9-1-1987

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

The Reconstruction Congress enacted the Civil Rights Act of 1871 in order to enforce the provisions of the fourteenth amendment to the Constitution.\(^1\) Section 1 of this Act, currently codified at Title 42 United States Code, Section 1983,\(^2\) provided that parties deprived of their constitutional rights by a "person" acting under color of state law or custom could bring suit in federal court for appropriate relief against the person who caused the constitutional injury.\(^3\) The statute's general language and its lack of clear legislative history\(^4\) has left the interpretation of section 1983's scope to the federal judiciary, and especially the Supreme Court.\(^5\)

In 1961, ninety years after section 1983 became law, the United States Supreme Court directly addressed the statute's application to municipalities for the first time.\(^6\) The Court held that local government officials were "persons" as defined by section 1983,\(^7\) but that municipalities fell outside the statute's provisions.\(^8\) Just seventeen years later, however, the Court reversed this decision and found that municipalities were indeed "persons" for the purposes of section 1983.\(^9\)

The Court limited municipal liability under section 1983, however, to situations where policy or custom directly attributable to the municipality itself caused a constitutional violation.\(^10\) Under this standard, written rules and enacted ordinances, for example, are clearly municipal policies.\(^11\) If, by following these policies, a municipal employee deprives a person of a constitutional right, the aggrieved party may hold the municipality liable under section 1983.\(^12\)

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\(^1\) The Act, 17 Stat. 13 (1871), was entitled, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution to the United States, and for other Purposes."
\(^3\) Section 1983 provides, in relevant part:
    Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.


\(^6\) Monroe, 365 U.S. at 187. See also infra note 74.
\(^7\) Monroe, 365 U.S. at 192.
\(^8\) Id. at 191.
\(^9\) Monell, 436 U.S. at 690.
\(^10\) Id. at 694.
\(^12\) Monell, 436 U.S. at 694.
The Court has more difficulty, however, determining when municipalities may delegate official policymaking authority to municipal officials, thereby giving rise to potential section 1983 liability for the results of actions taken pursuant to policies established under such delegated authority. In addition, the Court has not clearly articulated a standard for determining when municipal liability may attach under section 1983 for constitutional deprivations resulting from actions taken pursuant to municipal custom or usage. The Court's two most recent decisions addressing section 1983 municipal liability have engendered no less than eight separate opinions, and not one of these opinions has mustered the support of a majority of the Court.

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

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

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13 See Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1298 (1986); id. at 1301 (White, J., concurring); id. at 1304 (O'Connor, J., concurring).
15 See Pembaur, 106 S. Ct. at 1292, id. at 1301 (White, J., concurring), id. at 1302 (Stevens, J., concurring), id. at 1304 (O'Connor, J., concurring), id. at 1304 (Powell, J., concurring); Tuttle, 471 U.S. at 808, id. at 824 (Brennan, J., concurring), id. at 834 (Stevens, J., dissenting).
16 The Supreme Court's official policy standard has given rise to two conflicting interpretations of what constitutes official policy in the lower courts. Compare Kibbe v. City of Springfield, 777 F.2d 801, 804 (1st Cir. 1985), cert. denied as improvidently granted, 107 S. Ct. 1114 (1987) (per curiam) (inadequate training valid theory of liability); with Grandstaff v. City of Borger, 767 F.2d 161, 169 (5th Cir. 1985) (inadequate training does not ordinarily give rise to liability).
18 See infra notes 30–70 and accompanying text.
19 See infra notes 71–312 and accompanying text.
20 See infra notes 293–312 and accompanying text for a comparison of Kibbe and Grandstaff.
Section two of this note presents the proposed foreseeability-based standard. The first section argues for a clear standard for determining municipal liability under section 1983. The second section concludes that the proposed standard is consistent with the statutory language, legislative history, judicial construction and underlying policy basis of section 1983.

I. THE DEVELOPMENT OF MUNICIPAL LIABILITY UNDER SECTION 1983

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

A. The Legislative History of Section 1983

1. Section 1 of the Civil Rights Act of 1871

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

21 See infra notes 313-21 and accompanying text.
22 See infra notes 322-47 and accompanying text.
23 See infra notes 354-58 and accompanying text.
24 See infra notes 359-63 and accompanying text.
25 See infra notes 364-403 and accompanying text.
26 See infra notes 404-20 and accompanying text.
27 Owen v. City of Independence, 445 U.S. 622, 635 (1980) ("the starting point in our analysis must be the language of the statute itself").
30 Civil Rights Act of April 20, 1871, 17 Stat. 13 (1871) (also known as the "Ku Klux Klan Act").
31 As originally enacted, § 1 of the Civil Rights Act of 1871 read as follows: That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any right, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or
amendment. Although some sections of the Ku Klux Klan Act were contested hotly by members of Congress, section 1 aroused very little debate.

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

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

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

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

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

Senator Osborn of Florida voiced this concern:

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

Senator Pratt of Indiana stated this problem clearly:

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

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

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

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

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

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

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

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

38 Id. at 174.

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

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


42 See remarks of Representative Kerr, infra note 54.

43 See remarks of Representative Carpenter, infra note 47.

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

45 See remarks of Senator Carpenter, infra note 47.

46 See remarks of Representative Hoar, infra note 54.
Members of Congress understood section 1983's wide-ranging power, but the seriousness of the Klan's outrages, coupled with the failure of local governments to deal with these outrages, had convinced Congress to act. Moreover, the bill's sponsor in the House stated that courts should construe the Act "liberally and beneficently" in order to fully effectuate the fourteenth amendment's guarantees. Congress intended section 1983 to deter violations of constitutional rights and, when violations occurred, to provide a federal remedy to the victim. Congress recognized that if the fourteenth amendment's broad civil rights guarantees were to be available throughout the United States, neutral federal courts would have to enforce them.

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

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

While section 1 of the Civil Rights Act of 1871 aroused relatively little controversy, Senator Sherman's proposed amendment to the Civil Rights Act caused an
As originally passed by the Senate, the Sherman amendment imposed individual liability and monetary damages upon inhabitants of a municipality where prohibited injuries occurred. The House, however, rejected the proposed amendment. When the Sherman amendment emerged from the conference committee, it mandated that courts enforce judgments first against the persons who committed the proscribed acts and, if not satisfied within two months, then against the municipal corporation itself.

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

Proponents of the Act, however, while fully aware of the extension, justified it as being a proper exercise of federal power: protection of the citizens' federal constitutional rights. Thus, the proponents continued, pursuant to the fourteenth amendment, Congress was justified in infringing upon what previously was exclusively the states' province. To the proponents, the importance of protecting and effectuating the provisions of that amendment outweighed any concern over weakening the states' rights. Representative Hoar stated:

The question is not whether a majority of the people in a majority of the States are likely to be attached to and able to secure their own liberties. The question is not whether the majority of the people in every State are not likely to desire to secure their own rights. It is, whether a majority of the people in every State are sure to be so attached to the principles of civil freedom and civil justice as to be as much desirous of preserving the liberties of others as their own, as to insure that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights.
Members of Congress agreed that the fourteenth amendment protected all inhabitants of the United States. Opponents of the Sherman amendment argued, however, that the proposal sought to impose an affirmative obligation that was beyond the power of the federal government. In 1871, the prevailing view of coordinate sovereignty regarded municipalities as subdivisions of the state governments which existed by the states' consent and under their dominion. Thus state governments could require municipalities engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

_Monell_, 436 U.S. at 702–03 (quoting _Globe_, supra note 33, at 663).

