See *supra* note 221.

³³² See *supra* note 314.

³³³ *Slidell*, 728 F.2d at 769.

³³⁴ See *supra* note 221.

³³⁵ *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980).

2. The Role of Custom

The *Monell* Court expressly stated that a municipality "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."³³⁶ The plurality opinion in *Tuttle*, however, mistakenly appeared to equate "custom" with "policy."³³⁷ By equating policy and custom and then stating that policy "generally implies a course of action consciously chosen from among various alternatives,"³³⁸ the plurality opinion in *Tuttle* ignored the force of custom. Custom generally implies a course of action mandated by past practice, not chosen from alternatives. Custom can be likened to tradition and may include practices which, although not officially adopted, constitute the norm in a given situation. In order to effectuate fully the language of section 1983 and the *Monell* decision, the Supreme Court must articulate a standard that recognizes the inherent differences between an official municipal policy and a municipal custom. This standard would make it possible to determine when a municipality should be held liable under section 1983 for actions taken pursuant to controlling municipal custom.

3. The Role of Causation and Fault

In *Monroe v. Pape*, the Supreme Court stated that section 1983 should be applied in light of tort principles that hold a person responsible for his or her own actions.³³⁹ This statement has helped both define the cause of action under section 1983 and obscure its application. At least one commentator has noted that because the purposes and principles that motivated section 1983's enactment are quite different from those underlying tort law, courts should not blindly rely on tort law analogies to find liability under section 1983.³⁴⁰ In addition, the Supreme Court itself further muddled the waters by requiring an "affirmative link" or "causal connection" between the alleged constitutional injury and a municipal policy or custom before section 1983 liability may attach.³⁴¹ The Court created further complication by hinting that "fault" may be the basis for this liability.³⁴² Thus, the Court has not yet articulated a coherent standard which courts can apply consistently and clearly to determine when liability will attach.

Because of the Supreme Court's lack of clarity, the lower courts have developed different approaches to the causation requirement.³⁴³ The inadequate police officer training cases demonstrate the division of the circuit courts.³⁴⁴ The First Circuit, for example, recognized an affirmative link between a policy or custom of inadequate training of police officers and the use of harmful police practices.³⁴⁵ In contrast, the Fifth Circuit, holds that inadequate police training is ordinarily *not* the moving force

³³⁶ *Monell*, 436 U.S. 690-91.

³³⁷ *Tuttle*, 471 U.S. at 819-24.

³³⁸ *Tuttle*, 471 U.S. at 823.

³³⁹ *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

³⁴⁰ Nahmod, *supra* note 87, at 10.

³⁴¹ See *supra* notes 173-95 and accompanying text.

³⁴² See *Tuttle*, 471 U.S. at 824; *id.* at 831 (Brennan, J., concurring).

³⁴³ See *supra* notes 293-312 and accompanying text.

³⁴⁴ See *supra* note 16. See also *supra* notes 293-312 and accompanying text.

³⁴⁵ *Kibbe*, 777 F.2d at 814.

behind a constitutional deprivation.³⁴⁶ Although the Supreme Court could resolve this issue by deciding whether inadequate training of police officers may serve as an affirmative link between a municipality and a plaintiff's constitutional deprivation,³⁴⁷ the more fundamental issue of determining what municipal action will constitute an "affirmative link" sufficient to trigger section 1983 liability would still remain. The Supreme Court must announce a standard which clarifies the Court's causation requirement, as well as effectuates the *Monell* "official policy or custom" standard.

B. *The Basis for a Foreseeability-Based Standard for Determining Municipal Liability Under Section 1983*

Any standard for determining municipal liability under section 1983 must address three factors: the statute's language and legislative history,³⁴⁸ the Supreme Court's decisions regarding municipal liability under section 1983,³⁴⁹ and public policy considerations.³⁵⁰ The Supreme Court relied on these three factors in *Monell*, when it first recognized municipal liability under section 1983,³⁵¹ and also in the later decisions of *Owen*³⁵² and *Fact Concerts*.³⁵³ The proposed foreseeability standard effectuates the dictates of section 1983 and is consistent with both the legislative history and the judicial construction of the statute.

