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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†

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The Supreme Court's decisions under section 1983¹ continue to generate confusion and uncertainty.² Particularly troublesome for the Court has been the question of entity liability³ for violations of federal rights. States cannot be sued for damages, at least in federal court, thanks to the shield provided by the eleventh amendment.⁴ Taken literally, section 1983's imposition of liability upon “every person” could easily be read to include states. In *Quern v. Jordan*,⁵ however, the Court ruled the other way, settling the matter at least for now.

But what of municipalities against whom a cause of action is asserted under section 1983?⁶ According to *Monroe v. Pape*,⁷ municipalities were not persons either and thus,

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¹ 42 U.S.C. § 1983 (1982) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

² E.g., Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 482–83 (1982).

³ As used in this article the term entity liability involves the ability of a plaintiff to sue a governmental unit such as a municipality for damages, as opposed to suing individual officials or employees.

⁴ E.g., Brown, *State Sovereignty Under the Burger Court — How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363, 363–64 (1985).

⁵ 440 U.S. 332 (1979).

⁶ Section 1983 is not jurisdictional. See *Butz v. Economou*, 438 U.S. 478, 526 (1978) (Rehnquist, J., dissenting). Although not providing the underlying substantive rights and duties, it is a component of the plaintiff's cause of action, perhaps most accurately described as a right of action.

⁷ 365 U.S. 167 (1961).

were also immune from section 1983 liability. Yet the Court chose to overrule this aspect of *Monroe* seventeen years later. It might have gone to the opposite extreme and invoked the well-established doctrine of *respondeat superior* to determine municipal liability. Instead, in 1978, in *Monell v. Department of Social Services*,⁸ the Court sought to establish a middle ground between these two rules: municipalities are liable for acts of their employees only when the acts involve "official policy."⁹ At a doctrinal level, the concept of official policy may well make sense, but in operation it is a quicksand of uncertainty. The Court has recently attempted to give it content in *Pembaur v. City of Cincinnati*,¹⁰ finding a municipality liable, and in *City of Oklahoma City v. Tuttle*,¹¹ finding a municipality not liable. Each case was decided by a plurality, with various justices concurring and dissenting. The entire edifice of municipal liability is a creation of the Burger Court.¹² Official policy is its cornerstone. Yet it is not an exaggeration to say that no one knows what "official policy" is.

Of course, deep divisions within the Court are hardly unique and are not limited to section 1983 cases. Government by judiciary may have become government by plurality.¹³ Yet section 1983 does seem to pose its own peculiar problems. An initial question relates to the sources of law: can the extensive body of cases applying a broadly worded 1871 statute really be characterized — and justified — as statutory construction?¹⁴ It seems inevitable that the Court will act as a common law tribunal, weighing and utilizing competing notions of public policy. What makes the conflict over section 1983 particularly sharp is that the cases arise in the broader context of federalism debates. The section 1983 plaintiff is invoking federal authority (usually a federal tribunal as well as federal law) to oversee and correct actions of his or her state or local government. Indeed, the statute has become perhaps the major focal point of Burger Court federalism conflicts.¹⁵

To say that the Court is fundamentally divided over the nature and role of the American federal system is to understate the obvious. Two opposing visions compete, each winning out some of the time. First, what might be called the federalistic vision emphasizes the prerogatives of states (and local governments as well). States are seen as somewhat sovereign, somewhat autonomous, and they merit comity at the hands of the national government. Cases such as *National League of Cities v. Usery*,¹⁶ the *Younger* "ab-

⁸ 436 U.S. 658 (1978).

⁹ *Id.* at 694.

¹⁰ 106 S. Ct. 1292 (1986).

¹¹ 105 S. Ct. 2427 (1985).

¹² The principal cases involving municipal liability are *Pembaur*, 106 S. Ct. 1292; *Tuttle*, 105 S. Ct. 2427; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Owen v. City of Independence*, 445 U.S. 622 (1980); *Monell*, 436 U.S. 658 (*Monell* overruled that part of *Monroe v. Pape*, 365 U.S. 167 (1961), which held that municipalities were not persons).

¹³ Cf. Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981).

¹⁴ See, Eisenberg, *supra* note 2, at 487.

¹⁵ *Developments in the Law, Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135 (1977) [hereinafter *Developments*].

The elevation and appointment of Chief Justice Rehnquist and Justice Scalia were confirmed by the Senate as this article was coming to publication. The article centers on the treatment of section 1983 entity liability by the Burger Court. While it is impossible to know whether section 1983 will remain a focal point in the Court's federalism conflicts, it seems likely that such conflicts will continue with Justice Scalia replacing Chief Justice Burger in the federalistic camp. See *infra* text accompanying notes 16-21.

¹⁶ 426 U.S. 833 (1976).

stention" decisions,¹⁷ and those giving new life to the eleventh amendment¹⁸ epitomize this view of federalism as a guiding force in placing limits on both Congress and the judiciary. In the 1970's, many scholars saw this deferential federalism as a hallmark of the Burger Court, and a disturbing one at that.¹⁹

Any reports of federalism's triumph were, however, exceedingly premature. In 1985, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.²⁰ *Garcia* not only re-establishes the primacy of Congress in national-state conflicts; it also emphasizes the tenuous nature of the 5 to 4 decisions in which the federalistic vision has prevailed. *Garcia* reflects the second and what might be called the nationalist vision of the Court. This vision is anchored in the supremacy clause and the fourteenth amendment. It has particular implications for the federal judiciary; when federally created rights are at stake, concern for the states should not block their assertion. The federal courts are seen as the "primary and powerful"²¹ forum for the vindication of federal rights. The extreme dichotomy between the federalistic and nationalist visions prevents a coherent view of the federal system from commanding a consistent majority of the Court.

As in other related fields,²² the Court's inability to reach a consensus on the nature of the American federal system results in ambiguous section 1983 decisions. Federalistic concerns have frequently operated to bar access to the federal courts for section 1983 plaintiffs. The decisions reflecting these concerns led, at one time, to dire predictions of "evisceration" of the statute.²³ Yet once in court, plaintiffs have encountered a frequently hospitable reception. The Court has held municipalities to be "persons" liable in section 1983 suits²⁴ and has denied municipalities the ability to assert a good faith immunity defense.²⁵ Further, the Court has found official policy, thus rendering the municipality liable, in a single act by a high level official.²⁶ To be sure, the record is mixed. Punitive damages cannot be assessed against municipalities,²⁷ and official policy may not be found.²⁸ When it comes to suits against *individuals*, the plaintiff will confront an array of immunity defenses.²⁹ Even here, however, the cases are not an unmixed string of pro-defendant rulings.³⁰ Ambiguity, rather than evisceration, has been the order of the day.

¹⁷ *E.g.*, *Juidice v. Vail*, 430 U.S. 327 (1977); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975); *Younger v. Harris*, 401 U.S. 37 (1971). See generally C. WRIGHT, *LAW OF FEDERAL COURTS*, 320-30 (4th ed. 1983).

¹⁸ *E.g.*, *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142 (1985); *Pennhurst State School & Hosp. v. Halderman* (Pennhurst II), 465 U.S. 89 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974).

¹⁹ *E.g.*, Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977).

²⁰ 105 S. Ct. 1005 (1985).

²¹ *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (emphasis deleted) (quoting F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1928)).

²² See, e.g., Chayes, *The Supreme Court 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

²³ *E.g.*, *Juidice*, 430 U.S. at 346 (Brennan, J., dissenting); *Developments*, *supra* note 15, at 1175.

²⁴ *Monell*, 436 U.S. at 690.

²⁵ *Owen*, 445 U.S. at 650.

²⁶ *Pembaur*, 106 S. Ct. at 1293.

²⁷ *Fact Concerts*, 453 U.S. at 271.

²⁸ *Tuttle*, 105 S. Ct. at 2435-36.

²⁹ The defendant may claim either absolute immunity or qualified immunity. For a discussion of the two, see, e.g., *Malley v. Briggs*, 106 S. Ct. 1092, 1095-99 (1986).

³⁰ Compare *Malley*, 106 S. Ct. at 1097 (police officer seeking complaint entitled to qualified

This article examines that ambiguity as it is manifested in both the general area of section 1983 municipal liability and in the specific context of the *Tuttle* and *Pembaur* decisions, the Court's two attempts to develop the concept of official policy. That concept was born as a seeming mid-point between either holding municipalities absolutely immune from or vicariously liable under section 1983. Like any compromise, it is prone to attempts to make it mean all things to all people. Thus, the cases discussed here show virtual unanimity within the Court on official policy as the relevant inquiry. This agreement, however, is coupled with sharply divergent approaches on how to answer the inquiry. Federalistic and nationalist interpretations of the concept vie for a majority. The analysis offered in this article suggests that neither side is likely to prevail, although a tilt towards the federalistic view is probable. As a result, continued ambiguity can be expected in the section 1983 entity liability context.

I. THE MUNICIPAL LIABILITY OPTIONS — ABSOLUTE IMMUNITY, VICARIOUS LIABILITY, OR SOMETHING IN BETWEEN

A. A Note on Section 1983 Methodology

Before analyzing the three options available to the Court and its treatment of them, some consideration of the sources of law problem mentioned above seems appropriate. Does the Court exercise a relatively free hand in developing a "law" of section 1983, or is its course guided and constricted by rules of statutory construction? The Court frequently insists that the latter situation pertains. Thus, the opening ritual may include a statement that what is involved is "essentially [a matter] of statutory construction."³¹

At times the statutory language does provide at least some guidance. In *Polk County v. Dodson*,³² for example, the Court concluded that section 1983 was not applicable because "under color of law" was not a term which extended to the activities of a county-funded public defender.³³ Similarly, in deciding that a municipality could not be liable under theories of *respondeat superior*, the Court emphasized the statute's utilization of the words "subjects, or causes to be subjected" as requiring a direct involvement by the municipality rather than permitting liability on any vicarious basis.³⁴

The Court has remained within the statutory context by also relying heavily on the purposes of the 1871 Reconstruction Congress in decisions which emphasize the importance of compensation for victims of official wrongdoing and deterrence of such conduct in the future.³⁵ Finally, insofar as the traditional tools of statutory construction play a role, the Court frequently refers to the legislative history, particularly to Congress's rejection in 1871 of the so-called Sherman amendment, which would have made municipalities liable for injuries inflicted by private persons.³⁶

immunity only) with *Briscoe v. LaHue*, 460 U.S. 325, 335-36 (1983) (police officer testifying at trial entitled to absolute immunity).