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

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

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

_Monell_, 436 U.S. at 670 & n.21, 673.

_Monell_, 436 U.S. at 673. Members of Congress noted that municipalities are creations of the states and exist at their pleasure, and thus may have limitations or obligations imposed by the states. Municipalities were considered to be, in some ways, subdivisions of the states, formed in order to allow the states to govern more effectively. Municipalities, unlike states, however, were not found to be protected by the provisions of the eleventh amendment.

Representative Blair stated:

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

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

_Monell_, 436 U.S. at 674–75 (quoting _Globe_, supra note 33, at 795). The Sherman amendment, which would have granted the federal government the power to require municipalities to keep the peace, was likened to the recently overturned power to tax state officers and thereby destroy the states. _Id._ at 675 (quoting the remarks of Rep. Blair, _Globe_, supra note 33, at 795, _citing Collector v. Day_, 11 Wall. 113 (1871)).

_Monell_, 436 U.S. at 678–79.
municipalities to raise a police force in order to protect their citizens, but the federal
government had no sovereign power to do so. Federal power was limited to preventing
the states and their subdivisions from violating the provisions of the federal Constitu-
tion. The distinction was drawn between Congress requiring municipalities to act to
protect a person's constitutional rights, and Congress requiring municipalities themselves
to refrain from violating a person's constitutional rights. In short, members of Congress
believed that the federal government did not have the power to require that municipali-
ties actively protect their citizens' rights. This was not because they felt that a municipality
could violate its citizens' constitutional rights, but because they viewed federal authority
as limited in this area.66

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

B. Judicial Construction of Municipal Liability Under Section 1983

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

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62 Id. at 668.
63 Id. at 680. The remarks of Representative Burchard make this clear:
[T]here is no duty imposed by the Constitution of the United States, or usually by
State laws, upon a county to protect the people of that county against the commission
of the offenses herein enumerated, such as the burning of buildings or any other
injury to property or injury to person. Police powers are not conferred upon counties
as corporations; they are conferred upon cities that have qualified legislative power.
And so far as cities are concerned, where the equal protection required to be afforded
by a State is imposed upon a city by State laws, perhaps the United States courts could
enforce its performance. But counties . . . do not have any control of the police . . .
Id. (quoting GLOBE, supra note 33, at 795).
64 Id. at 674–75.
65 Id. at 680.
66 Id.
67 Id. at 681 n.40.
68 See supra note 31 for the text of § 1 of the Act.
69 See supra note 58 for the text of the Sherman amendment and relevant portions of the first
conference substitutes.
70 Monell, 436 U.S. at 681 n.40.
71 The number of § 1983 municipal liability cases has increased astronomically since the Su-
72 Compare, e.g., Monell, 436 U.S. at 694 (municipalities may be liable under § 1983) with Monroe
contrastng pairs of cases. Each pair of cases addresses the same underlying issue, yet the result reached or the analysis applied differs between the cases, demonstrating the ambiguity and confusion in the current state of the law. These inconsistencies demonstrate the tension between the Justices of the Court who favor either an expansive or limited interpretation of municipal liability under section 1983. Often neither philosophy can summon a majority of the Justices. This note, therefore, submits that an unarticulated "middle ground," which represents a compromise between expansive and limited interpretations of section 1983, has emerged that most accurately describes current Supreme Court doctrine.

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

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

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

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


75 Monroe, 365 U.S. at 187.

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

77 Id. at 187.

78 Id. at 191.

79 Id. at 192.

80 See id. at 171–87.

81 Id. at 191. Referring to the 42d Congress's debates, the Court stated that by defeating the Sherman amendment, "[t]he response of the Congress to the proposal to make municipalities liable for actions being brought within the federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." Id.
of [law]" could reach the actions of municipal officers who deprive a person of a constitutional right.\textsuperscript{82} This interpretation gave rise to many suits against municipal officials in their "official capacity" for actions taken pursuant to municipal policy or custom.\textsuperscript{83}

The \textit{Monroe} Court also employed tort doctrine\textsuperscript{84} to interpret section 1983's language which attaches liability to a person who indirectly causes another to suffer a constitutional violation.\textsuperscript{85} The Court stated that "[s]ection [1983] should be read against the background of tort liability that makes a [person] responsible for the natural consequences of his [or her] actions."\textsuperscript{86} While this statement specifically referred to municipal officers who deprived individuals of their constitutional rights while acting "under color of law," it has shaped the subsequent development of actions brought under section 1983.\textsuperscript{87}

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

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

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

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

\textsuperscript{84} \textit{Monroe}, 365 U.S. at 187.

\textsuperscript{85} 42 U.S.C. \$ 1983 (1982) ("Everyone who . . . subjects, or causes to be subjected").

\textsuperscript{86} Id. It should be noted, however, that \textit{Monroe} was essentially a "constitutional tort" action. See supra note 83 for a discussion of political versus constitutional tort \$ 1983 actions.

\textsuperscript{87} As a result of this statement, courts have relied on the concepts of causality and fault. \textit{See}, e.g., \textit{City of Oklahoma City v. Tuttle}, 471 U.S. 898, 824 (1985). While this approach provides a means of organizing actions and, through the use of analogy, extending the scope of \$ 1983, one commentator has argued that some courts have "seized upon the 'background of tort liability' catch phrase with little consideration given to the background of 1983 liability." \textit{See}, e.g., Nahmod, \textit{Section 1983 and the 'Background' of Tort Liability} 50 Nw. U. L.J. 5, 8–9 (1974). Later cases, however, have developed the tort principles of duty, causality and fault within the context of such actions. \textit{See}, e.g., \textit{Tuttle}, 471 U.S. at 822–24; \textit{id.} at 829–32 (Brennan, J., concurring); \textit{Parratt v. Taylor}, 451 U.S. 527 (1982); Owen v. City of Independence, 445 U.S. 622, 654 (1980).

\textsuperscript{88} \textit{Monroe}, 365 U.S. at 172–87.
exhaust state remedies before bringing suit in federal court. The Court found that an important aspect of section 1983 is the existence of an independent federal remedy, which assures adequate compensation for persons deprived of constitutional rights.

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

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

The Monell Court's decision turned on a reinterpretation of the Sherman amendment debates and a recognition of the validity of the Dictionary Act of 1871. The

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89 Id. at 173–74, 183.
90 Id. at 174.
91 Id. at 192.
92 Id. at 191.
93 Id. at 187. See also Nahmod, supra note 87.
94 Id. at 173–74.
95 See supra note 83. In these suits, nominally against the municipal official "responsible" for the action, the named defendant changed each time the office changed hands.
96 See id.
97 Monell, 436 U.S. at 690 ("Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies") (emphasis in original). Monell involved an official policy of a local independent school board that compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The Court previously held that such a policy was unconstitutional. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). Thus, the only question was whether school boards were "persons" within the meaning of § 1983. Monell, 436 U.S. at 662.
98 Id.
99 Id. at 694. The Court stated that municipal liability would attach "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the [constitutional deprivation]." Id.
100 Id. at 665–83.
101 Dictionary Act of Feb. 25, 1871, § 2, 16 Stat. 431 (1871). This Act stated that, "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense."
Court's fresh analysis of the Sherman amendment debates led it to distinguish between holding a municipality responsible for its own actions and imposing an affirmative obligation on municipalities. The Court found that Congress rejected the federal imposition of a new obligation. The Court stated that the Sherman amendment would have imposed liability regardless of whether a municipality was at fault in any way. Section 1983, however, requires government action which results in deprivation of a constitutional right before courts may grant relief under the statute.