1. The Foreseeability-Based Standard Is Consistent With the Language and Legislative History of Section 1983

The proposed foreseeability standard is consistent with the language of section 1983. This statutory language mandates, in part, that any person, acting under color of enacted or customary state law, who subjects any person to the deprivation of a constitutional right shall be liable to the injured party.³⁵⁴ The proposed standard expressly recognizes liability for actions taken pursuant to both enacted law, in the form of official policy, and customary law, in the form of municipal custom. Thus the standard fully effectuates

³⁴⁶ *Grandstaff*, 767 F.2d at 169-70.

³⁴⁷ Interestingly, the Court passed up an opportunity to resolve the question of a municipality's liability for inadequate training of police officers when it dismissed certiorari in *Kibbe v. City of Springfield* as being improvidently granted. 107 S. Ct. 1114 (1987). Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Powell, wrote a stinging dissent to the *per curiam* decision and then proceeded to decide the case on the merits. The dissenting opinion concluded that, absent "reckless disregard for or deliberate indifference to the rights of persons," municipal liability will not attach under a theory of inadequate training. *Id.* at 1121 (O'Connor, J., dissenting).

³⁴⁸ *Tuttle*, 471 U.S. at 816; *id.* at 828 (Brennan, J., concurring) ("I agree with the plurality that it is useful to begin with the terms of the statute.").

³⁴⁹ See *supra* notes 71-292 and accompanying text for a discussion of the major Supreme Court decisions relating to municipal liability under § 1983.

³⁵⁰ *City of Newport v. Fact Concerts*, 453 U.S. 247, 259 (1981); *Owen v. City of Independence*, 445 U.S. 622, 650 (1980).

³⁵¹ *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690 (1978).

³⁵² *Owen*, 445 U.S. at 650.

³⁵³ *Fact Concerts*, 453 U.S. at 259.

³⁵⁴ See *supra* note 3 for the text of § 1983. In the *Monell* decision, the Court recognized that the term "person" encompasses municipalities. *Monell*, 436 U.S. at 690.

section 1983's language concerning liability for actions taken under color of both "statute, ordinance, [or] regulation"³⁵⁵ and "custom, or usage."³⁵⁶

Furthermore, by mandating a dual standard of care, the proposed foreseeability standard effectuates the "cause clause" of section 1983,³⁵⁷ which imposes liability only on those persons who directly subject a person to deprivation of a constitutional right, or who cause such an injury.³⁵⁸ The proposed standard defines causation in terms of a standard of care. Only violations of a constitutional right foreseeably resulting from an official municipal policy, or resulting from the gross negligence of a municipal official in not correcting a harmful municipal custom, will be held to have been caused by the municipality and thus result in liability under section 1983.

The legislative history of section 1983 also supports the proposed foreseeability standard. Section 1983 was intended to put the power of the federal courts at the disposal of those who could not obtain equal justice in their state or local courts.³⁵⁹ If a municipality caused a constitutional deprivation, either through enacted law or through unwritten custom, Congress intended courts to hold the municipality liable under section 1983.³⁶⁰

By providing a means to impose liability for both the results of municipal policy and municipal custom, the proposed standard effectuates the intent of the 42d Congress.³⁶¹ Congress specifically provided that not only would persons who actually acted be liable under section 1983,³⁶² but also those who *caused* those actions.³⁶³ The proposed standard, consistent with Congress's determination to eliminate the cause of such a constitutional deprivation, seeks to find section 1983 liability when either a municipal policy or a municipal custom has caused the deprivation of a person's constitutional right.

2. The Foreseeability-Based Standard Is Consistent With the Judicial Construction of Section 1983

The proposed foreseeability standard also is consistent with the judicial interpretation of section 1983.³⁶⁴ In *Monell*, the Supreme Court interpreted section 1983's mandate

³⁵⁵ 42 U.S.C. § 1983 (1982).

³⁵⁶ *Id.*

³⁵⁷ *Id.* ("subjects, or causes to be subjected"). See also Schnapper, *supra* note 17, at 235.

³⁵⁸ See *supra* note 3 for the text of § 1983.

³⁵⁹ See *Monroe*, 365 U.S. at 183.

³⁶⁰ *Monell*, 436 U.S. at 690.