³¹ *Owen*, 445 U.S. at 635.

³² 454 U.S. 312 (1981).

³³ *Id.* at 325.

³⁴ *Monell*, 436 U.S. at 694; see *infra* text accompanying notes 85-87.

³⁵ E.g., *Owen*, 445 U.S. at 650-51.

³⁶ E.g., *Tuttle*, 105 S. Ct. at 2433 ("The principal objections to the Sherman amendment voiced in the 42d Congress were that the section appeared to impose a federal obligation to keep the peace . . .").

Realistically, however, the broad — some have said vague³⁷ — language of the statute answers few questions. Nor does the history of what Congress rejected in 1871 reveal much about what it enacted. Even in those section 1983 cases purportedly grounded in statutory construction, a substantial discussion of current public policy considerations is the norm.

Another technique which permits the Court to cling to the notion that a process of statutory interpretation is involved is recourse to the legal climate in which section 1983 was enacted.³⁸ The theory here is that Congress was aware of current common law doctrines and intended the statute to be applied in accordance with these doctrines. This justification for linking section 1983 to the common law has had its most extensive utilization with respect to the assertion of individual immunity defenses, both qualified and absolute.³⁹ There is no reference to immunity on the face of the statute and little guidance from the legislative history. Still, the Court has insisted that Congress would not have wished to discard such well-established 19th-century immunities as those accorded to judges and legislators. The use of the legal climate approach, however, does not stop there. At times the Court seems to be saying, in the immunity context, that the 1871 Congress intended to incorporate common law methodology. Thus the classic common law technique of analogizing current problems to those of other times permits decisions which rest substantially on considerations of public policy.⁴⁰

Realistically, a good deal more than statutory construction is involved. The Court itself has admitted that section 1983 "is not to be taken literally."⁴¹ The section 1983 cases generally, not just those dealing with immunity, might be viewed as a body of federal common law analogous to that body of law permitting suits against federal officials for constitutional violations which the Court has developed in the *Bivens* context.⁴² Indeed, the two lines of cases draw upon each other.⁴³ In *Butz v. Economou*,⁴⁴ a *Bivens* case dealing with a range of immunity issues, the Court made plain the common law nature of the section 1983 immunity decisions. It described them as representing what the Court "deemed to be the appropriate type of immunity"⁴⁵ and justified their use as guiding precedent in the *Bivens* context by eschewing any "undue emphasis" on the congressional source of the section 1983 cause of action.⁴⁶ The *Bivens* cases use the section 1983 precedents not out of historical compulsion but because the Court thinks they represent sound policy.

³⁷ *Developments*, *supra* note 15, at 1156.

³⁸ *Briscoe*, 460 U.S. at 336-41.

³⁹ See cases cited *supra* notes 29-30.

⁴⁰ The best examples of this technique are *Bivens* cases such as *Cleavinger v. Saxner*, 106 S. Ct. 496, 500-04 (1985) (prison disciplinary board receives only qualified immunity), and *Butz*, 438 U.S. at 508-14 (absolute immunity for administrative hearing examiners). The *Bivens* cases and those under section 1983 use similar methodologies in this respect. See *infra* text accompanying notes 41-46. For a section 1983 case which uses common law techniques to blend historical analysis with current notions of public policy, see *Briscoe*, 460 U.S. at 329-46.

⁴¹ *Briscoe*, 460 U.S. at 330.

⁴² *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁴³ E.g., *Cleavinger*, 106 S. Ct. at 501 (a *Bivens* case citing *Briscoe*, which is a section 1983 case).

⁴⁴ 438 U.S. 478 (1978).

⁴⁵ *Id.* at 503.

⁴⁶ *Id.* at 503-04, 511.

The similarity between the Court's development of section 1983 law and *Bivens*-style federal common law⁴⁷ may be part of a broader phenomenon. Recent scholarship has explored the close relationship among statutory interpretation, constitutional adjudication, and federal common law.⁴⁸ In this respect, it is possible to analogize the section 1983 cause of action to the jurisdictional statute at issue in the *Textile Workers Union v. Lincoln Mills* case.⁴⁹ In both instances Congress has given the judiciary a relatively free hand in the enforcement of federally created rights.

Thus, in the context of municipal liability under section 1983, the statute does provide some guidance and support with respect to the Court's rejection of the two polar options — municipal liability under *respondeat superior* theory or municipal immunity from liability — and its establishment of the middle ground, official policy concept. That the term "official policy" does not even appear in the statute, however, shows that the Court is acting in a common law manner as well as engaging in statutory construction narrowly defined. With respect to the unanswered questions about the meaning of official policy, the Court is largely on its own.

B. *One End of the Spectrum: Municipal Immunity Reconsidered*

One might have expected a federalistic Court to accord cities total immunity, putting them on a par with states. That was the pre-Burger Court interpretation of section 1983 established in 1961 by *Monroe*. The *Monroe* Court relied on the 1871 Congress's rejection of the so-called Sherman amendment as justification for a holding that municipalities were exempt from any liability.⁵⁰ The amendment as reported out of conference committee would have made municipalities and similar levels of government liable for certain lawless acts committed within their borders whether they had any control over, or knowledge of, these acts. The 1871 Congress rejected this approach decisively. The Court drew the conclusion that what was at work was not only an intense opposition to the Sherman amendment but also a broader aversion to municipal liability of any kind. Thus, paradoxically, the case regarded as the fountainhead of current section 1983 litigation⁵¹ did not open the flood gates at all on one of the fundamental issues in most 1983 suits: whether the municipal entity can itself be liable.

Monroe's treatment of the issue might be criticized as cursory. Seventeen years later, in *Monell*, the Court reconsidered the issue and found that *Monroe* was wrong and should be overruled.⁵² The primary reason for this fresh look was the existence of a number of cases in which the Court appeared to have proceeded upon the assumption that municipalities could be sued directly under section 1983.⁵³

Justice Brennan's opinion for the seven justice majority in *Monell* returned to the rejection of the Sherman amendment and focused on what precisely can be gleaned

⁴⁷ See Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409, 416–19 (1978); Eisenberg, *supra* note 2, at 486.

⁴⁸ E.g., Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883 (1986); Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

⁴⁹ 353 U.S. 448 (1957).

⁵⁰ *Monroe*, 365 U.S. at 188–92.

⁵¹ See, e.g., *Developments*, *supra* note 15, at 1137, 1169–72.

⁵² *Monell*, 436 U.S. at 663.

⁵³ *Id.* at 695–96; *id.* at 710–11 (Powell, J., concurring).

from this refusal to adopt a measure of such draconian proportions.⁵⁴ Justice Brennan argued somewhat convincingly that the amendment was aimed at something quite different than holding a municipality liable for the acts of its *own* officials.⁵⁵

That rejection of the Sherman amendment did not foreclose the broader issue of municipal liability only answered part of the problem posed, however, in the *Monroe-Monell* situation, in which plaintiffs attempt to proceed directly against the municipality. In addition it was necessary for Justice Brennan to demonstrate affirmatively that municipalities were included within the statute's reference to "any person." For Justice Brennan, this question could be answered "unequivocally."⁵⁶ This conclusion has a three-fold basis. First, it was generally agreed that the statute was remedial and to be broadly construed.⁵⁷ Second, there was one reference in the 1871 debate to suits against cities, which Justice Brennan interpreted as demonstrating that Congress understood that such suits would lie if the bill were enacted.⁵⁸ Finally, he relied on relevant language in the contemporary "Dictionary Act" to the effect that "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."⁵⁹

This broad exercise in statutory construction is certainly open to question even if one accepts the Court's views on the implications of the rejection of the Sherman amendment.⁶⁰ Indeed, Justice Rehnquist raised several difficult points in his dissent, including the obvious weakness of the Dictionary Act's use of the word "may" and the fact that contexts could vary the meaning of the word "person."⁶¹ Nonetheless, Justice Brennan is probably on sound ground given the admittedly broad remedial purpose of section 1983. The word "person" will certainly bear a meaning which includes municipal corporations. Given the enacting Congress's intent to reach the acts of governmental units, the result in *Monell* may well be the correct one as long as the issue can be viewed as not implicating any constitutional obstacles.

There is, however, a constitutional provision which cannot be ignored when addressing the fundamental issue of whether a municipal entity can be liable. That provision is the eleventh amendment, which the Court has broadly construed to prohibit federal question suits against *states* by their own citizens in federal courts.⁶² Yet the treatment of the amendment in *Monell* suggests that the issue hardly merits discussion. Justice Brennan relegated it to a footnote in which he first noted that the tenth amendment, as amplified in *National League of Cities*, was inapplicable to municipalities because the fourteenth amendment — which overrides the tenth — was at issue.⁶³ The same reasoning would have been sufficient to answer any eleventh-amendment objections if section 1983 is viewed, as it should be, as a statute enacted pursuant to the fourteenth

⁵⁴ *Id.* at 664–83. As noted, the Sherman amendment would have made municipalities liable for injuries inflicted by private persons.

⁵⁵ *Id.*

⁵⁶ *Id.* at 683. Justice Brennan also stated that this conclusion is compelled, *id.* at 690, and beyond doubt. *Id.* at 700.

⁵⁷ *Id.* at 683–86.

⁵⁸ *Id.* at 686–87.

⁵⁹ *Id.* at 688 (quoting Dictionary Act of Feb. 25, ch. 71, 1871, § 2, 16 Stat. 431 (1871)).

⁶⁰ See generally *id.* at 714–24 (Rehnquist, J., dissenting).

⁶¹ *Id.* at 719–20 (Rehnquist, J., dissenting).