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

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102 Monell, 436 U.S. at 665–63. This distinction was stated by Representative Poland: [T]he enforcing [of] a liability, existing by [municipalities'] own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever.

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

103 Id.

104 Id. at 681 n.40.

105 See Monroe, 365 U.S. at 187.

106 Monell, 436 U.S. at 690–91.

107 See Brown, supra note 54, at 896.


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

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

111 Id. at 690.


113 Id. at 691. The Court stated: "the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." Id. at 692.
expressly rejected a *respondeat superior* basis for municipal liability. In summary, *Monell* established that courts may hold a municipality liable under section 1983 when an officially adopted policy, or a custom not formally approved but "permanent and well settled," causes the deprivation of a person's constitutional rights. Although *Monell* extended section 1983 liability to municipalities, the decision did not resolve many issues, including the scope of municipal liability.

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

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

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

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

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

115 *Monell*, 436 U.S. at 691.

116 *Id.* at 694.

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


120 *Owen*, 445 U.S. at 638.

121 *Fact Concerts*, 453 U.S. at 267.

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

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

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

125 *Owen*, 445 U.S. at 628-29.
alleged, among other things, that Police Chief Owen had misappropriated police department property for his own use, that drugs and money had disappeared from his office, and that traffic tickets had been "fixed." 126 After receiving the city council's authorization, the city manager discharged Owen without explanation.127 Owen brought suit against the City of Independence, the City Manager, and the members of the city council in their official capacities, alleging that he had been discharged without due process of law.128 Although the city counselor had assured the members of the city council that their actions would not result in liability for either the city or the council,129 the Supreme Court held otherwise.130

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

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

126 Id. at 627-28.
127 Id. at 628-29.
128 Id. at 630.
129 Id. at 629 n.6.
130 Id. at 638.
131 Id. at 635-36.
132 Id. at 638-50.
133 Id. at 650.
134 Id. at 638. The Court stated "we can discern no 'tradition so well grounded in history and reason' that would warrant the conclusion that in enacting [§ 1983] . . . Congress sub silentio extended to municipalities a qualified immunity based on the good faith of their officers." Id. at 650.
135 Owen, 445 U.S. at 637. The Court was likely referring to § 1983's language stating that "Every person who" causes constitutional injury is to be held liable. See 42 U.S.C. § 1983 (1982).
136 Id. at 637-38.
138 Owen, 445 U.S. at 640-50 ("a municipality has no 'discretion' to violate the Federal Constitution").
139 Id. at 651 ("How 'uniquely amiss' it would be . . . if the government itself . . . were permitted to disavow liability for the injury it has begotten.").
140 Id. at 650-51.
141 Id. at 657 ("No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.
The Court also noted that a good faith immunity may deprive the victim of a constitutional injury of adequate compensation. The Court also noted that a good faith immunity may deprive the victim of a constitutional injury of adequate compensation. Mr. Justice Powell wrote a dissenting opinion which stressed the importance of federalism and limited section 1983 municipal liability. The Powell dissent stated that the Owen decision virtually created strict municipal liability under section 1983. The opinion also pointed out a number of factors which counsel in favor of extending a good faith immunity to municipalities: substantial municipal tort immunity under nineteenth century common law, "basic fairness," and concern for the public fisc. Less than one year later, in the 1981 decision of City of Newport v. Fact Concerts, Inc., the Court concluded that Congress, in its silence, did not intend that municipalities would be liable for punitive damage awards under section 1983. The Court's opinion relied on many of the same factors cited by the Owen majority, such as congressional silence, historical background, and public policy. The majority in Fact Concerts, however, also relied on many factors cited by the Owen dissent, namely the background of municipal tort "immunity" in 1871, concepts of blameworthiness, and concern for the municipal fisc. The Fact Concerts Court did, however, reiterate that section 1983's main goals are deterrence of and compensation for constitutional deprivations.

We believe that today's decision ... properly allocates these costs among the three principals in ... the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public.

" Owen, 445 U.S. at 657.

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

" Id. at 669 (Powell, J., dissenting).

" Id. at 670 (Powell, J., dissenting).

" Id. at 676 (Powell, J., dissenting).

" Id. at 665 (Powell, J., dissenting).


" Owen, 445 U.S. at 258-71. The Court found that "members of Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and they likely intended these common-law principles to obtain, absent specific provisions to the contrary." Id. at 259. The Court stated that it must consider "both the policies that [an immunity] serves and its compatibility with the purposes of § 1983... before recognizing an immunity under the statute."

" Id. at 271; Owen, 445 U.S. at 670 (Powell, J., dissenting).

" Fact Concerts, 453 U.S. at 267. Id.

" Fact Concerts, 453 U.S. at 268.
The crux of the *Fact Concerts* opinion, however, was the Court's reasoning that a municipality could not have the malicious intent required for punitive damages to attach.\(^ {160}\) The Court distinguished between holding a municipality liable for constitutional deprivations that result from the effectuation of its official policies, and holding a municipality liable for the "knowing and malicious" acts of a municipal official.\(^ {161}\) The *Fact Concerts* Court noted that when an official acts pursuant to an officially adopted municipal policy, he or she often will be accorded a good faith immunity;\(^ {162}\) the municipality, however, may be held liable under section 1983.\(^ {163}\) If an official acts unilaterally, and maliciously deprives an individual of his or her constitutional rights, in contrast, that official will not be accorded a good faith immunity and may be held personally liable under section 1983.\(^ {164}\) Thus the Court found that only the actual wrongdoer should be punished, and the victim of a constitutional injury accorded an avenue of redress in either instance.\(^ {165}\)

In summary, the Court in both *Owen* and *Fact Concerts* relied on common law principles to give meaning to the language of section 1983.\(^ {166}\) Both opinions relied on section 1983's legislative history and language, the state of the common law in 1871, and public policy grounds to give meaning to Congress's silence on the issues of a good faith municipal immunity and the award of punitive damages against municipalities under section 1983.\(^ {167}\) The philosophies underlying the two opinions, however, appear to have been quite different.\(^ {168}\) The *Owen* opinion stated that "equitable loss-spreading" should join fault in determining liability, thus potentially opening municipalities to broad section 1983 liability.\(^ {169}\) The *Fact Concerts* opinion took the opposite approach and limited the permissive scope of damage awards by finding municipal malice impossible thus precluding the award of punitive damages.\(^ {170}\) One opinion sought to broaden municipal liability, while the other limited it.\(^ {171}\) Both opinions, however, stressed that compensation for past constitutional violations and the deterrence of future deprivations of constitutional rights are the twin goals of section 1983.\(^ {172}\)