³⁶¹ See *Monroe v. Pape*, 365 U.S. 167, 176-78 (1961) for a discussion of the legislative history of § 1983 that demonstrates that the Reconstruction Congress considered inclusion of custom necessary to eradicate the Klan's evils. Section 1983 was enacted to enforce the provisions of the fourteenth amendment. The Forty-Second Congress realized that facially equal laws were being unequally applied. This discriminatory application of the laws was being directed at certain identifiable groups. Although the fourteenth amendment gave the federal courts power to strike down discriminatory state law as being unconstitutional, unwritten practices made the bringing of those suits extremely difficult. Other practices denied certain persons the protections of the local laws because of those persons' political views or race. Consequently, the Forty-Second Congress enacted a statute that made it a federal offense for anyone acting under color of any written or unwritten state law to cause the deprivation of a person's constitutional rights. *Id.*

³⁶² 42 U.S.C. § 1983 (1982).

³⁶³ *Id.*

³⁶⁴ See *infra* notes 364-403 and accompanying text for a discussion of how the proposed standard effectuates § 1983's judicial construction.

to include municipalities.³⁶⁵ The *Monell* Court also stated that a municipality may be held liable if effectuation of an official policy or custom causes a constitutional deprivation.³⁶⁶ Additionally, the *Monell* Court made the *Rizzo* holding — that no section 1983 liability can be imposed without an affirmative link between the constitutional injury and a policy or custom — applicable to municipalities.³⁶⁷ The Court also has held that mere negligence cannot give rise to section 1983 liability, but the Court has not determined whether a stricter standard may be appropriate.³⁶⁸ Finally, the Court rejected *respondeat superior* liability,³⁶⁹ finding that section 1983 liability may be imposed only for a municipality's *own* actions which cause a constitutional deprivation.³⁷⁰

The Supreme Court holds municipalities liable under section 1983 only for the results of policies or customs directly attributable to the municipality itself.³⁷¹ The Court will not predicate municipal liability on *respondeat superior*, however, because that could lead to liability for employee actions taken without the municipality's knowledge or consent.³⁷² This resulted in the *Monell* Court's official policy standard.³⁷³ The Supreme Court, however, has had a great deal of difficulty in applying the *Monell* standard.³⁷⁴ This in turn has resulted in varying applications and inconsistent results in the circuit courts.³⁷⁵

The major problem with section 1983 liability is that a municipality cannot act independently.³⁷⁶ A municipality can act only through a policymaking official.³⁷⁷ Consequently, the Court will find a municipality liable under section 1983 only when execution of an official policy or custom inflicts a constitutional deprivation.³⁷⁸

The Court's official policy standard has two components: liability for officially enacted policies,³⁷⁹ and liability for municipal custom.³⁸⁰ Each component of the *Monell*

³⁶⁵ *Monell*, 436 U.S. at 690.

³⁶⁶ *Id.* at 694.

³⁶⁷ *Id.*

³⁶⁸ *Daniels v. Williams*, 106 S. Ct. 662, 665 (1986). See also *supra* notes 196–210 and accompanying text for a discussion of negligence and intent in § 1983 actions.

³⁶⁹ *Monell*, 436 U.S. at 691.

³⁷⁰ *Id.* See also *Tuttle*, 471 U.S. at 824.

³⁷¹ *Monell*, 436 U.S. at 690–91. See also *supra* note 314.

³⁷² *Respondeat superior* liability does not depend on fault to establish liability. It looks only to the employment relationship and holds the employer liable for the torts of the employee. See *W. KEETON*, *supra* note 114, § 70 at 501–02.

³⁷³ See *Brown*, *supra* note 54, at 906–08. See also generally *Levin*, *supra* note 83.

³⁷⁴ See *supra* notes 211–293 and accompanying text for a discussion of *Pembaur* and *Tuttle*.

³⁷⁵ See *supra* note 314.

³⁷⁶ *Monell*, 436 U.S. at 690.

³⁷⁷ See, e.g., *Pembaur*, 106 S. Ct. at 1299–1301. See also *supra* notes 221 and 314 and accompanying text for a discussion of how the “final authority” standard has fared in the lower courts.

³⁷⁸ *Monell*, 436 U.S. at 694.

³⁷⁹ *Id.* at 690 (“Local governments may be sued directly under § 1983 . . . where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body’s officers.”).