⁶² *E.g.*, *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

⁶³ *Monell*, 436 U.S. at 690 n.54.

amendment. Justice Brennan, however, dismissed the eleventh amendment on the somewhat simpler ground that municipalities enjoy no protection under that provision because they "are not considered part of the State for eleventh amendment purposes."⁶⁴ It is not surprising to find Justice Brennan giving an eleventh-amendment argument short shrift in view of his frequently voiced hostility to any broad application of that constitutional provision.⁶⁵ Somewhat more surprising are the views of Justice Powell, who concurred in the *Monell* result. He has been one of the eleventh amendment's principal champions.⁶⁶ In *Monell*, however, he described as "odd" a result which would permit suits against local government employees while the entities themselves remained exempt from liability.⁶⁷ Yet the court's eleventh amendment decisions produce this very result in damages suits where conduct of state employees is at issue.⁶⁸

In *Monell* and elsewhere,⁶⁹ the Burger Court has perpetuated prior doctrine that cities enjoy no eleventh-amendment protection. Indeed, one of the uncertainties of Burger Court federalism is the status of sub-national units within the federal system.⁷⁰ In *National League of Cities*, the Court extended the protection of state sovereignty to local units of government.⁷¹ One might expect that municipalities would enjoy the same protection in the more specific context of the eleventh amendment. It can certainly be argued that the same symbolic considerations, such as protecting a unit of the state from the affront of being haled before a federal tribunal,⁷² are at work regardless of whether the defendant is labelled "state" or "municipal." In addition, including municipalities within the ambit of the eleventh amendment would further the general federalistic goal of unfettered state discretion in choosing the structure for delivery of government services and would prevent federal courts from restricting the provision of services through damages awards against the public treasury,⁷³ a specific goal of eleventh amendment doctrine. In this respect, it matters little whether one views cities as operating as simply an arm of the state, or exercising a form of sovereignty which they have been delegated by the state.

If in interpreting section 1983 the Court is in fact exercising a common law function, the principles of federalism might also lead to immunity for municipalities. This is, in

⁶⁴ *Id.*

⁶⁵ See, e.g., *Green v. Mansour*, 106 S. Ct. 423, 429 (1985) (Brennan, J., dissenting); *Atascadero*, 105 S. Ct. at 3150 (Brennan, J., dissenting); *Pennhurst II*, 465 U.S. at 125-26 (Brennan, J., dissenting).

⁶⁶ E.g., *Atascadero*, 105 S. Ct. at 3147-50; *Pennhurst II*, 465 U.S. at 97.

⁶⁷ *Monell*, 436 U.S. at 705 (Powell, J., concurring).

⁶⁸ The states cannot be sued for damages, at least in federal court, because of the eleventh amendment. However, the principle of *Ex parte Young*, 209 U.S. 123 (1908), permits injunctive relief against state employees even if sued in their official capacity. The employees are, of course, liable to suit in their individual capacity.

⁶⁹ *Moor v. County of Alameda*, 411 U.S. 693, 718 (1973).

⁷⁰ Cf. Lee, *The Federal Courts and the Status of Municipalities: A Conceptual Challenge*, 62 B.U.L. Rev. 1 (1982). The Court has been called upon to adjudicate the rights and duties of municipalities in various legal contexts. Yet there is no clear pattern to the Court's holdings; decisions have variously increased and restricted the scope of federal power over municipalities. Consequently, the case law regarding the rights and duties of sub-national units is in a state of confusion.

⁷¹ *National League of Cities*, 426 U.S. at 845.

⁷² See Brown, *supra* note 4, at 371.

⁷³ Note, *The Denial of Eleventh Amendment Immunity to Political Subdivisions of the States: An Unjustified Strain on Federalism*, 1979 DUKE L.J. 1042, 1062 (1979).

effect, what has happened with states, even though the word "person" in section 1983 would seem equally applicable to states.⁷⁴ (Any doctrinal problems which flow from allowing the section 1983 entity action to be brought in state, as opposed to federal, court are equally present in both cases.⁷⁵) Indeed, a striking paradox of Burger Court federalism is that cities *have* been treated as hierarchically equivalent to states in section 1983 *equitable* actions. In *Rizzo v. Goode*,⁷⁶ for example, plaintiffs had sought equitable relief against the practices of a municipal police department. The Court, per Justice Rehnquist, invoked principles of comity and federalism in cautioning against federal judicial interference with what it termed "state" executive functions.⁷⁷ In *Rizzo* and other equitable cases,⁷⁸ the principles of federalism work to the municipalities' benefit and against the language of section 1983. This approach has strong similarities to that found in eleventh-amendment cases in which the amendment's clear language is subordinated to considerations of state sovereignty.⁷⁹ The eleventh amendment comes into play, however, primarily in the context of damages actions. Protection of the public fisc lies at the heart of eleventh-amendment jurisprudence. It is suprising that this concern seems absent from the development of section 1983 actions against municipalities.

Suppose the Court had embarked down this public fisc road. Where might it have come out? There are arguments in favor of municipal immunity. To begin with, there is the unquestioned fact that many units of local government are not in a strong financial position.⁸⁰ Thus, an award of damages against the local treasury may place serious obstacles in the way of provision of basic local services and may even raise the spectre of bankruptcy. In congressional consideration of a possible alteration of the *Monell* ruling, municipal advocates have repeatedly raised these public fisc arguments and treated the relevant committee to a veritable parade of horrors.⁸¹ It may be that these arguments are substantially overstated. For example, in describing the threat posed by section 1983 suits, critics tend to cite the amounts claimed in plaintiffs' complaints rather than those actually awarded in judgments or settlements.⁸² Nonetheless, the existence of urban fiscal stress (and perhaps rural as well) seems to be sufficiently accepted that arguments based on it might lead toward immunity.

Of course, there are very strong principles drawn from the law of torts which cut in the other direction. The most obvious are the desire to compensate the victim of wrongdoing and notions of spreading the loss over the components of the broad entity

⁷⁴ See *Quern*, 440 U.S. at 350-51 (Brennan, J., concurring).

⁷⁵ If a state is not a "person" as that term is used in section 1983, it is hard to see precisely how section 1983 actions can be brought against states in state courts any more than in federal court. Of course, the analysis in *Quern* focuses on whether Congress in enacting section 1983 intended to withdraw the states' traditional eleventh amendment immunity. *Id.* at 342-45. This immunity applies only to suits in federal court. Nonetheless, *Quern* appears to hold that states are not "persons" under section 1983. See *id.* at 342-43; *id.* at 350 (Brennan, J., dissenting).

⁷⁶ 423 U.S. 362 (1976).

⁷⁷ *Id.* at 379-80.

⁷⁸ *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983).

⁷⁹ See generally Brown, *supra* note 4, at 366-72. Just as the eleventh amendment is one manifestation of concern for state sovereignty, so the "principles of federalism" are another.

⁸⁰ See, e.g., *Owen*, 445 U.S. at 670 (Powell, J., dissenting).

⁸¹ See generally *Municipal Liability Under 42 U.S.C. 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

⁸² Eisenberg, *supra* note 2, at 530 n.212.

which may fairly be said to have caused the loss.⁸³ These considerations argue strongly in favor of municipal liability. Arguments based on compensation fit squarely within the underlying purposes of section 1983. The case for municipal liability is buttressed by the fact that the growth of immunity defenses for individual officials might leave the section 1983 plaintiff remediless.

Thus, there is much to be said for *Monell's* rejection of municipal immunity even after injecting and weighing the policy arguments in the other direction. Yet these policy arguments are by no means dead. They are an important consideration in efforts to limit the liability established by *Monell* and may even have played a role in *Monell* itself.

C. Why Not *Respondeat Superior*?

Having gone so far as to find municipalities liable under the statute, it would not have been surprising for a nationalist oriented Court to take the additional step of establishing *respondeat superior* as the principle under which liability would be determined in a particular case. Yet *Monell*, written by Justice Brennan, specifically rejected *respondeat superior* and purported to reject as well any policy-based construction of section 1983 which would have led to vicarious liability.⁸⁴ The Court's analysis rested on the language of the statute and the legislative history. As to the former, Justice Brennan emphasized the words, "shall subject, or cause to be subjected . . .".⁸⁵ He viewed these verbs as emphasizing the importance of a direct relationship between the defendant and the victim. To remain faithful to the language, it would be necessary that the municipality's involvement be direct, as opposed to indirect solely through the employment of the person who committed the wrong.⁸⁶ As for the legislative history, the Court again viewed Congress's rejection of the Sherman amendment as shedding light on broader issues of the statute's scope. The amendment itself represented a type of vicarious liability, and from Congress's refusal to incorporate this particular form, Justice Brennan drew "the inference that Congress did not intend to impose such liability" in any form.⁸⁷ He recognized that basic principles of tort law are frequently invoked to justify *respondeat superior*: notably, the possibility of reduction of accidents through deterrence and the desirability of spreading costs among the community as a whole.⁸⁸ Justice Brennan, however, viewed these arguments as similar to those put forward in favor of the amendment.⁸⁹ The entire tone of Justice Brennan's analysis suggests that these policy arguments for imposing liability under *respondeat superior* theory might have their place in elaboration of tort liability by a common law court but that they are not to be considered by a federal court in the narrower exercise of construing section 1983.

Having decided that *respondeat superior* is not the proper standard for municipal liability, the *Monell* Court stated that "it is 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 injury that the government as an entity is

⁸³ See, e.g., *Owen*, 445 U.S. at 657.

⁸⁴ *Monell*, 436 U.S. at 691.

⁸⁵ *Id.* at 691 (quoting 42 U.S.C. § 1983).

⁸⁶ *Id.* at 692.

⁸⁷ *Id.* at 693 n.57.

⁸⁸ *Id.* at 693-94.

⁸⁹ *Id.* at 694.

responsible under § 1983."⁹⁰ The Court left for "another day" amplification of what was meant by official policy.⁹¹ Although the justices have struggled with attempts to carry out this task, they continue to insist that the basic choice of official policy over *respondeat superior* is one that "tracks the language of the statute."⁹²

Commentators have been exceptionally sharp in criticizing the Court's rejection of *respondeat superior*. Several themes stand out. The first is that the language of section 1983 is hardly as clear as the Court would have one believe. In particular, the word "cause" is a somewhat vague term which contains room for a broad range of meaning.⁹³ Not only is the notion of causation an invitation for flexible analysis; it takes on a particularly policy-oriented content when coupled with the notion of *respondeat superior*. Both are concepts aimed at the proper allocation of costs and risks. In the context of section 1983, one can easily argue that a *respondeat superior* analysis permits the conclusion that the municipality can be sued for having indirectly "caused" the defendant to be subjected to a violation in any situation in which the municipal employee was within the general scope of his or her authority.⁹⁴ Alternatively, one might view the municipality as having acted directly through the wrongdoing employee, thus satisfying notions of direct causation.⁹⁵ The general point is that the doctrine was well-established at common law and that having decided that Congress meant to treat municipalities as persons, the Court's exclusion of *respondeat superior* is a surprising exercise in statutory construction.