\(^ {160}\) Id. at 267.
\(^ {161}\) Id. at 263, 267. The Court called liability for punitive damages the inequity of visiting retribution "upon the shoulders of blameless or unknowing taxpayers . . ." for acts of a "knowing and malicious" government official. Id. at 267. The dissent, however, took exception with the majority's exculpation of "blameless or unknowing taxpayers" stating, "when the elected representatives of the people adopt a municipal policy that violates the Constitution, it seems perfectly reasonable to impose punitive damages on those ultimately responsible for the policy — the citizens." Id. at 274 (Brennan, J., dissenting).
\(^ {162}\) See supra note 137 and accompanying text for a discussion of § 1983 immunities.
\(^ {164}\) *Fact Concerts*, 453 U.S. at 267.
\(^ {165}\) Id. at 263.
\(^ {166}\) See supra notes 132–38 and accompanying text concerning common law principles and § 1983 municipal liability.
\(^ {167}\) See supra notes 131–34 and accompanying text and note 150 and accompanying text concerning congressional silence.
\(^ {168}\) See supra note 124 and accompanying text contrasting the philosophies of the *Owen* and *Fact Concerts* opinions.
\(^ {169}\) See supra notes 141–43 and accompanying text for a discussion of "equitable loss-spreading."
\(^ {170}\) See supra notes 160–61 and accompanying text for a discussion "municipal malice."
\(^ {171}\) See supra note 124 and accompanying text.
\(^ {172}\) See supra notes 140 and 159 and accompanying text for a discussion of the Court's assessment of the purposes behind § 1983.
b. The "affirmative link" or "causal connection" requirement: Rizzo and Polk County

Both *Owen* and *Fact Concerts* concerned constitutional deprivations clearly caused by official municipal policies.\(^{179}\) In many other cases, however, plaintiffs allege that action less directly attributable to the municipality or its officials has "caused" a constitutional deprivation.\(^{174}\) As a result, the Supreme Court requires proof of an "affirmative link" between the alleged constitutional injury and an official municipal policy or custom in order to trigger municipal liability under section 1983.\(^{175}\)

The requirement of an affirmative link between the alleged constitutional deprivation and an official municipal policy derives from the Supreme Court's 1976 decision in *Rizzo v. Goode*.\(^{176}\) The *Rizzo* plaintiffs alleged a pattern of frequent constitutional rights violations by the Philadelphia police.\(^{177}\) The plaintiffs also alleged that departmental procedure tended to discourage civilians from filing complaints and minimized the consequences of police misconduct.\(^{178}\) The district court found no departmental policy concerning the alleged police misconduct, although it agreed that the plaintiffs had proved numerous instances of police misconduct.\(^{179}\) The Supreme Court stated that the absence of such a policy, or so-called "affirmative link," between the demonstrated police misconduct and the decisionmaking officials relieved the defendants of liability under section 1983.\(^{180}\)

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

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\(^{177}\) In *Owen* the city council adopted a resolution to release the information to the press and authorized the city manager to "take all direct and appropriate action." *Owen*, 445 U.S. at 628–29. The Newport City Council's actions resulted in a substantial loss to a state licensed concert promoter. *Fact Concerts*, 453 U.S. at 249–52.


\(^{179}\) Id. at 366.

\(^{180}\) Id. at 372.

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

\(^{180}\) *Rizzo*, 423 U.S. at 371.

\(^{181}\) See, e.g., *Grandstaff v. City of Borger*, 767 F.2d 161, 170 (5th Cir. 1985); *Milligan v. City of Newport News*, 743 F.2d 227, 229 (4th Cir. 1984); *Sanders v. St. Louis County*, 724 F.2d 665, 667
municipal liability may attach under section 1983. Finally, still other courts have read Rizzo for the principle that, under section 1983, supervisors do not have a duty to supervise municipal employees. At a minimum, however, Rizzo requires (1) an official policy or unofficial but widespread custom, (2) attributable to the municipality, either explicitly or implicitly, (3) that is a sufficient "affirmative link" to the alleged constitutional deprivation, before municipal liability will attach.

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

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

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

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

See, e.g., Dick v. Watonwan County, 738 F.2d 999, 943 (8th Cir. 1984) (must be policy for county liability, failure to supervise insufficient to establish such liability); Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir. 1982) (must be at least implicit authorization by municipal policymaker to establish liability).

Rizzo, 423 U.S. at 371.
Monell, 436 U.S. at 690.
Polk County, 454 U.S. at 326 (quoting Monell, 436 U.S. at 694).
id. at 315.
id. at 326.
id.
id. Some lower courts have seized upon this language to require a "constitutionally forbidden rule or procedure" before a municipality may be liable under § 1983. See Rizzo, 423 U.S. at 362. Lower courts have stated this principle as a requirement that "[a]t a minimum a plaintiff must show that the [policymaking] official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." Hays v. Jefferson County, 668 F.2d 869, 874 (4th Cir. 1982). See also Dick v. Watonwan County, 738 F.2d 999, 943 (8th Cir. 1984). The Court has not determined yet whether an official municipal policy or custom must itself be unconstitutional or whether a policy or custom need only cause a constitutional deprivation before § 1983 liability will attach. See Tuttle, 471 U.S. at 824 n.7; id. at 839 n.8 (Brennan, J., concurring).
Polk County, 454 U.S. at 326; Rizzo, 423 U.S. at 371.
See, e.g., Tuttle 471 U.S. at 824 n.7; id. at 839 n.8 (Brennan, J., concurring).
Polk County, 454 U.S. at 326.
id. at 326. See also generally W. Keeton, supra note 114, §§ 41–45 (proximate cause).
c. The Role of Negligence in Section 1983 Municipal Liability: Parratt and Daniels

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

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

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

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197 106 S. Ct. 662 (1986).
199 106 S. Ct. 671 (Brennan, J., dissenting); id. at 671 (Blackmun, J., dissenting, joined by Marshall, J.); id. at 677-78 (Stevens, J., concurring).
200 Parratt, 451 U.S. at 528-29. Parratt involved a complaint against prison officials who allegedly negligently misplaced a state prison inmate's hobby materials. The prisoner brought suit under § 1983 alleging that he had been deprived of property without due process of law in violation of his fourteenth amendment rights. Id. at 530-31.
201 Id. at 535.
202 Id. at 534.
203 Id. at 534-35.
204 Id. at 535.
205 Id. at 534-35. The Court, however, went on to find that although the conduct had been under "color of state law," it did not constitute a denial of due process because adequate state procedural safeguards existed. Id. at 544. The Court noted that unless somehow limited, "every alleged violation which may have been inflicted by a state official acting 'under color of law' [would become] a violation of the Fourteenth Amendment cognizable under § 1983." Id. Four justices joined in concurring opinions, three limiting the decision to deprivation of property. Id. at 544-46 (Stewart, White & Blackmun, JJ., concurring). Justice Powell, concurring in the result, asserted that there was no "uniform answer" to the intent question, but that close attention should be paid to the "nature of the particular constitutional violation in determining whether intent is a necessary element of such a violation." Id. at 547-48 (Powell, J., concurring).
208 Daniels, 106 S. Ct. at 665. The Court further stated that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together
mere negligence on the part of a state official cannot violate the due process clause of the fourteenth amendment.\textsuperscript{209} The dissenting opinions in Daniels' companion case, Davidson v. Cannon, however, raise the possibility that a higher degree of negligence, such as gross negligence, could implicate the provisions of the due process clause and rise to the level of a fourteenth amendment violation.\textsuperscript{210} The Court, however, has not yet addressed what standard will apply in cases arising under other constitutional provisions.


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

\textsuperscript{209} See Davidson v. Cannon, 106 S. Ct. 668, 671 (1986) (Brennan, J., dissenting); id. at 673 & n.2 (Blackmun, J., dissenting). The Davidson case, decided the same day as Daniels, applied the Daniels holding to a more difficult situation, which lead three justices to dissent and Justice Stevens to concur only in the judgments of both cases. In Davidson, a prison inmate, after being threatened by a fellow inmate, sent a note reporting the situation to a prison official. No official took action in response to the note, and two days later the plaintiff was attacked by the other inmate and seriously injured. Stating that "[t]he guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials," the Court relied on Daniels to hold that the "protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." Id. at 670-71.