³⁸⁰ *Id.* at 690–91 (“[L]ocal governments . . . may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decisionmaking channels.”). See also *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970); and *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 367, 369 (1940). Eric Schnapper has written, regarding municipal custom: “The frequency and pattern of the practice alleged to be a custom or usage must be sufficient to give rise to a reasonable inference

standard raises separate issues. By definition, municipal policymakers establish official policy.³⁸¹ These same policymakers represent the municipality, which makes the municipality aware of the policies and, presumably, their foreseeable results. Customs, in contrast, are not established by policymakers but are the result of practice or tradition.³⁸² It is thus likely that a municipality, through its policymakers, will be less aware of customs and their foreseeable results. Therefore, courts can attach section 1983 liability for a constitutional deprivation arising from effectuation of a policy adopted by municipal policymakers.

Finding the requisite connection between a custom and a municipality in order for section 1983 liability to attach is more difficult. This may explain why recent Supreme Court decisions have neglected the role of customary law in section 1983 municipal liability.³⁸³ The *Monell* Court acknowledged that unwritten customs occasionally have the force of law.³⁸⁴ In *Tuttle*, however, the plurality avoided the possibility that municipal custom dictated some police officer training and supervisory procedures that could have controlled the officer's actions at issue in the case.³⁸⁵

The crucial difference between an official municipal policy and a municipal custom under section 1983 should not be based on the number of occurrences of a given act,³⁸⁶ as the plurality opinion in *Tuttle* suggests,³⁸⁷ but, rather, on the municipality's knowledge of the policy or custom at issue. If municipal policymakers have notice of policies or customs that control employees' actions in given circumstances, then a municipality should be responsible for those actions. If constitutional deprivations result, the courts should find the municipality at fault and liable to the person injured under section 1983.

The distinction between official municipal policy and municipal custom provides a continuum based on the degree of the municipality's awareness of possible liability under

that the public employer and its employees are aware that public employees engage in the practice and do so with impunity" Schnapper, *supra* note 17, at 229.

³⁸¹ But see the multiple decisions in *Pembaur*, 106 S. Ct. at 1293, 1301 (White, J., concurring), *id.* at 1302 (Stevens, J., concurring), *id.* at 1304 (O'Connor, J., concurring), and *id.* at 1305 (Powell, J., dissenting) for the Supreme Court Justices' debate concerning the definition of official policy. See also notes 204-28 and accompanying text for a discussion of *Pembaur*.

³⁸² See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970) ("Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."); *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369 (1940) ("It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of a written text.").

³⁸³ E.g., *Pembaur*, 106 S. Ct. at 1299; *Tuttle*, 471 U.S. at 823-24.

³⁸⁴ *Monell*, 436 U.S. at 691.

³⁸⁵ See *Tuttle*, 471 U.S. at 823 (ignores possibility of "custom" of inadequate training of police officers; instead opinion referred to "policy" of inadequate training and then discussed probability that such a policy would not be consciously adopted).

³⁸⁶ E.g., compare *id.* at 824 ("considerably more proof than the single incident will be necessary in every case to establish both the requisite fault . . . and the causal connection") with *id.* at 832 (Brennan, J., concurring) ("A § 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims.").

³⁸⁷ *Id.* at 824.

the proposed foreseeability standard. According to this standard, on one end of the spectrum an officially adopted municipal policy leads to liability under section 1983 when it is reasonably foreseeable that the policy would violate the plaintiff's constitutional rights. At the other end of the spectrum, a municipality is not liable under section 1983 for constitutional deprivations resulting from the unilateral actions of a municipal agent.³⁸⁸ In the center of the spectrum lies municipal custom. Because custom is more difficult for municipal policymakers to apprehend and oversee, the standard imposes liability only when such customs are the result of the policymakers' gross negligence, and evidence a lack of the exercise of even slight care.