The critics have also made short shrift of arguments that municipalities could not be liable under theories of *respondeat superior* based on the 1871 Congress's refusal to adopt the Sherman amendment. It may be that Congress simply was not focusing upon municipal liability of a *respondeat superior* nature when it considered the amendment.⁹⁶ The main argument put forth by the critics is one which would seem to have appeal to Justice Brennan: the Sherman amendment represented a form of municipal liability so different from *respondeat superior* liability that it is misguided to infer anything about the latter from the rejection of the former.⁹⁷ Justice Brennan himself refused to see in Congress's action taken on the Sherman amendment what Justice Rehnquist was willing to see — a general rejection of municipal liability.⁹⁸ The critics, therefore, surely have a point in questioning the majority's conclusion that the rejection of the Sherman amendment constituted a rejection of *respondeat superior* municipal liability.

Once the broader issues are viewed as properly open to consideration, the critics have had a field day in pointing out that the policy considerations underlying section 1983 would be furthered by adoption of a *respondeat superior* approach. Among the obvious and frequently mentioned rationales are those of compensating the victim in line with the remedial purposes of the statute,⁹⁹ spreading the loss equitably to the

⁹⁰ *Id.*

⁹¹ *Id.* at 694-95.

⁹² *Tuttle*, 105 S. Ct. at 2433.

⁹³ See Blum, *supra* note 47, at 409, 412, n.14; Eisenberg, *supra* note 2, at 505 n.99.

⁹⁴ Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 939, 941 (1979) [hereinafter Note, *Section 1983*].

⁹⁵ *Id.* at 940.

⁹⁶ Blum, *supra* note 47, at 413 n.15.

⁹⁷ E.g., Eisenberg, *supra* note 2, at 516; Note, *Section 1983*, *supra* note 94, at 942-47.

⁹⁸ Monell, 436 U.S. at 722-23 (Rehnquist, J., dissenting).

⁹⁹ Note, *Section 1983*, *supra* note 94, at 953-54.

deeper pocket of the community,¹⁰⁰ and deterring official misconduct through encouraging more careful supervision and training of municipal employees.¹⁰¹ Thus, the arguments which the *Monell* Court refused to consider and which support a *respondeat superior* approach play a major role in the critique of that decision by those who feel that the question was an open one.

The Court's decision in *Owen v. City of Independence*,¹⁰² handed down two years after *Monell*, in 1980, gave the unmistakable impression that a majority of the Court, including Justice Brennan, had gotten the message. The principal issue in *Owen* was whether a municipality could invoke a good faith immunity in circumstances when such a defense would be available to the officers whose conduct had injured the plaintiff.¹⁰³ The Court held that it could not, utilizing an analysis whose tones seem much closer to those of *Monell's* critics than to those of the decision itself. The *Owen* majority invoked both "the legislative purpose in enacting the statute and . . . considerations of public policy."¹⁰⁴ Compensation of those wronged was seen as the principal aim of the statute, and therefore it would be particularly unjust if the government itself could escape liability. As Justice Brennan, writing for the majority, put it,

[i]t hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. Indeed, Congress enacted § 1983 precisely to provide a remedy for such abuses of official power Elemental notions of fairness dictate that one who causes a loss should bear the loss.¹⁰⁵

The opinion also states that deterrence would be furthered by denying any good faith immunity to municipalities in the *Owen* context.¹⁰⁶ Although the precise words *respondeat superior* are not present in the opinion, because in *Owen* the majority reasoned that official policy of the municipality had caused the plaintiff's injury, it is hard not to hear strong echoes of the general tort doctrines supporting that theory in the statement quoted above. Those doctrines can also be seen in the Court's further observation that "it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately *responsible* for its administration."¹⁰⁷ Justice Brennan summed up his result as recognizing the evolution of doctrines of tort law toward equitable loss-spreading as a co-equal factor with fault and viewed this result as a proper approach to allocation of the costs attendant upon constitutional violations,¹⁰⁸ despite Justice Powell's contention, in dissent, that the approach places a heavy financial burden on "the level of government least able to bear it."¹⁰⁹ The *Owen* Court seemed not only to be embracing a policy-orientated approach to section 1983 — in particular,

¹⁰⁰ 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, 919 (1979) [hereinafter Note, *One Step Forward*].

¹⁰¹ Note, *Section 1983*, *supra* note 94, at 954.

¹⁰² 445 U.S. 622 (1980).

¹⁰³ *Id.* at 624-25.

¹⁰⁴ *Id.* at 650.

¹⁰⁵ *Id.* at 654.

¹⁰⁶ *Id.* at 651.

¹⁰⁷ *Id.* at 655 (emphasis added).

¹⁰⁸ *Id.* at 657.

¹⁰⁹ *Id.* at 670 (Powell, J., dissenting).

policies associated with tort law — but also to be heading toward the inevitable conclusion that those policies would, in a proper case, mean *respondeat superior*.

Despite the *Owen* Court's seeming adoption of the *Monell* critics' views, the Court has not adopted *respondeat superior* and, indeed, seems to have pulled back from the logic of *Owen* read broadly. For example, in 1981, in *City of Newport v. Fact Concerts, Inc.*,¹¹⁰ the Court confronted the issue of whether punitive damages were available against a municipality whose official policy had violated the plaintiff's constitutional rights. The Court ruled that no such damages could be awarded, engaging in an analysis that at times seems close to Justice Powell's dissent in the *Owen* case.¹¹¹ Justice Blackmun, writing for the majority in *Fact Concerts*, trotted out the rejection of the Sherman amendment as evidence both that Congress was concerned with financial burdens on local governments, and also that it did not want "innocent taxpayers . . . unfairly punished for the deeds of persons over whom they had neither knowledge nor control."¹¹² The taxpayers in *Owen* may well have had knowledge and control, at least imputed through the concept of official policy, but it would seem equally unfair to punish taxpayers in that context if the relevant officials acted in a blameless fashion. Perhaps *Owen* and *Fact Concerts* are not inconsistent. The Court certainly thought the decisions were consistent, emphasizing in the latter case the deterrence and compensatory effects of the damages which *would* be assessed against the municipality.¹¹³ Neither decision is directly on point when it comes to the issue of *respondeat superior*. As for that question, the Court has insisted since *Owen* and *Fact Concerts* that the *Monell* result was correct and that the task now is to flesh out the meaning of the concept of official policy. The only justice to dissent on this issue is Justice Stevens.¹¹⁴

Not all of the arguments put forth in favor of *respondeat superior* by Justice Stevens and the critics are overwhelmingly convincing. For example, it seems difficult, despite their insistence,¹¹⁵ to draw any clear conclusion from the status of municipal tort liability in 1871. This is, in any event, a matter over which the Court is hopelessly divided. Justice Powell has described section 1983 as enacted against a "background of immunity,"¹¹⁶ while Justice Blackmun has indicated that at the time municipalities were "subject to suit for a wide range of tortious activity."¹¹⁷ Perhaps the historical argument is essentially a matter of emphasis, to the point that one can find in the common law background support for either conclusion.¹¹⁸ To the extent, however, that the Court is willing to recognize the general pertinence of common law principles, which develop and change, to section 1983 adjudication, this willingness would lead to a receptive view of *respondeat superior*. If the Court were once again to plunge as deeply into the waters of contemporary tort theory as it did in *Owen*, the same undertaking would almost certainly lead to a repudiation of *Monell* on this point.

¹¹⁰ 453 U.S. 247 (1981).

¹¹¹ See *id.* at 266-70; *Owen*, 445 U.S. at 671-75 (Powell, J., dissenting).

¹¹² *Fact Concerts*, 453 U.S. at 266.

¹¹³ *Id.* at 266-69.

¹¹⁴ See *Pembaur*, 106 S. Ct. at 1303 (Stevens, J., concurring); *Tuttle*, 105 S. Ct. at 2441 (Stevens, J., dissenting).

¹¹⁵ *Tuttle*, 105 S. Ct. at 2442 & n.5 (Stevens, J., dissenting).

¹¹⁶ *Owen*, 445 U.S. at 679 n.18 (Powell, J., dissenting).

¹¹⁷ *Fact Concerts*, 453 U.S. at 259.

¹¹⁸ See, e.g., *Tuttle*, 105 S. Ct. at 2434 n.5.

Perhaps there is a substantial degree of policy oriented analysis lurking in the *Monell* Court's rejection of the *respondeat superior* approach. The relevant policies, however, are those of comity and federalism. What is worth pondering is whether the principles of federalism, as articulated in the *Younger* line of cases and similar decisions, may not have made a sub-silentio reappearance in the *respondeat superior* portion of *Monell*, after being seemingly ignored in the basic decision to hold municipalities liable. In particular, it is worth noting that the *Monell* Court drew on the Sherman amendment's history as justification for a *limiting* approach to municipal liability under section 1983.¹¹⁹ Yet such an approach flies in the face of much of what preceded it in the *Monell* opinion itself where the Court "unequivocally" concluded that municipalities were included in the statute's reference to any person. It may be that the Court was indeed concerned with the impact of section 1983 lawsuits on municipal treasuries and eschewed loss-spreading arguments precisely because those who would bear the loss would ultimately be the taxpayers, particularly in their ability to receive the desired level of municipal services. There is thus a striking ambiguity about *Monell*, an ambiguity which makes sense if one accepts the view that federalism concerns drove the Court to seek a limited form of municipal liability every bit as much as nationalist concerns drove it to establish that liability in the first place. The pivotal question then becomes whether official policy, the operative concept which the Court adopted in lieu of *respondeat superior*, will perform a limiting function without going so far as to swallow up the liability which spawned it initially. The recent struggles to give content to the concept shed light on this question, as does a closer look at the arguments in favor of its adoption — as opposed to those which simply lead to rejecting the polar alternatives of *respondeat superior* or municipal immunity.