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

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


\textsuperscript{211} 106 S. Ct. 1292 (1986).

\textsuperscript{212} 471 U.S. 808 (1985).

\textsuperscript{213} See infra notes 216-40 and accompanying text for a discussion of Pembaur. See infra notes 241-92 and accompanying text for a discussion of Tuttle.
municipal liability, while Tuttle finds the plurality opinion applying an individual liability analysis.215

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

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

215 See supra note 83 for a discussion of municipal/political case liability versus individual/constitutional tort actions.
216 106 S. Ct. 1292 (1986).
217 Monell, 436 U.S. at 694.
218 Pembaur, 106 S. Ct. at 1294. Pembaur involved police officers who attempted to serve two capiases on a doctor's employees and were denied entrance to the doctor's office. The officers made a number of phone calls to successively higher ranking municipal officials, finally contacting the County Prosecutor who instructed them to "go in and get them." When the officers were unable to force the door, they chopped it down with an axe and entered. Although two individuals were detained, they were not the employees named in the capiases. Id. at 1294-97.
219 Id. at 1297. The Supreme Court granted certiorari in order to determine whether the County Prosecutor's telephoned instructions constituted official county policy, thus making the county liable under § 1983. Id. Pembaur resulted in a plurality opinion written by Justice Brennan, joined by Justices Marshall and Blackmun, three separate concurrences by Justices White, Stevens and O'Connor, and a dissent written by Justice Powell, joined by Chief Justice Burger and Justice Rehnquist.
220 Pembaur, 106 S. Ct. at 1301.
222 Pembaur, 106 S. Ct. at 1300.
223 Id. The opinion compared the decisions officially adopted by the city councils in Owen v. City of Independence, 445 U.S. 622, 628-29 (1980) and City of Newport v. Fact Concerts, 453 U.S.
stressed that a municipality thus may be liable for a single decision by a policymaker, or a single action resulting from that policy, if a person is deprived of a protected right.224

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

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

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

224 Pembaur, 106 S. Ct. at 1298.
225 Id. at 1301.
226 Id.
228 Pembaur, 106 S. Ct. at 1300.
229 See id. at 1304 (O'Connor, J., concurring); id. at 1302 (White, J., concurring).
230 Id. at 1304 (O'Connor, J., concurring); id. at 1301–02 (White, J., concurring).
231 Id. at 1302 (White, J., concurring). The Justice further stated that "[n]ot every act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality." Id. at 1301 (White, J., concurring).
232 Id. at 1295 (White, J., concurring).
233 Id. at 1303–04 (Stevens, J., concurring). Justice Stevens stated that at the time § 1983 was originally enacted, the doctrine of respondeat superior was applied to municipalities. Id. (Stevens, J., concurring). Justice Stevens referred to four articles critical of the Court's "official policy" standard that argue for respondeat superior liability under § 1983. See, Blum, From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts, 51 Temple L.Q. 409 (1978); Note, Section 1983 Municipal Liability and the Doctrine of Respondeat Superior, 46 U. Chi. L. Rev. 935 (1979); Note, Municipal Liability Under Section 1983 for Civil Rights Violations After Monell, 64 Iowa L. Rev. 1032 (1979); Note, Monell v. Department of Social Services: One Step Forward and a Half Step Back for Municipal Liability Under Section 1983, 7 Hofstra L. Rev. 893 (1979).
234 Pembaur, 106 S. Ct. at 1308–09 (Powell, J., dissenting).
Powell, an official policy should be a "rule of general applicability." The dissent contended that the plurality’s reasoning was circular, official policy being made by "policymakers" and policymakers establishing official policy. By focusing on the nature of the policymaker’s decision and the process by which it was reached, Justice Powell argued, mere ad hoc decisions would be distinguished from true municipal policies. Applying this reasoning to the facts of the case, the dissent found that the municipality had adopted no rule of general applicability, suitable to all similar situations. In addition, Justice Powell’s opinion stated that the “off the cuff manner” of the prosecutor’s decision did not indicate an extended deliberation or a formal decisionmaking process that would evidence the adoption of an official policy. The dissent concluded, therefore, that the county prosecutor’s instructions could not have established an official county policy.

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

235 Id. at 1309 (Powell, J., dissenting). The dissent’s standard is similar to that recently articulated by the Fifth Circuit in Bennett. See supra note 221.
236 Id. at 1308 (Powell, J., dissenting) ("policy is what policymakers make, and policymakers are those who have authority to make policy").
237 Id. at 1309 (Powell, J., dissenting).
238 Id. (Powell, J., dissenting).
239 Id. at 1310 (Powell, J., dissenting).
240 Id. (Powell, J., dissenting). Furthermore, the dissent took exception with a finding of a constitutional deprivation, noting that in Ohio the Sixth Circuit had held that a capias was sufficient authority to enter a building. It was not until four years after the events in Dr. Pembaur’s office that the Supreme Court held that a search warrant must be obtained in such situations. Thus, the dissent argued that there had been no violation of the Constitution at the time of the events in question. Id. at 1305 (Powell, J., dissenting).
241 See supra notes 216–40 and accompanying text for a discussion of Pembaur.
243 Id. at 814; id. at 827 (Brennan, J., concurring). Lower courts, however, have distinguished Tuttle when numerous police officers are involved in a “single incident.” See, e.g., Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985), cert. denied as improvidently granted, 107 S. Ct. 1314 (1987); Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985). Both courts agreed that Tuttle’s single incident rule was not implicated when many police officers were involved in the incident at issue. See infra notes 267–77 and accompanying text for discussion of the single incident rule. Grandstaff, 767 F.2d at 170; Kibbe, 777 F.2d at 805–06. Each court allowed municipal liability to be inferred under § 1983. The Grandstaff court relied on a police department policy or custom of dangerous recklessness. 767 F.2d at 170. The Kibbe court found inadequate training as a basis for municipal liability. 777 F.2d at 804.
244 The suit in Grandstaff arose from the actions of the entire night shift of the Borger, Texas, police department. A high-speed automobile chase ultimately led all five units of the Borger police department onto a ranch in pursuit of a driver who allegedly had fired upon officers after refusing to stop. Grandstaff, the foreman of the ranch, attempted to investigate the commotion and he was killed in full view of his family by a barrage of police gunfire as he stepped out of his pickup truck. Grandstaff, 767 F.2d at 165. The court found that “[t]he City and officers insist, to this day, that they are free of fault and deserve no blame . . . . There is not a single word in this record about any effort at any time by the City of Borger to avoid police failure or abuse.” Id. at 166.
245 In Kibbe, up to twenty Springfield, Massachusetts police officers were involved in an automobile chase through the city that ultimately resulted in the death of Clinton Thurston, the driver of the pursued car. Three different officers fired shots at the car, and the final round caused Thurston’s
the city and an individual police officer under section 1983, alleging that their actions deprived the decedent of his constitutional rights. The plaintiff argued that under Monell the city should be liable for gross negligence in failing to train its police officers adequately. Furthermore, this inadequate training could be inferred from a single, unusually excessive use of force by a police officer, as in this case, where a robbery suspect was shot and killed. A majority of the Court refused to infer official municipal policy from a single incident involving a municipal officer without policymaking authority such as a low-level police officer. Both the plurality and concurring opinions relied on the Monell Court's statement that a municipality may be liable only for its own actions. Citing Monell's fault requirement and the statute's causation requirement, both opinions concluded that municipal liability under section 1983 requires more than an employment relationship. Instead, the plaintiff must prove that the municipality itself, through an official policy or custom, caused the constitutional violation.