The proposed foreseeability standard does not define official municipal policy, but it clarifies the Court's concept of official policy in two ways. First, this standard distinguishes between official policies, which are the result of conscious choice,³⁸⁹ and municipal custom, which generally results from tradition or practice. Second, this standard clarifies the application of the official policy standard by providing a standard of conduct to which municipal officers must adhere to protect their municipality from section 1983 liability. Thus, the proposed foreseeability standard puts municipalities on notice that these policies will cause municipal employees to act as directed by the policy. If these actions will foreseeably result in a constitutional deprivation, then the municipality is "at fault" when such an injury occurs, and courts should hold them liable under section 1983. Although the exact dimensions of the Court's official policy standard remain undefined,³⁹⁰ clearly, the Court must resolve the conflict between the circuits and establish a standard for determining when a municipality has delegated policymaking authority.³⁹¹

The proposed standard also clarifies the concept of a municipal custom and distinguishes it from officially adopted municipal policy by requiring a higher degree of municipal misconduct to trigger section 1983 liability. In instances where implicit customary law is at issue, however, knowledge is more difficult to establish. If municipal policymakers do not have actual knowledge of such a custom, the municipality cannot act to prevent its application and consequent harm. Section 1983, however, establishes liability when persons acting under color of state custom or usage cause a constitutional deprivation.³⁹² The courts have had the most difficulty distinguishing between those situations where custom causes an injury, and where the injury results from a person's unilateral action. An equitable balance mandates municipal liability under section 1983 when actions taken pursuant to municipal customs, so egregious as to rise to the level of gross negligence, result in constitutional injury.³⁹³ Because such customs evidence a

³⁸⁸ This is consistent with the *Monell* Court's rejection of *respondeat superior* liability for municipalities under § 1983. See *supra* note 114 for a discussion of the theory of *respondeat superior* liability.

³⁸⁹ See *Tuttle*, 471 U.S. at 823.

³⁹⁰ See generally *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986). See *supra* notes 216-40 and accompanying text for a discussion of *Pembaur*.

³⁹¹ See *supra* notes 221 and 314 and accompanying text for a discussion of the lower courts' conflict over the proper application of the official policy standard.

³⁹² 42 U.S.C. § 1983 (1982) ("acting under color of any . . . custom, or usage, of any State"). Congress recognized that unwritten law, or custom, can dictate behavior in a given situation with the same force as statutory law. The Supreme Court also acknowledged the power of custom in the *Monell* decision. See *Monell*, 436 U.S. at 690-91 & n.56.

³⁹³ Many lower courts have adopted a gross negligence standard:

If a municipality completely fails to train its police force, or trains its officers in a reckless or grossly negligent manner so that future police misconduct is almost inevitable, the municipality exhibits a "deliberate indifference" to the resulting violations

lack of even slight care by municipal officials, courts may justly impute both knowledge and responsibility to the municipality.³⁹⁴ This standard recognizes that it is essential that municipalities are held liable for constitutional injuries resulting from municipal custom in order fully to effectuate the language of section 1983.

Finally, the proposed standard clarifies the Court's affirmative link or causal connection requirement.³⁹⁵ The standard attempts to reconcile the congressional directive that no person, acting under color of state law, shall subject, or cause to be subjected, another person to the deprivation of a constitutional right³⁹⁶ with the difficult problem of ascertaining the "true" cause of a constitutional injury.³⁹⁷ Because fundamental rights are at stake, deterring constitutional violations is of paramount importance. The standard encourages municipal policymakers to continually evaluate officially adopted municipal policies and stimulates inquiry into municipal custom.

The Supreme Court has not clearly addressed the role of causation in section 1983 actions against municipalities.³⁹⁸ The Court has stated that lower courts should read section 1983 in light of tort principles.³⁹⁹ The Supreme Court Justices have disagreed over the requirements of section 1983's causation element, however.⁴⁰⁰

The issue of "proximate cause," or more accurately, legal cause, has been framed as whether the defendant is under any duty to the plaintiff, or whether the duty encompasses protection against plaintiff's specific injury.⁴⁰¹ Clearly, the disagreement concerning causation among the Justices of the Supreme Court, and among the circuits,

of a citizen's constitutional rights. In such a case, the municipality may fairly be termed as acquiescing in and implicitly authorizing such violations.

Leite v. City of Providence, 463 F. Supp. 585, 590 (D.R.I. 1978). See also *Voutour v. Vitale*, 761 F.2d 812, 820 (1st Cir. 1985); *Wellington v. Daniels*, 717 F.2d 932, 937 (4th Cir. 1983); *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981); *Turpin v. Maillet*, 619 F.2d 196, 202 (2d Cir. 1980).