D. Official Policy — A Doctrine Derived from a Process of Elimination?

The Court's opinion in *Monell* offers substantial justification for rejecting both municipal immunity and *respondeat superior*, but relatively little support for adopting official policy as the operative concept for determining municipal liability. Justice Brennan may have thought the conclusion was obvious — "compel[led]" by the language and legislative history,¹²⁰ as he stated — or the Court may have settled on official policy by a process of elimination. Neither of the polar alternatives was acceptable; thus, the answer was to be found somewhere in between at a rather nebulous point to be clarified later. While this reading is tempting, *Monell* and subsequent cases do offer some guidance as to the reason for adopting official policy.

One theme is that of directness: a municipality should be liable only for its own acts, not those of others, even municipal employees. Perhaps the legislative history — the rejection of the Sherman amendment — provides more support for this notion than does the statutory language. Rejection of vicarious liability can imply an acceptance of direct liability,¹²¹ while "causes to be subjected" does not necessarily point one way or the other. Justice Rehnquist has, in fact, explained this aspect of *Monell* as guided primarily by the legislative history.¹²²

¹¹⁹ See *supra* text accompanying notes 87–89.

¹²⁰ *Monell*, 436 U.S. at 690, 691.

¹²¹ Cf. Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 Geo. L.J. 1483, 1523–24 (1977).

¹²² *Tuttle*, 105 S. Ct. at 2433.

Of course, municipal corporations are like other artificial persons in that they can act only through agents. Implicit in the concept of official policy is a distinction between policymaking "agents" and those of lower rank. The taxpayers should be liable only for the choices of those in the former category because their policy decisions can be imputed more directly to the taxpayers who "chose" them. Holding a municipality liable for, say, an unconstitutional ordinance thus is substantially different from holding it (and the taxpayers) liable for such costs and risks of government as errant policemen. The latter is vicarious liability, the former is direct. Line drawing is inescapable. Ordinances generally are not adopted by referendum, for example; even here, there is an element of vicariousness. Still, one can see what the Court is driving at.

A second theme is that of fault. The *Monell* opinion only used the word "fault" twice, somewhat in passing.¹²³ The subsequent case of *Tuttle*, however, recast *Monell* as establishing a fault-based approach to municipal liability under section 1983.¹²⁴ What the Court means by fault is not yet clear. It may be only a means of restating the directness requirement. Fault-based liability is the opposite of vicarious liability. But the Court may be reaching for something more through the use of fault, in particular, for notions of culpability. The municipality must have done something which is *wrong* in some sense. Adoption of an unconstitutional policy is one example of a wrong act, even if, under *Owen*, there was no bad faith. State of mind may come into play, however, if the municipality acts deliberately in a manner which, although not itself unconstitutional, causes a constitutional violation. As analysis of *Tuttle* will demonstrate, developing the concept of fault is likely to prove difficult for the Court.¹²⁵

A point in favor of the concept of official policy is that redressing unlawful core conduct by government entities is one of the principal roles of the civil rights litigation which section 1983 exemplifies.¹²⁶ One perceptive pre-*Monell* commentator drew a distinction between "political cases" and "constitutional tort cases."¹²⁷ He defined political cases as "those in which a plaintiff sues a state or local government, alleging that its *policies*, usually embodied in statutes or regulations, are unconstitutional."¹²⁸ Municipal liability in the political cases not only would be faithful to the goals of civil rights litigation; it would be essential because the individual defendants would enjoy some form of immunity thus potentially leaving the claimants remediless.¹²⁹ In contrast, in the constitutional tort cases, such as *Monroe*, involving individual abuse of power, the individual defendant would be liable while the municipality would be immune. The *Monell* Court appears to have agreed with this analysis.

Thus, there are arguments in favor of official policy as the operative concept of municipal liability. Beyond any intrinsic merit, however, is the underlying desire of the Court, or at least some of its members, to limit the liability established in *Monell*. Justice Rehnquist, in particular, has suggested a need to develop official policy in a manner which makes these limits effective.¹³⁰ It is in this search for limits that the principles of

¹²³ *Monell*, 436 U.S. at 681 n.40, 692 n.57.

¹²⁴ See generally *Tuttle*, 105 S. Ct. at 2434; *id.* at 2440 (Brennan, J., concurring).

¹²⁵ See *infra* text accompanying notes 166-69.

¹²⁶ Levin, *supra* note 121, at 1519.

¹²⁷ *Id.* at 1487.

¹²⁸ *Id.* (emphasis added).

¹²⁹ *Id.* at 1536-37.

¹³⁰ *Tuttle*, 105 S. Ct. at 2436. See also *id.* at 2434 n.5 (discussing *Monell* as a case limiting municipal liability).

federalism emerge as a powerful force. Governments are treated differently from corporations in applying the doctrine of *respondeat superior* because, in the American federal system, they occupy a distinct position.¹³¹ Concern for the public fisc is present also.¹³² The municipal treasury is reachable (putting aside possible indemnification in individual officer suits) only when core conduct of the municipality itself is at issue.

Yet the official policy concept has, merit apart, an obvious Achilles' heel: workability. Its contours may be more than elusive; they may be incapable of ascertainment. Questions such as who are policymakers, when and how do policymakers make policy, and whether the policy itself must be unconstitutional to impose liability are proving extremely difficult for the Supreme Court and lower courts. Something more than the inevitable fleshing out of a new concept may be involved. Close examination of the Supreme Court's post-*Monell* decisions on the question leads to the conclusion that despite surface agreement over official policy as the operative concept, there is still fundamental disagreement over whether the concept is to perform a limiting function or whether any distinction between "political cases" and "constitutional torts" will be blurred to the point of obliteration. For the federalistic block, the search for limits is dominant. For the nationalists, "*Monell* is a case about *responsibility* . . .,"¹³³ and the concept of official policy need not operate to defeat liability.

II. THE ELUSIVE CONTOURS OF OFFICIAL POLICY — TOWARDS A LIMITING OR A BROAD DEFINITION?

A. *Tuttle and the Problem of Linking Single Acts to Official Policy*

Seven years after *Monell*, in 1985, the Court took its first "small but necessary step" toward clarifying official policy.¹³⁴ *City of Oklahoma City v. Tuttle*¹³⁵ presented one of the classic issues which the official policy concept will pose: when the only direct violation of constitutional rights is the act of a nonpolicymaking municipal employee, what conduct by policymakers must be shown in order to link the municipality itself to the violation?

Tuttle involved the fatal shooting of plaintiff's husband by a police officer who had been on the city's force for ten months.¹³⁶ The evidence raised substantial questions about the officer's claim that his use of deadly force was justified given the threat to his life from a possible robber.¹³⁷ Plaintiff's case against the city was based on the theory that a policy of inadequate police training had caused the officer's actions.¹³⁸ As proof of this policy, she introduced expert testimony on the force's training, testimony by the officer concerning his training, and facts about the incident itself.¹³⁹ The trial judge's instructions appeared to permit the jury to infer the existence of a policy of inadequate

¹³¹ Levin, *supra* note 121, at 1534 n.199.

¹³² See, e.g., *Owen*, 445 U.S. at 665 (Powell, J., dissenting). See also Note, *One Step Forward*, *supra* note 100, at 919; Note, *Municipal Liability Under Section 1983 for Civil Rights Violations After Monell*, 64 IOWA L. REV. 1032, 1048-49 (1979).

¹³³ *Pembaur*, 106 S. Ct. at 1297 (emphasis added).

¹³⁴ *Tuttle*, 105 S. Ct. at 2429.

¹³⁵ 105 S. Ct. 2427 (1985).

¹³⁶ *Id.* at 2429-30.

¹³⁷ *Id.* at 2430.

¹³⁸ *Id.*

¹³⁹ *Id.*

training solely from the fact that the incident occurred.¹⁴⁰ The Supreme Court reversed the Court of Appeals for the Tenth Circuit's decision upholding a verdict against the city.¹⁴¹

Justice Rehnquist wrote for a plurality of four.¹⁴² He first focused on the relationship of the instruction to plaintiff's theory of inadequate training. He noted that the plaintiff did not argue that the city had a policy which authorized the use of excessive force, but that its training and supervision were so lax that such incidents would occur.¹⁴³ This raised the issue of what evidence concerning training (and supervision) was before the jury. Justice Rehnquist rejected the plaintiff's claim that she had introduced sufficient evidence by focusing on the instruction. Under it the jury could have disbelieved all testimony concerning training except the fact that the shooting occurred and still found the municipality liable for its policy.¹⁴⁴ Such an inference would be an incorrect application of *Monell* and the concept of official policy because it would permit "the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers."¹⁴⁵ In other words, plaintiff's trial counsel had secured too favorable an instruction.

One might have expected Justice Rehnquist to leave matters there. He proceeded, however, to an apparent alternate holding based on plaintiff's contention that *Monell* permits a finding of official policy based on a single decision with a single victim.¹⁴⁶ In addressing this argument, Justice Rehnquist distinguished *Monell* by noting that the policy at issue there "in and of itself violated the constitutional rights . . ." of the plaintiffs.¹⁴⁷ No such claim could be made for the policy asserted in *Tuttle*. Justice Rehnquist argued that some kind of policy can always be found and connected to an alleged deprivation. In *Tuttle*, for example, the city had a "policy" of maintaining a police force.¹⁴⁸ Thus, Justice Rehnquist observed, the plaintiff's broad reading of *Monell* raised the issue of constitutional violations tied to not-unconstitutional policies.¹⁴⁹

Before reaching the issue of constitutional violations tied to not-unconstitutional policies, Justice Rehnquist suggested a narrow definition of policy, based on state-of-mind elements. Policy implies "a course of action consciously chosen from among various alternatives."¹⁵⁰ Requiring a conscious decision would seem to rule out the possibility that negligent training can amount to policy. Indeed, Justice Rehnquist raised the question whether even gross negligence would be enough.¹⁵¹

¹⁴⁰ See *id.* at 2430-31.