Justice Brennan identified four elements as essential to recovery under section 1983. Tuttle's concurring opinion stated that a plaintiff must show that (1) a person, (2) acting under color of state law, (3) subjected the plaintiff, or caused the plaintiff to be subjected, (4) to the deprivation of a protected right. The plurality and concurring opinions differed as to which element of the section 1983 cause of action implied death. At trial, the plaintiff introduced evidence that Springfield police officers were not trained adequately in proper pursuit procedures. Indeed, one of the pursuing officers testified that "his training on stopping a car consisted of being told to move up behind it, put on his lights and siren, and hope the suspect pulls over." Kibbe, 777 F.2d at 807.

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

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

246 Id. at 813. The district court judge instructed the jury, "a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." Id.

247 Id. at 823–24; id. at 892–93 (Brennan, J., concurring).

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

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

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

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

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

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

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

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

256 Id. (Brennan, J., concurring).
The opinions also diverged on the question of whether a single incident which results in a constitutional deprivation could ever give rise to municipal liability under section 1983. Justice Rehnquist's plurality opinion emphasized that municipal policies must be the result of "conscious choice," presumably made by municipal policymakers. Furthermore, a course of conduct rather than a single incident was required before a court might infer municipal custom. Justice Brennan's concurring opinion, in contrast, emphasized the need for proving the municipality's causation of the injury and invoked foreseeability as a relevant standard.

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

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

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257 For a discussion of the causation element of a § 1983 claim, see supra notes 278-79 and accompanying text.
258 See Tuttle, 471 U.S. at 823-24, id. at 831 (Brennan, J., concurring).
259 Id. at 823. See also infra note 278.
261 Id. at 831 (Brennan, J., concurring).
262 Id. (Brennan, J., concurring).
263 Id. at 823-24.
264 Id. at 832.
265 Id.
266 Id. at 823-24.
267 Id.
268 Id. at 833 n.8 (Brennan, J., concurring) ("If a municipality takes actions ... that cause the deprivation of a citizen's constitutional rights, section 1983 is available as a remedy.").
269 Id. at 829-31 (Brennan, J., concurring). The concurrence disagreed with the plurality's implicit requirement of proof of more than one violation of a constitutional right before a municipality may be liable under § 1983. Justice Brennan specifically noted that "[a] § 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims ... ." Id. at 832 (Brennan, J., concurring).
270 Tuttle, 471 U.S. at 831 (Brennan, J., concurring) ("In such a case, when the misbehavior was attributable to other factors for which the city is not responsible, the city itself may well not bear any part of the fault for the incident; there may have been nothing that the city could have done to avoid it.").
the causation element of section 1983 into two parts: an action taken by a municipality as opposed to a municipal employee's unilateral action, and proof that this municipal action caused the deprivation of a protected right. Under this analysis, the concurrence found that a municipality's procedures for training its police officers were bona fide policies for the purposes of the first part of the test. Justice Brennan concluded, however, that the lower court's instructions had made it possible for the jury to disregard the second element of the test. Justice Brennan's concurrence stated, therefore, that liability could not attach because the lower court had not required proof of a causal connection between the municipality's policy of training and the constitutional deprivation. Inferring such a policy or custom from a single incident would be tantamount to respondeat superior liability, stated Justice Brennan. But, he stated, section 1983 is as available to the first victim of a policy or custom which causes a constitutional violation as it is for subsequent victims. In addition, Justice Brennan's opinion noted that the foreseeability, and thus avoidability, of a victim's injury as a result of a municipal policy or custom was a sound basis for imposing section 1983 liability.

The two opinions' different emphases may explain their division over two issues raised in dicta by the plurality: whether a municipality's training program for its police officers constitutes an "official policy" as envisioned by Monell and whether an otherwise constitutional policy could give rise to municipal liability under section 1983. Justice Rehnquist's plurality found that, generally, it was doubtful that a constitutional policy such as police training procedures, could ever give rise to municipal liability under section 1983. Justice Rehnquist contrasted Monell's clearly unconstitutional policy of requiring maternity leaves regardless of physical condition with the more "nebulous" police training procedures alleged in Tuttle. Justice Brennan's concurring opinion, however, stated that it is irrelevant whether a policy is constitutional or unconstitutional. Instead he looked to the question of causation. Finally, Justice Stevens, in his

271 Id. at 829–30 (Brennan, J., concurring).
272 Id. (Brennan, J., concurring).
273 Id. at 832–33 (Brennan, J., concurring).
274 Id. (Brennan, J., concurring).
275 Id. at 831 (Brennan, J., concurring).
276 Id. at 832 (Brennan, J., concurring).
277 Id. at 832–32 (Brennan, J., concurring).
278 Tuttle, 471 U.S. at 823. The Court stated that the term "policy generally implies a course of action consciously chosen from among various alternatives, it is therefore difficult . . . to accept the submission that someone pursues a 'policy' of 'inadequate training' unless evidence . . . proves . . . that the policymakers deliberately chose a training program which would prove inadequate." Id. See also id. at 829 (Brennan, J., concurring) ("In this case, the municipal policies involved were the set of procedures for training and supervising police officers.").
279 Id. at 824 n.7 ("We express no opinion on whether a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can ever meet the policy requirement of Monell."); id. at 833, n.8 (Brennan, J., concurring) ("I do not understand, nor do I see the necessity for, the metaphysical distinction between policies that are themselves unconstitutional and those that cause constitutional violations.").
280 Tuttle, 471 U.S. at 823.
281 For a discussion of Monell, see supra notes 97–117 and accompanying text.
282 Tuttle, 471 U.S. at 822–23.
283 Id. at 833 n.8 (Brennan, J., concurring). See also supra note 279.
284 Id. at 833 n.8 (Brennan, J., concurring) ("If a municipality takes actions . . . that cause the deprivation of a citizen's constitutional rights, section 1983 is available as a remedy.").
dissenting opinion, argued that *respondeat superior*, rather than the Court’s “official policy” standard, should be applied to municipal liability under section 1983.\(^{285}\)

In summary, a majority of the *Tuttle* Court agreed that an official municipal policy or custom cannot be inferred from a single isolated incident involving a single low-level police officer.\(^{286}\) Furthermore, a majority agreed that section 1983 liability attaches only when a municipality itself is at fault by causing a constitutional deprivation through its own policy or custom.\(^{287}\) The *Tuttle* Court divided, however, over defining official policy and sufficient cause under section 1983.\(^{288}\) Justice Rehnquist viewed conscious choice as an essential element of policy\(^{289}\) and stated that when the policy is not in itself unconstitutional, it may not provide a sufficient basis for municipal liability.\(^{290}\) The concurring opinion of Justice Brennan, however, relied on causation as the accurate measure of fault.\(^{291}\) If a municipality’s official policy or custom causes a constitutional violation, argued Justice Brennan, the municipality ought to be liable under section 1983 regardless of whether the policy itself is unconstitutional.\(^{292}\)

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

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

\(^{286}\) *Tuttle*, 471 U.S. at 8823. See *supra* notes 264–67 and accompanying text.

\(^{287}\) *Supra* notes 251–53 and accompanying text.