³⁹⁴ Gross negligence is defined as the lack of even slight care. *W. KEETON*, *supra* note 114, § 34 at 211. When municipal policymakers do not use even slight care in overseeing the implementation of municipal custom, it is foreseeable that constitutional deprivations will result.

³⁹⁵ See *supra* notes 173-84 and accompanying text for a discussion of the Court's affirmative link or causal connection requirement.

³⁹⁶ See *supra* note 3 for the text of § 1983.

³⁹⁷ 42 U.S.C. § 1983 (1982).

³⁹⁸ The Court has stated that there must be a "causal connection" or "affirmative link" between a municipal policy or custom and the resulting constitutional violation before municipal liability will attach under § 1983. See *supra* notes 173-84 and accompanying text. The Court has not, however, defined that connection.

³⁹⁹ *Monroe*, 365 U.S. at 187. The Court stated, "[s]ection [1983] should be read against the background of tort liability that makes [one] responsible for the natural consequences of [one's] actions." *Id.* It may well be, however, that the Court meant that § 1983 should be applied in light of such fundamental tort principles as deterring future misconduct and compensating for past injury. See, e.g., *Nahmod*, *supra* note 87, at 9-11. Professor Nahmod argues that "[b]ecause tort law and section 1983 might serve different purposes and protect different interests, this federal common law should be developed with a view to effectuating the purposes of section 1983." *Id.* at 9. He lists as § 1983's two major functions: compensation, especially when there is no adequate state remedy; and deterrence, which, "because constitutional interests are at stake, . . . might be more important under section 1983 than it is under tort law." *Id.* at 10-11.

⁴⁰⁰ See *Tuttle*, 471 U.S. at 823-24; *id.* at 829-31 (Brennan, J., concurring).

⁴⁰¹ See *W. KEETON*, *supra* note 114, § 42 at 275. "Duty" has been described as "a duty, or obligation recognized by law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risk." *Id.*, § 30 at 164.

is less a question of fact than a question of the proper legal policy in each case. Thus, the standard of conduct⁴⁰² that the Court should impose on municipalities for the protection of constitutional rights must address the principles and purposes underlying section 1983.⁴⁰³

The proposed foreseeability-based standard for determining section 1983 municipal liability provides the required causal connection between a municipality and a constitutional deprivation. Constitutional deprivations foreseeably caused by municipal policies of which municipal policymakers have actual knowledge should trigger section 1983 liability. So, too, when an egregious municipal custom causes a constitutional deprivation, courts should hold the municipality liable under section 1983 by imputing knowledge of the custom to the municipality.

3. Effectuation of the Policies Implicit in Section 1983

Congress enacted section 1983 to protect all persons within the jurisdiction of the United States from deprivations of their constitutionally protected rights by actions taken under color of state law.⁴⁰⁴ Section 1983 establishes a duty on the part of all persons, including municipalities, to refrain from conduct that subjects a person, or causes a person to be subjected, to deprivation of a constitutional right.⁴⁰⁵ While responsibility for direct violations of a person's constitutional rights is relatively simple to determine, indirect causation is much more difficult to ascertain.

The determination of proximate or legal cause is necessarily based on policy considerations⁴⁰⁶ and commentators have identified two major policies as central to section 1983: deterring deprivations of constitutional rights and compensating such deprivations.⁴⁰⁷ Section 1983 accomplishes its goals by deterring future deprivations of constitutional rights and compensating victims of past constitutional violations.⁴⁰⁸ Thus a standard for determining municipal liability under section 1983 should promote deterrence of and compensation for violations of constitutional rights.

Professor Nahmod states that because of the importance of constitutional rights, deterrence of constitutional violations is section 1983's most compelling goal.⁴⁰⁹ In order to deter constitutional violations caused by municipalities, a standard must permit municipalities to prevent such policy- or custom-based actions and must provide an incentive for municipalities to exercise such foresight. In addition, when constitutional deprivations occur as the result of municipal policies or customs, plaintiffs should be able to rely on an equitable and consistent standard to demonstrate a municipality's causal connection to the constitutional injury.

⁴⁰² W. KEETON, *supra* note 114, § 42 at 273-75.

⁴⁰³ See *infra* notes 404-20 and accompanying text for a discussion of how the proposed foreseeability-based standard effectuates the policies underlying § 1983.