¹⁴¹ *Tuttle v. City of Oklahoma City*, 728 F.2d 456 (10th Cir. 1984), *rev'd*, 105 S. Ct. 2427 (1985).

¹⁴² Justice Rehnquist was joined by Chief Justice Burger, Justice White, and Justice O'Connor. *Tuttle*, 105 S. Ct. at 2429. Justice Powell did not participate. Justices Brennan, Marshall, and Blackmun concurred in part and concurred in the judgment. *Id.* at 2437 (Brennan, J., concurring). See *infra* text accompanying notes 154-65. Justice Stevens dissented on the ground that *respondeat superior* should be the applicable standard. *Id.* at 2441-47 (Stevens, J., dissenting).

¹⁴³ *Tuttle*, 105 S. Ct. at 2434.

¹⁴⁴ *Id.* at 2435.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2435-37.

¹⁴⁷ *Id.* at 2435. *Monell* is also distinguishable because there was no dispute in *Monell* that the policy concerning medical leaves by pregnant employees had been adopted by the city. See, e.g., *id.* at 2441 (Brennan, J., concurring).

¹⁴⁸ *Tuttle*, 105 S. Ct. at 2436.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 2436 n.7.

As to policies not in themselves unconstitutional, Justice Rehnquist's treatment of the issue raises doubts as to whether he would ever find liability under such circumstances.¹⁵² At the very least, he argued, plaintiffs in not-unconstitutional policy cases must prove more than a "single incident . . . to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation."¹⁵³ Just what the plaintiff is to prove more of is not clear from Justice Rehnquist's opinion. As for *Tuttle* itself, the defective instruction removed the need for any further analysis of the issue of liability in a not-unconstitutional policy case because the instruction in *Tuttle* would have permitted a finding of liability without proof of anything beyond the incident.

Justice Brennan's concurring opinion, for himself and Justices Blackmun and Marshall, accepts much of Justice Rehnquist's analysis as well as his result.¹⁵⁴ Because the jury could have found the city liable solely on the basis of what one officer did on one occasion, the trial judge's instruction would have improperly allowed circumvention of *Monell's* rejection of *respondeat superior*.¹⁵⁵ He reiterated *Monell's* emphasis on causation, an inquiry required by the statute.¹⁵⁶ Justice Brennan noted that the predicate to a finding of causation is that the city itself acted.¹⁵⁷ Yet, he concluded, the instruction could have led the jury to disregard any evidence about what municipal policymakers did or did not do.¹⁵⁸

Justice Brennan disagreed with the plurality over the issue of policies not in themselves unconstitutional. In part he felt that that question need not be reached.¹⁵⁹ As Justice Brennan noted, the instruction's defect was the possibility that the municipal policy, whatever its nature, would not be a factor in the jury's verdict.¹⁶⁰ Thus, Justice Brennan concluded that by reaching the issue of constitutional violations tied to not-unconstitutional policies, the plurality had only complicated a matter which was simple, at least in this case.¹⁶¹

While Justice Brennan felt the question should not be reached, he made it clear where he stood with respect to the issue of the nature of the policy: it makes no difference whether the municipal policy alleged is unconstitutional or not.¹⁶² He noted that the first two elements of a section 1983 action were satisfied in *Tuttle* because a city is a "person" for purposes of section 1983 and its police training procedures are actions "under color of state law."¹⁶³ Justice Brennan further noted that the plaintiff would also have to show that the policy in question caused deprivation of a constitutional right, but stated that the nature of the policy would not be determinative on this point.¹⁶⁴ Indeed, Justice

¹⁵² Justice Rehnquist argued that "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter." *Id.* at 2436.

¹⁵³ *Id.* (citations omitted).

¹⁵⁴ *Id.* at 2437 (Brennan, J., concurring).

¹⁵⁵ *Id.* at 2440.

¹⁵⁶ *Id.* at 2439-40.

¹⁵⁷ *Id.* at 2439.

¹⁵⁸ *Id.* at 2440.

¹⁵⁹ *Id.* at 2441 n.8.

¹⁶⁰ *Id.* at 2441 n.7.

¹⁶¹ *See id.* at 2437.

¹⁶² *Id.* at 2441 n.8.

¹⁶³ *Id.* at 2439.

¹⁶⁴ *Id.* at 2441 n.8.

Brennan dismissed as "metaphysical" any "distinction between policies that are themselves unconstitutional and those that cause constitutional violations."¹⁶⁵

Tuttle presents a paradigmatic official policy problem: the only municipal employee whose actions were directed at the plaintiff was of nonpolicymaking rank. In the police context, for example, there is a wide range of training policies which might be attributable to a particular city. The gamut runs from sloppiness in hiring, training, and supervision to an express authorization to use deadly force in unwarranted circumstances. Under *respondeat superior*, the plaintiff would succeed if she showed that the employee was acting within the scope of his authority. Under official policy, she must go further and show some link between his action and actions or decisions of policymakers. In this respect, Justice Brennan is right that, on its facts, *Tuttle* is an easy case. Under the instruction, the jury could have ignored the relevant policymakers altogether and still found for plaintiff. *Tuttle* does, however, raise broader issues.

Both Justices Rehnquist and Brennan agreed that the question of fault was present in *Tuttle*.¹⁶⁶ They may even be in agreement on Justice Rehnquist's first suggested limit: that policy implies a state of mind more or less equivalent to an express authorization of the act complained of.¹⁶⁷ Justice Brennan seemed to require policies that either "authorized the . . . act or those that did not authorize but nonetheless were the 'moving force' . . . or cause of the violation."¹⁶⁸ He also quoted with approval the plurality's reference to "conscious choices" as indicative of policy.¹⁶⁹ A strict definition of policy can be seen as satisfying both the directness and culpability aspects of fault. Conscious choice of a course of conduct justifies holding the one who chose it liable for foreseeable results without recourse to notions of vicariousness. There is an element of culpability also: the entity knew or should have known that the constitutional violation would occur.

The above analysis blends consideration of the policy with its results. Justice Rehnquist may, as an alternative, wish to pursue a separate inquiry limited to the nature of the policy. Perhaps notions of culpability require that the policy itself be unconstitutional for the entity to be held liable at all. Thus he might distinguish between sloppy hiring and express authorization to use deadly force in unwarranted circumstances because the former, apart from whether it is a policy and apart from whether it caused plaintiff's constitutional injury, is not a federally invalid way of governing. As an alternative to no liability for not-unconstitutional policies, Justice Rehnquist may settle for the position that such policies trigger more demanding standards of causation suggested by the term "moving force."¹⁷⁰ If this is so, he and Justice Brennan may not be far apart. Justice Brennan dealt with the plurality's hypothetical of a "policy" of having a police force by indicating that "but for" tort analysis is not enough in every case to establish liability,¹⁷¹ although he views "[o]rdinary principles of causation"¹⁷² as sufficient. To the extent that Justice Rehnquist would go beyond ordinary principles of causation in not-unconstitutional policy cases, the inquiry might become quite complex. Would a sliding scale of

¹⁶⁵ *Id.*

¹⁶⁶ See *id.* at 2434; *id.* at 2440 (Brennan, J., concurring).

¹⁶⁷ See *Tuttle*, 105 S. Ct. at 2439 n.4 (Brennan, J., concurring).

¹⁶⁸ *Id.* at 2440 (citation omitted).

¹⁶⁹ *Id.* at 2439 n.4.

¹⁷⁰ *Id.* at 2436 n.8.

¹⁷¹ *Id.* at 2441 n.9 (Brennan, J., concurring).

¹⁷² *Id.*

proof be necessary depending on how close to being unconstitutional the policy was, for example, and what would be the variables?

The Court will soon have an opportunity to clarify the issues opened up by *Tuttle*.¹⁷³ At the very least, it seems Justice Rehnquist has identified problems that are lurking beneath the surface. Whether factors such as the nature of the policy and the policymaker's state of mind can be enlisted in his effort to use official policy as a limiting concept remains to be seen. The *Tuttle* problem of finding a link between what the municipality did and the ultimate constitutional violation when the policymaker has not acted *vis a vis* the plaintiff or the plaintiff's situation would seem inherently more difficult than finding that same link in *Pembaur v. City of Cincinnati*,¹⁷⁴ where a policymaker had acted. Yet *Pembaur* produced five opinions and perhaps as many approaches.

B. *Pembaur and the Problem of Single Acts by Policymakers*

Pembaur arose out of an attempt to serve capias writs upon the premises of a third party against whom no search warrant or similar order had been obtained.¹⁷⁵ The capias were directed at employees of a doctor.¹⁷⁶ He refused to let county deputy sheriffs, later joined by city police officers, enter his clinic beyond the reception area.¹⁷⁷ Efforts to obtain guidance from higher level officials on how to deal with the situation led ultimately to the county prosecutor.¹⁷⁸ His instructions were to "go in and get" the witnesses.¹⁷⁹ The police officers chopped down the door with an axe, and the deputy sheriffs entered and searched the clinic.¹⁸⁰ Asserting that the search and entry violated his constitutional rights, the doctor commenced a section 1983 action against numerous defendants, including the county.¹⁸¹ The lower courts ruled against him on the county's liability, finding that no county policy on the matter had existed.¹⁸² The Supreme Court granted certiorari to review the dismissal of the claim against the county.¹⁸³

In *Pembaur*, unlike *Tuttle*, there was a policymaker directly involved in the constitutional violation. State law authorized the prosecutor to render legal "instructions" to other county officials.¹⁸⁴ Although the sheriff himself was not directly involved in the *Pembaur* incident, he testified that it was standard practice to refer such matters to the prosecutor.¹⁸⁵ The question in *Pembaur* was whether *the prosecutor* had made county policy in issuing a single order directed at a particular set of circumstances. Writing for a plurality of four, Justice Brennan answered the question in the affirmative, viewing the

¹⁷³ The Court has granted *certiorari* in *City of Springfield v. Kibbe*, 106 S. Ct. 1374 (1986). *Kibbe* involved a form of single incident: a high speed chase, leading to an individual's death, in which several officers participated. The case below is reported at 777 F.2d 801 (1st Cir. 1985).

¹⁷⁴ 106 S. Ct. 1292 (1986).