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

\(^{289}\) Compare *Tuttle*, 471 U.S. at 8823 n.7. See *supra* note 267 and accompanying text.

\(^{290}\) *Supra* notes 268–70 and accompanying text.

\(^{291}\) See *supra* note 269 and accompanying text.

\(^{292}\) *Kibbe*, 777 F.2d 801 (1st Cir. 1985) (inadequate police officer training may give rise to § 1983 municipal liability) with *Grandstaff*, 767 F.2d 161 (5th Cir. 1985) (inadequate police officer training usually will not give rise to § 1983 municipal liability).

\(^{293}\) 777 F.2d 801 (1st Cir. 1985).

\(^{294}\) 767 F.2d 161 (5th Cir. 1985).

\(^{295}\) 777 F.2d at 804.

\(^{296}\) 767 F.2d at 169.

\(^{297}\) 777 F.2d at 805; *Grandstaff*, 767 F.2d at 171.
and both courts inferred municipal liability under section 1983. The Grandstaff court found a police department policy or custom of dangerous recklessness, while the Kibbe court identified inadequate training as the basis for municipal liability.

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

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

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

Lower courts urgently need a clear standard for determining municipal liability under section 1983. The Supreme Court's attempts to fashion a compromise between municipal immunity and respondeat superior liability clearly has created a great deal of
confusion and uncertainty in this area. Although the Supreme Court requires a causal link between a municipality's official policy or custom and a plaintiff's constitutional injury, the Court's opinions provide relatively little guidance on how lower courts may correctly construe this causal connection requirement. Hence, the lower courts have established differing standards for imposing section 1983 municipal liability.

This note proposes a standard based on whether a municipality's policies or customs could foreseeably deprive a person of a constitutional right. This standard clarifies Monell, 436 U.S. at 683 (emphasis in Tuttle). Monell's "official policy or custom" standard was also a compromise between continuing the municipal immunity of Monroe, with its inconsistent result of many "official capacity" suits and respondeat superior liability. Official capacity suit judgments rendered against municipal officials, interestingly, were usually paid out of municipal treasuries or by municipal insurance policies when such judgments resulted from actions taken pursuant to a municipal policy which caused a constitutional deprivation. Respondeat superior liability, however, would have resulted in municipal liability solely on the basis of the employment relationship existing between the municipality and its employees. See W. Keeton, supra note 114, § 70 at 301. Thus a municipality would be liable for any constitutional violations visited by any municipal employee while acting under color of law, whether furthering municipal policy, acting pursuant to municipal custom, or acting on the vagaries of a whim.

E.g., compare Kibbe, 777 F.2d at 805–06 (inadequate police officer training a valid affirmative link to establish municipal liability) with Grandstaff, 767 F.2d at 109 (inadequate police officer training not the "ticket to municipal liability"). Even proponents of the official policy standard realized that it would be difficult to define and apply. See Levin, supra note 83, at 1540. The Supreme Court, as reflected in Pembaur's disparate opinions, itself is divided deeply as to the proper parameters of its requirement. Currently, the most widespread standard applied by the lower courts is the "final authority" standard, first articulated by the Fifth Circuit in Briscoe v. Familias Unidas, 619 F.2d 391 (5th Cir. 1980). See supra note 221. This standard, similar to the one proposed by Justice Brennan in the plurality opinion in Pembaur, states that "in those areas where a city officer is the final authority or ultimate repository of [city] power his official conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the [city] may be held responsible under section 1983." Schneider v. City of Atlanta, 628 F.2d 915, 920 (5th Cir. 1980) (quoting Martell, 436 U.S. at 690). Although this standard has been adopted by many of the circuits, see supra note 221, the Fifth Circuit recently overturned the "final authority" standard and articulated a new one. See Bennett v. City of Slidell, 728 F.2d 765 (5th Cir. 1984) (en banc). The new Fifth Circuit definition of "official policy" has two parts. Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984), aff'd in part, rev'd in part, remanded, 739 F.2d 993 (5th Cir. 1984) (en banc) (per curiam). In the Webster decision the court stated:

Official policy is:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policymaking authority; or

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

Id. Monell, 436 U.S. at 694.


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

Professor Eric Schnapper first identified foreseeability as the crucial factor in municipal
Both the *Rizzo* Court's causal connection requirement and the *Monell* Court's official policy or custom standard by providing a means to determine whether an officially adopted municipal policy, or an implicit municipal custom caused the plaintiff's constitutional deprivation. The essential element of this standard is municipal awareness of official policies and pervasive custom.

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

### A. The Need for a Clear Standard

A majority of the Supreme Court Justices have agreed that municipalities may be held liable under section 1983 when an official municipal policy or custom subjects a person, or causes a person to be subjected, to the deprivation of a constitutional right. The Court, however, has had a great deal of difficulty achieving a consensus concerning the parameters of the *Monell* "official policy" standard. As a result, the lower courts have been unsure when municipal liability should attach under section 1983. Consequently, See *Schnapper*, *supra* note 17, at 235 ("The most plausible construction of the cause clause is that it includes official policies which entail an unreasonable foreseeable risk of causing a constitutional violation.").

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322 See *Tuttle*, 471 U.S. at 818.

323 But see the multiple decisions in *Pembaur*, 106 S. Ct. at 1293, 1301 (White, J., concurring), 1302 (Stevens, J., concurring), 1304 (O'Connor, J., concurring), and 1305 (Powell, J., dissenting) (Supreme Court Justices' debate concerning the definition of official policy). See also *supra* notes 215-40 and accompanying text for a discussion of *Pembaur*.


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


328 See *supra* notes 293-312 and accompanying text.
sequently, the circuits follow different standards regarding what constitutes Monell's official policy and who may establish this policy. Three separate issues, central to the application of the Monell Court's standard, remain to be clarified. The first is the definition of "official policy," second the role of municipal custom, and third the role of the Court's "affirmative link" or "causal connection" requirement in section 1983 municipal liability.

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

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

The lower courts have also had a great deal of difficulty in applying the official policy standard to situations where a municipal officer promulgated the policy in question. For example, the Fifth Circuit recently abandoned the "final authority" standard which it had itself articulated — and which other circuits had adopted — only to articulate a stricter standard. In the 1984 case of Bennett v. City of Slidell, the Fifth Circuit replaced its "final authority" standard with a two-part test that requires either formal municipal action which expressly delegates policymaking authority to a municipal officer, or municipal conduct or practice which encourages or acknowledges the officer's policymaking role. Other appellate courts, however, continue to adhere to the final authority standard. This standard holds that the conduct and decisions of a municipal officer who is the "final authority or ultimate repository of [municipal] power" represents official policy for which the municipality may be held liable under section 1983. It is clear, therefore, that conflict exists both within the Supreme Court and among the circuit courts concerning who may establish official municipal policy.