⁴⁰⁴ See *supra* note 3 for the text of § 1983. See *supra* notes 30-70 and accompanying text for a discussion of § 1983's legislative history.

⁴⁰⁵ See *supra* note 3 for the text of § 1983.

⁴⁰⁶ See W. KEETON, *supra* note 114, § 42 at 274.

⁴⁰⁷ Nahmod, *supra* note 87, at 10-11.

⁴⁰⁸ *City of Newport v. Fact Concerts*, 453 U.S. 247, 263, 268 (1981); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) ("[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."). See also Nahmod, *supra* note 87, at 10.

⁴⁰⁹ See Nahmod, *supra* note 87, at 10-11.

In addition, the standard of conduct applied to municipalities must recognize the gravity of the harm that section 1983 seeks to prevent. Tort principles hold that the gravity of harm must be balanced against the utility of the conduct which creates the risk.⁴¹⁰ Because of the gravity of constitutional violations, the Court must articulate strict standards which balance the potential violation against the public utility of a municipality's policy or custom.

The purposes and policies underlying section 1983's enactment and its judicial interpretation support a foreseeability-based standard of municipal liability. A foreseeability-based standard would deter constitutional deprivations by forcing municipalities to consider the consequences of their policies and customs, thus making municipalities responsible for their own actions. This standard also furthers the goal of compensation by opening municipalities to liability, often when the acting municipal officer may rely on immunity for protection from a judgment for damages.⁴¹¹ By setting a more definite limit on municipal liability under section 1983, the foreseeability standard removes the uncertainty that lately has diminished the availability of municipal liability insurance,⁴¹² thus allowing municipalities to adequately indemnify themselves.

The proposed foreseeability standard would deter deprivations of constitutional rights in two ways. First, the standard would deter such injuries by encouraging municipal officials to examine the foreseeable results of officially promulgated municipal policies. Second, the standard would accomplish this goal by encouraging municipal officers to be aware of municipal customs and, if necessary, take remedial actions in order to ensure that such municipal customs will not lead to any deprivations of constitutional rights. The proposed standard would also clarify three persistent and troubling issues relating to section 1983 municipal liability: the definition of official policy, the role of municipal custom, and the requirement of a causal connection or affirmative link between an official municipal policy or custom and a constitutional deprivation.

Section 1983's twin goals of deterrence and compensation can be achieved through monetary damages. There is no question that a foreseeability standard may subject municipalities to substantial monetary judgments. A substantial judgment, however, will almost certainly deter similar future municipal actions, and also will compensate the victim of the constitutional deprivation.

In addition, the standard enables municipalities to avoid substantial judgments by exercising foresight. The prospect of substantial damages should encourage municipalities to examine all present and future policies closely. Potential damage awards also would encourage municipal officers to be aware of municipal customs and determine whether a constitutional deprivation could foreseeably result from these customs. The proposed standard should also enable municipalities to obtain indemnification. Insurance

⁴¹⁰ W. KEETON, *supra* note 114, § 43 at 298.

⁴¹¹ See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976) (immunity for prosecutors); *Pierson v. Ray*, 386 U.S. 547 (1967) (immunity for judges); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (immunity for legislators). It should be noted that the various immunities extended by the Court have limited drastically the situations in which a damages remedy may be available against an individual municipal officer under § 1983. In cases where a municipal policy has caused the deprivation, a municipal officer may rely on a defense of good faith to protect him or her from liability. *Malley v. Briggs*, 106 S. Ct. 1092, 1095-96 (1986); *Brandon v. Holt*, 469 U.S. 464 (1985); *Owen*, 445 U.S. at 638 (citing cases). It is only in cases of "knowing and malicious acts" that an official may be liable individually. *Fact Concerts*, 453 U.S. at 267.

⁴¹² See Blodgett, *Premium Hikes Stun Municipalities*, 72 A.B.A.J. 48 (1986).

underwriters, currently chilled by the shifting and contradictory judicial determinations regarding municipal liability under section 1983,⁴¹³ also may institute their own evaluations concurrent with indemnifying municipalities against such actions.