¹⁷⁵ *Id.* at 1294.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1294-95.

¹⁷⁹ *Id.* at 1295.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Pembaur v. City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984), *rev'd*, 106 S. Ct. 1292, 1301 (1986).

¹⁸³ *Pembaur v. City of Cincinnati*, 105 S. Ct. 3475 (1985).

¹⁸⁴ *See Pembaur*, 106 S. Ct. at 1301.

¹⁸⁵ *Id.*

matter as a rather straightforward application of *Monell*. The doctrine of official policy, he wrote, requires courts "to distinguish acts of the *municipality* from acts of *employees*"¹⁸⁶ The opinion makes clear that a municipality acts through its policymakers, and authority to make policy may be found at several levels.¹⁸⁷ Policy can be of general applicability or it can be made in the context of a one-time decision aimed at a particular situation.¹⁸⁸ The crucial question for Justice Brennan was determining who policymakers are. He defined them as decisionmakers with "final authority to establish municipal action with respect to the action ordered."¹⁸⁹ This question, Justice Brennan wrote, should be answered by reference to state law.¹⁹⁰ He concluded that on the facts of *Pembaur* official policy could be found with "little difficulty"¹⁹¹ The county prosecutor had made a decision, and he had final authority under state law to instruct officers, such as the deputy sheriffs, with respect to the legal aspects of their duties.¹⁹²

Both Justices White and O'Connor joined in the judgment and the finding of official policy.¹⁹³ There is, however, a subtle difference in their opinions, one which takes on great importance given the fact that without both of them there would be no majority as to the proper analysis of official policy in single incident cases such as *Pembaur*. Justice White cited the admitted practice of the *city* to use force in such circumstances as an indication of *county* policy on the matter.¹⁹⁴ He also agreed with Justice Brennan that the county prosecutor had authority to make policy, although he seemed to treat the sheriff as having joined in the particular decision.¹⁹⁵ Justice White wrote separately to emphasize that the entry in *Pembaur* was not at the time unlawful under existing Supreme Court fourth amendment precedents.¹⁹⁶ Assuming that it was county policy to act to the full extent of its authority, Justice White stated that the then lawfulness of the forcible entry made it possible for the officials involved to adopt that procedure as standard policy. Had "controlling law," such as a Supreme Court holding, forbade the entry, individual officials could not have done so.¹⁹⁷ Because "the controlling law places limits on their authority," Justice White reasoned, "they cannot be said to have the authority to make contrary policy."¹⁹⁸ These reservations were not relevant to *Pembaur*; thus, Justice White concurred in the Court's judgment and opinion.

Justice O'Connor concurred in the judgment but not in the opinion.¹⁹⁹ Her own opinion is somewhat puzzling. Like Justice White, she was willing to infer that the county's policy paralleled the city's, given the apparent legality at the time of entry of the deputy

¹⁸⁶ *Id.* at 1298 (emphasis in original).

¹⁸⁷ *Id.* at 1298-99.

¹⁸⁸ *Id.* at 1299.

¹⁸⁹ *Id.* (citation omitted).

¹⁹⁰ *Id.* at 1301.

¹⁹¹ *Id.* at 1300.

¹⁹² *Id.* at 1300-01.

¹⁹³ *Id.* at 1301 (White, J., concurring); *id.* at 1304 (O'Connor, J., concurring). Justice Stevens cast a sixth vote for reversal. He again advocated *respondeat superior* and rejected the entire inquiry into official policy as improper. *Id.* at 1303 (Stevens, J., concurring).

¹⁹⁴ *Id.* at 1301 (White, J., concurring).

¹⁹⁵ See *id.* at 1302 ("in this case . . . the sheriff and prosecutor chose a course that was not forbidden by any applicable law . . .").

¹⁹⁶ *Id.* at 1301.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1304 (O'Connor, J., concurring).

sheriffs' and police officers' actions.²⁰⁰ She also viewed the actions taken as those of more than one official, and apparently viewed this as a factor in determining the existence of county policy.²⁰¹ She rejected, however, the majority's analysis as broader than necessary to decide the case and potentially too broad for future cases.²⁰²

It is hard to figure out from Justice O'Connor's opinion when the county prosecutor would not be a policymaker with respect to the legality of arrest procedures. Her reference to "standard operating procedure"²⁰³ may suggest that the elected county governing body knew of the practices and that this knowledge was relevant. She rejected Justice Brennan's final authority test, although for reasons that are not clear. Justice White's insistence on lawfulness as a variable, as well as the other factors noted, suggests that he too wanted the inquiry to extend beyond the status of the decision maker. Both Justice O'Connor and Justice White seem to have searched the record to ascertain the presence of someone of policymaking rank besides the prosecutor and of something beyond the one-time phone call in order to find official policy.

Justice Powell's dissent,²⁰⁴ for himself, Chief Justice Burger, and Justice Rehnquist, is quite explicit. He rejected the plurality's approach to ascertaining the existence of policy as focusing on *who* acted rather than *what* they did. He found Justice Brennan's reasoning inherently circular: "policy is what policymakers make, and policymakers are those who have authority to make policy."²⁰⁵ For Justice Powell, the inquiry should focus on the nature of what was done and the process which led to it.²⁰⁶

One indication that policy has been made, wrote Justice Powell, is the formulation of a rule of general applicability.²⁰⁷ He reasoned that governments are properly held responsible for generalized decisions about how to govern.²⁰⁸ Justice Powell went on to state that one time decisions, as well as rules of general applicability, can also constitute official policy.²⁰⁹ Whether a one time decision is official policy, he explained, depends on the process which yielded that decision.²¹⁰ Where formal procedures involving "voting by elected officials, prepared reports, extended deliberations, or official records" are utilized in making the one time decision, Justice Powell would find that official policy had been made.²¹¹ To him, the *Pembaur* facts involved merely an "off-the-cuff answer to a single question"²¹² rather than a generalized rule about arrest procedures or the product of any policymaking process. Because neither a rule of general applicability nor a single decision resulting from formal procedures was present, Justice Powell viewed the majority as holding the municipality liable for *all* decisions by policymakers within the scope of their authority, whether the decisions were policy or not.²¹³ To him, this result was tantamount to the *respondeat superior* liability which *Monell* forbids.²¹⁴

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* (Powell, J., dissenting).

²⁰⁵ *Id.* at 1308.

²⁰⁶ *Id.* at 1308-09.

²⁰⁷ *Id.* at 1309.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 1310.

²¹³ *Id.* at 1308.

²¹⁴ *Id.*

Neither the Brennan nor the Powell approach commands a majority of the Court. Each illustrates the problems of workability which are endemic to the official policy concept. In applying the Brennan test, determining the locus of "final authority" will inevitably pose difficulties. Apparently, final means binding unless appealed to someone who has authority to reverse the decision.²¹⁵ Justice Brennan recognized that policymaking authority may be delegated.²¹⁶ Thus plaintiffs in particular cases will seek to identify final authority further and further down the line of municipal command. The lower courts will have to look to state and local law, which may be unclear. These problems, while serious, will probably sort themselves out over time as a body of guiding precedent is developed, assuming the plurality approach is followed.

Justice Powell's approach — it cannot really be called a test — might prove harder to apply. It appears that the status of the decision maker is not relevant. Only the two factors of generality and process are. How much generality is necessary to convert what might be considered a one-time decision into a rule of general applicability? In the *Tuttle* context, would the outcome have been different if the prosecutor had also issued an "off-the-cuff" memo outlining what he had authorized and implying that it represented arrest policy for future incidents? Alternatively, how much process would have sufficed to turn the telephone response into a one-time decision constituting policy? Justice Powell's opinion suggests that if some sort of deliberative action had preceded the instructions — a staff meeting perhaps — the instructions would have constituted policy. Given the flexibility of the criteria offered; especially in the "process" prong, it would take the lower courts a long time to formulate a consistent approach to policy in the context of a one-time decision by an official of policymaking rank.²¹⁷

On a more fundamental level is the question of which approach is most faithful to *Monell's* endorsement of municipal liability coupled with its rejection of *respondeat superior*. Justice Brennan can be criticized for failing to deal adequately with the problem of *ad hoc* decisions by policymakers within their sphere of authority. If the municipality is liable for everything policymakers do within that sphere, Justice Powell's equation of this position with *respondeat superior* has merit. Justice Brennan chose to rely on definitions of policy, leading to a battle of the dictionaries.²¹⁸ A better defense might be that the municipality has chosen to put the particular official in a form of governing position. That is quite different from merely "hiring a tortfeasor" and seems to reflect the core conduct approach implicit in the concept of official policy. The policymaker can be viewed as sufficiently part of the government itself that both the directness and culpability aspects of fault are met.²¹⁹

Justice Powell does, of course, recognize the possibility of *ad hoc* decisions and treats them as different from policy. There is much to be said for focusing on generality and/or process as the hallmarks of official policy for which a municipality is liable. These are indications of governing — by definition the sort of activity for which governments should be liable under a core conduct approach.²²⁰ In addition, the municipality's posture

²¹⁵ Cf. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108, 3119–21 (1985) (defining final action).

²¹⁶ *Pembaur*, 106 S. Ct. at 1300.

²¹⁷ Predictability is somewhat aided by the fact that this is a federal law inquiry.

²¹⁸ Compare *Pembaur*, 106 S. Ct. at 1299 n.9 (1981 Webster's dictionary defines policy as a decision(s) to carry out a chosen course of action(s)) (Brennan, J.) with *id.* at 1309 (1979 Webster's dictionary defines policy as a "governing principle [or] plan") (Powell, J., dissenting).

²¹⁹ See *supra* text accompanying notes 121–25.

²²⁰ See *supra* text accompanying notes 126–32.

is weakest when it has done what Justice Powell would require and still come out with an unconstitutional policy. Liability is thus fully justified. But should the *ad hoc* cases escape liability? Particularly troublesome is the spectre of a municipality which, for whatever reason, eschews policy formulation and governs by *ad hoc*ery. Could the county prosecutor in *Pembaur* continue to give off-the-cuff advice in all such matters without triggering county liability for unconstitutional advice? If the *same* advice was repeated, Justice Powell would probably find evidence of a policy or custom sufficient to impose liability.²²¹ But the proverbial first bite would go unredressed. The issue separating the dissenters from the plurality is whether that first bite really came from the county or the prosecutor.

Tuttle and *Pembaur* present quite different facets of the problem of giving context to official policy as the operative concept for determining municipal liability. The former poses the problem of linking policymakers to the victim of a constitutional deprivation at the hands of nonpolicymakers who were the only municipal officials dealing specifically with him. In *Pembaur*, in contrast, a policymaker dealt directly with the victim.²²² The question is when do the policymaker's acts constitute policy. In both cases the Court was virtually unanimous in invoking official policy as the relevant inquiry, while badly split over how to apply it. Such splits are likely to continue. In part, this prediction is based on the novelty and malleability of the official policy concept. Each of the major opinions discussed above is a plausible interpretation and application of that concept. Beyond any particular question, however, lies the recurring issue of *Monell* and the search for limits.

III. THE OFFICIAL POLICY DEBATE IN THE CONTEXT OF BURGER COURT FEDERALISM — A PROTRACTED CONFLICT?

The parameters of the debate over official policy seem clear. Those who adhere to a nationalist position will attempt to turn it into a broad tool for finding liability. They view section 1983 as a statute to be applied in sweeping fashion, given its central role in vindicating national values through the federal courts. Justice Brennan's opinions in *Tuttle* and *Pembaur* epitomize the nationalist approach to official policy. Those who adhere to a federalistic approach seek to limit municipal liability while not precluding it. Behind their emphasis on *Monell's* rejection of *respondeat superior* lie broader principles of federalism and a desire to harmonize section 1983 with those principles. Justice Rehnquist's opinion in *Tuttle* reflects this approach.

An across the board victory for either side seems unlikely and unaffected by recent changes in the Court's composition. The Burger Court has been sharply split over many issues, including federalism. Its decisions on section 1983 do not fall into a consistent pattern. In the context of official policy, the task of putting together a coherent majority is even more difficult because we are dealing with a set of only eight justices. Justice Stevens rejects the inquiry into official policy altogether. The positions of Justices O'Connor and White in *Pembaur* suggest the absence of any permanent majority such as that which has preserved and strengthened the eleventh amendment despite repeated na-

²²¹ See *Pembaur*, 106 S. Ct. at 1309 (Powell, J., dissenting).

²²² Of course, nonpolicymakers were involved as well.

tionalist assaults.²²³ Still, it may be helpful to sketch some doctrinal factors which could at least tilt the debate one way or the other.

The strongest point in favor of a nationalist approach is that Congress has spoken. The nationalists would argue that the decision in *Garcia* represents broad acceptance of the view that it is Congress, not the federal courts, which is charged with protecting the interests of the states (and localities) within the national government. They would also point out that the original debates over section 1983 can indeed be read as support for the premise that Congress takes federalism concerns into account before it acts. Congress subordinated those concerns to the goals of compensation and deterrence when it enacted section 1983, a statute to be construed broadly. Finally any notions of *state* sovereignty which spring from the eleventh amendment are not relevant because that amendment does not protect municipalities.²²⁴

Central to any federalistic rebuttal of these contentions is the position that Congress spoke in a manner which authorized the courts to exercise broad latitude in giving content to section 1983. Thus it may be true that the Burger Court's principles of federalism are a judicial creation which must yield when Congress so directs.²²⁵ The Court, however, has not read section 1983 as containing such a directive. Indeed, many of the seminal Burger Court cases elaborating principles of federalism involve restrictions on section 1983. As the official policy debate unfolds, according to the federalistic view, it is proper to develop the meaning of official policy with federalism principles in mind. Given the highly intrusive nature of the section 1983 damages remedy, limiting it becomes important. That, for the federalists, is just what *Monell* did.

If the Court remains divided with no synthesis emerging, might Congress step in? Justice Rehnquist invited it to do so in plumbing the difficulties of *Tuttle*.²²⁶ There in fact have been significant legislative attempts to respond to the Court's section 1983 decisions. In the 1970's, liberals upset with decisions on such issues as immunity and intervention in state proceedings sought to overturn those decisions.²²⁷ In the 1980's, the impetus has come from conservatives who view the Court's decisions as too burdensome on local government.²²⁸ Neither attempt has prevailed. Part of the reason may be that the Court trimmed its sails more than once, whether or not in response to these initiatives. More importantly, it is doubtful that either side could win a legislative battle to secure significant changes in the Court's section 1983 decisions. The forces opposed to change in either direction could probably achieve a stand-off. A steamroller type victory such as the Voting Rights Amendments of 1982²²⁹ does not seem likely.

Another approach to the Court's sharp split in section 1983 decisions might be to develop a consensus for legislative reform. The premise would be that continuing un-

²²³ The recent 5-4 decisions sustaining eleventh amendment defenses have all been joined by Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor. For a list of cases, see *supra* note 65.

²²⁴ See *supra* text accompanying notes 62-65.

²²⁵ See Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 114, 117 (1985).

²²⁶ *Tuttle*, 105 S. Ct. at 2434 n.5.

²²⁷ See Howard, *The States and the Supreme Court*, 31 CATH. U.L. REV. 375, 382 (1982).

²²⁸ See Rader, *Section 1983, The Civil Civil Rights Action: Legislative and Judicial Directions*, 15 CUMB. L. REV. 571, 588-89 (1985).

²²⁹ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 1982 U.S. CODE CONG. & ADMIN. NEWS (96 Stat.) 131.

certainty over municipal liability benefits neither side. Municipalities need to plan their financial affairs and, in particular, to know as much about potential liabilities as possible.²³⁰ Would-be plaintiffs want to know where they stand. A possible trade-off would be some version of *respondeat superior* liability²³¹ in return for limits on damages and attorneys fees.²³² Yet, the experience to date with legislative efforts to change section 1983 suggests that any such consensus bill is politically unlikely, apart from attendant legal problems.

Assuming Congress will provide no further guidance, the development of official policy is in the hands of the courts. Leaving the matter to the lower courts seems unwise at this point. Widely varying decisions can be expected in an area — redress for constitutional violations — where uniformity seems particularly desirable. The general issues are known; it is time for the Supreme Court to step in and provide whatever guidance it can. The Court apparently agrees. After allowing *Monell* to develop in the lower courts for several years, it seems to have begun to use its certiorari discretion to address this issue.²³³

The question which arises is whether the Court's intervention will achieve much. In cases like *Tuttle*, where only nonpolicymakers cause the deprivation, a federalistic majority may prevail in insisting upon a substantial link between what the municipality did and the ultimate constitutional violation. With Justice Powell participating, the *Tuttle* plurality alternative holding could become the basis for further limitations on municipal liability, with the lawfulness of the city's conduct an important variable. The outcome in *Pembaur* situations is less certain. The direct involvement of a policymaker seems to make a difference to five members of the Court, although there are not five justices for whom it is enough. The final authority test²³⁴ cannot be viewed as accepted. Even if no majority can be found for a formulation of official policy, plaintiffs will win their share of cases given Justice Stevens' vote. Still, a federalistic majority might yet emerge here as well.²³⁵

²³⁰ See, e.g., Blodget, *Premium Hikes Stun Municipalities*, 72 A.B.A. J. 48 (July 1986) (lack of predictable basis for determining municipal liability under section 1983 has led to unavailable or extremely expensive liability insurance for municipal corporations).

²³¹ See Blum, *supra* note 47, at 413 n.15.

²³² See, e.g., *Tuttle*, 105 S. Ct. at 2447 (Stevens, J., dissenting).

²³³ A decision in *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 106 S. Ct. 1374 (1986), would mark the third straight term in which the Court handed down a decision on official policy.

²³⁴ See *supra* text accompanying notes 215–16.

²³⁵ For another, much commented on, test, see *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984) (initial rehearing *en banc*) *aff'd in part and rev'd in part*, 739 F.2d 993 (second hearing *en banc*), and relevant commentary. E.g., Note, *Bennett v. City of Slidell: New Guidelines for Municipal Liability for Civil Rights Violations*, 1984 DET. C.L. REV. 959 (1984); Note, *Municipal Liability Under 42 U.S.C. § 1983: Bennett v. City of Slidell*, 45 LA. L. REV. 1085 (1985). In *Bennett*, a divided fifth circuit, sitting *en banc*, articulated a stricter standard for determining when official municipal policy has been created by a policy-making official.

The governing body must expressly or impliedly acknowledge that the agent or board acts in lieu of the governing body to set goals and to structure and design the area of the delegated responsibility, subject only to the power of the governing body to control finances and to discharge or curtail the authority of the agent or board.

Bennett, 728 F.2d at 769. *Bennett* thus overruled the earlier broad standard of the fifth circuit that had found official policy to be created whenever the acts or edicts were of a city official with final authority for the relevant area of municipal activity. See, e.g., *Schneider v. City of Atlanta*, 628 F.2d 915 (5th Cir. 1980); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980).

CONCLUSION

A hallmark of the Burger Court's overall judicial federalism²³⁶ has been resistance to use of the federal courts to restructure sub-national institutions.²³⁷ The centerpiece of such litigation — as chronicled by Professor Chayes and others²³⁸ — is the wide-ranging injunctive decree.²³⁹ The Court has perceived serious conflict between systemic relief and principles of federalism.²⁴⁰ It may be that the section 1983 damages action is perceived as sufficiently different from the "public law" suit²⁴¹ that this conflict is not triggered. This would explain why municipalities are liable. Yet the effort to limit this liability springs from the same source as efforts to limit injunctive relief. The very existence of the official policy debate is a creature of Burger Court federalism. It seems likely that the creator's imprint will ultimately push the concept in a restrictive direction.

²³⁶ See generally Weinberg, *The New Judicial Federalism: Where We Are Now*, 19 GA. L. REV. 1075 (1985).

²³⁷ Chayes, *supra* note 22, at 45-56.

²³⁸ E.g., Chayes, *supra* note 22; Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 718-30 (1978).

²³⁹ See, e.g., Eisenberg, *supra* note 2, at 520 ("The injunction in its many forms was the sword of the civil rights movement . . .").

²⁴⁰ See generally Chayes, *supra* note 22.

²⁴¹ The term is that of Professor Chayes. See *id.* at 1.