Municipal liability for actions of police officers which result in constitutional injury provides an example of the need to balance policy considerations. Justice Rehnquist correctly stated that a municipality's "policy" of maintaining a police force may foreseeably result in the deprivation of constitutional rights⁴¹⁴ in the sense that almost anything may happen and is thus theoretically "foreseeable."⁴¹⁵ The great public need for police protection outweighs the slight risk that well-trained and supervised police officers will deprive a citizen of his or her constitutional rights.⁴¹⁶ When a municipality's police force is inadequately trained or supervised, however, the risk of constitutional deprivation increases,⁴¹⁷ while the public utility of an ill-trained or poorly supervised police force decreases. Because of its gravity, the courts and citizens should not accept the risk of *foreseeable* constitutional injury. Therefore, the standard of conduct that section 1983 imposes on municipalities should require municipal policymakers to monitor continually the possibility of a constitutional deprivation occurring pursuant to municipal policies. The proposed standard does exactly this by encouraging careful consideration of any officially adopted policies and by encouraging policymakers to continually monitor informal policy or municipal custom.

In addition, recent studies indicate that civil litigation — such as suits brought under section 1983 — has reduced by half the number of citizens killed by police in major metropolitan areas⁴¹⁸ and prompted many municipalities to reexamine their policies regarding police training and procedures.⁴¹⁹ Clearly, section 1983 has deterred and prevented violations of constitutional rights.⁴²⁰ A foreseeability-based standard would have the further salutary effect of making it easier to predict liability under section 1983, thus further encouraging both municipal officials to evaluate municipal policies and customs, and plaintiffs to seek their remedy. By holding a municipality liable under section 1983 when its policies or customs are the reasonably foreseeable cause of a constitutional deprivation, the victim of that constitutional injury is assured of an avenue of redress and compensation.

⁴¹³ *Id.*

⁴¹⁴ *Tuttle*, 471 U.S. at 822–23.

⁴¹⁵ W. KEETON, *supra* note 114, § 43 at 297.

⁴¹⁶ See Amicus Curiae Brief of the American Civil Liberties Union and The Civil Liberties Union of Massachusetts, at 28–35, *Kibbe v. City of Springfield* (Docket number 85–1217) (1987).

⁴¹⁷ *Id.*

⁴¹⁸ See *id.*

⁴¹⁹ *Id.*

⁴²⁰ The A.C.L.U. brief in *Kibbe* listed five positive effects resulting from suits brought under § 1983 against municipal police departments. The first positive effect of these suits is an emphasis on background investigations to eliminate applicants with violent or other negative propensities from police department hiring. Second, these suits have led to the use of administrative leave or seclusion to separate officers accused of misconduct from the public. In addition, § 1983 actions have encouraged prompt termination of unfit officers from municipal police forces. Furthermore, these actions have led to the development of specialized training for supervisory personnel which emphasizes potential liability for negligent failure to adequately supervise subordinates. The final positive effect of § 1983 suits, according to the A.C.L.U., is the fact that they may have made municipalities liable under § 1983 for inadequate training of officers, and that no good faith defense is available. *Id.* at 31–32 (citing Schmidt, *Section 1983 and the Changing Face of Police Management*, in *POLICE LEADERSHIP IN AMERICA* 235 (W. Geller, ed. 1985)).

CONCLUSION

A foreseeability-based standard for determining municipal liability under section 1983 will effectuate section 1983's goals. Congress enacted section 1983 to deter future violations of constitutional rights and compensate for past constitutional injuries.⁴²¹ A foreseeability-based standard allows a municipality to examine its officially enacted policies and its uncodified customs in order to determine whether they may foreseeably cause a violation of constitutional rights. Such scrutiny should result in fewer constitutional violations, and thus protect both citizens' constitutional rights and limited municipal finances. By providing a standard which courts may use to impose a damages remedy, the proposed standard both encourages scrutiny of municipal policies and customs, and provides a remedy for persons deprived of their protected rights. The foreseeability standard removes the uncertainty that currently plagues the lower courts. The standard facilitates litigants who, for the purposes of section 1983, must ascertain the "person" who caused the constitutional violation in order to obtain appropriate relief. The proposed foreseeability-based standard is consistent with the language, legislative history, and judicial interpretation of section 1983. It effectively achieves the statute's twin goals of deterring future constitutional injuries and compensating those of the past.

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⁴²¹ *Fact Concerts*, 453 U.S. at 263, 268; *Owen*, 445 U.S. at 651.