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325 See supra notes 221 & 314 and accompanying text.
326 See Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986) (five opinions, none achieving a majority, disputed the proper application of the official policy standard).
327 Monell, 365 U.S. at 694. See also supra note 99.
328 See supra note 173.
329 Pembaur, 106 S. Ct. at 1293; id. at 1301 (White, J., concurring); id. at 1302 (Stevens, J., concurring); id. at 1304 (O'Connor, J., concurring).
330 See supra notes 221–33 and accompanying text.
331 See supra note 221.
332 See supra note 314.
333 Slidell, 728 F.2d at 769.
334 See supra note 221.
335 Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980).
2. The Role of Custom

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

3. The Role of Causation and Fault

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

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

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357 Tuttle, 471 U.S. at 819-24.
358 Tuttle, 471 U.S. at 823.
360 Nahmod, supra note 87, at 10.
361 See supra notes 173-95 and accompanying text.
362 See Tuttle, 471 U.S. at 824; id. at 831 (Brennan, J., concurring).
363 See supra notes 293-312 and accompanying text.
364 See supra note 16. See also supra notes 293-312 and accompanying text.
365 Kibbe, 777 F.2d at 814.
behind a constitutional deprivation. Although the Supreme Court could resolve this issue by deciding whether inadequate training of police officers may serve as an affirmative link between a municipality and a plaintiff's constitutional deprivation, the more fundamental issue of determining what municipal action will constitute an "affirmative link" sufficient to trigger section 1983 liability would still remain. The Supreme Court must announce a standard which clarifies the Court's causation requirement, as well as effectuates the Monell "official policy or custom" standard.

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

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

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

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

546 Grandstaff, 767 F.2d at 169-70.
547 Interestingly, the Court passed up an opportunity to resolve the question of a municipality's liability for inadequate training of police officers when it dismissed certiorari in Kibbe v. City of Springfield as being improvidently granted. 107 S. Ct. 1114 (1987). Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Powell, wrote a stinging dissent to the per curiam decision and then proceeded to decide the case on the merits. The dissenting opinion concluded that, absent "reckless disregard for or deliberate indifference to the rights of persons," municipal liability will not attach under a theory of inadequate training. Id. at 1121 (O'Connor, J., dissenting).
548 Tuttle, 471 U.S. at 816; id. at 828 (Brennan, J., concurring) ("I agree with the plurality that it is useful to begin with the terms of the statute.").
549 See supra notes 71-292 and accompanying text for a discussion of the major Supreme Court decisions relating to municipal liability under § 1983.
552 Owen, 445 U.S. at 650.
553 Fact Concerts, 453 U.S. at 259.
554 See supra note 3 for the text of § 1983. In the Monell decision, the Court recognized that the term "person" encompasses municipalities. Monell, 436 U.S. at 690.
section 1983's language concerning liability for actions taken under color of both "statute, ordinance, [or] regulation" and "custom, or usage." Furthermore, by mandating a dual standard of care, the proposed foreseeability standard effectuates the "cause clause" of section 1983, which imposes liability only on those persons who directly subject a person to deprivation of a constitutional right, or who cause such an injury. The proposed standard defines causation in terms of a standard of care. Only violations of a constitutional right foreseeably resulting from an official municipal policy, or resulting from the gross negligence of a municipal official in not correcting a harmful municipal custom, will be held to have been caused by the municipality and thus result in liability under section 1983.

The legislative history of section 1983 also supports the proposed foreseeability standard. Section 1983 was intended to put the power of the federal courts at the disposal of those who could not obtain equal justice in their state or local courts. If a municipality caused a constitutional deprivation, either through enacted law or through unwritten custom, Congress intended courts to hold the municipality liable under section 1983. By providing a means to impose liability for both the results of municipal policy and municipal custom, the proposed standard effectuates the intent of the 42d Congress. Congress specifically provided that not only would persons who actually acted be liable under section 1983, but also those who caused those actions. The proposed standard, consistent with Congress's determination to eliminate the cause of such a constitutional deprivation, seeks to find section 1983 liability when either a municipal policy or a municipal custom has caused the deprivation of a person's constitutional right.

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

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

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356 Id.
357 Id. ("subjects, or causes to be subjected"). See also Schnapper, supra note 17, at 235.
358 See supra note 3 for the text of § 1983.
359 See Monroe, 365 U.S. at 183.
360 Monell, 436 U.S. at 690.
361 See Monroe v. Pape, 365 U.S. 167, 176-78 (1961) for a discussion of the legislative history of § 1983 that demonstrates that the Reconstruction Congress considered inclusion of custom necessary to eradicate the Klan's evils. Section 1983 was enacted to enforce the provisions of the fourteenth amendment. The Forty-Second Congress realized that facially equal laws were being unequally applied. This discriminatory application of the laws was being directed at certain identifiable groups. Although the fourteenth amendment gave the federal courts power to strike down discriminatory state law as being unconstitutional, unwritten practices made the bringing of those suits extremely difficult. Other practices denied certain persons the protections of the local laws because of those persons' political views or race. Consequently, the Forty-Second Congress enacted a statute that made it a federal offense for anyone acting under color of any written or unwritten state law to cause the deprivation of a person's constitutional rights. Id.
363 Id.
364 See infra notes 364-403 and accompanying text for a discussion of how the proposed standard effectuates § 1983's judicial construction.
to include municipalities. The Monell Court also stated that a municipality may be held liable if effectuation of an official policy or custom causes a constitutional deprivation. Additionally, the Monell Court made the Rizzo holding — that no section 1983 liability can be imposed without an affirmative link between the constitutional injury and a policy or custom — applicable to municipalities. The Court also has held that mere negligence cannot give rise to section 1983 liability, but the Court has not determined whether a stricter standard may be appropriate. Finally, the Court rejected respondeat superior liability, finding that section 1983 liability may be imposed only for a municipality's own actions which cause a constitutional deprivation.

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

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

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

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565 Monell, 436 U.S. at 690.
566 Id. at 694.
567 Id.
569 Monell, 436 U.S. at 691.
570 Id. See also Tuttle, 471 U.S. at 824.
571 Monell, 436 U.S. at 690-91. See also supra note 314.
572 Respondeat superior liability does not depend on fault to establish liability. It looks only to the employment relationship and holds the employer liable for the torts of the employee. See W. Keeton, supra note 114, § 70 at 501-02.
573 See Brown, supra note 54, at 906-08. See also generally Levin, supra note 83.
574 See supra notes 211-293 and accompanying text for a discussion of Pembaur and Tuttle.
575 See supra note 314.
576 Monell, 436 U.S. at 690.
577 See, e.g., Pembaur, 106 S. Ct. at 1299-1301. See also supra notes 221 and 314 and accompanying text for a discussion of how the "final authority" standard has fared in the lower courts.
578 Monell, 436 U.S. at 694.
579 Id. at 690 (“Local governments may be sued directly under § 1983 . . . where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers.”).
580 Id. at 690-91 (“[L]ocal governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels.”). See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970); and Nashville, C. & St. L. R. Co. v. Browning, 310 U.S. 367, 369 (1940). Eric Schnapper has written, regarding municipal custom: "The frequency and pattern of the practice alleged to be a custom or usage must be sufficient to give rise to a reasonable inference
standard raises separate issues. By definition, municipal policymakers establish official policy. These same policymakers represent the municipality, which makes the municipality aware of the policies and, presumably, their foreseeable results. Customs, in contrast, are not established by policymakers but are the result of practice or tradition. It is thus likely that a municipality, through its policymakers, will be less aware of customs and their foreseeable results. Therefore, courts can attach section 1983 liability for a constitutional deprivation arising from effectuation of a policy adopted by municipal policymakers.

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

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

The distinction between official municipal policy and municipal custom provides a continuum based on the degree of the municipality’s awareness of possible liability under that the public employer and its employees are aware that public employees engage in the practice and do so with impunity ....” Schnapper, supra note 17, at 229.

But see the multiple decisions in Pembaur, 106 S. Ct. at 1298, 1301 (White, J., concurring), id. at 1302 (Stevens, J., concurring), id. at 1304 (O’Connor, J., concurring), and id. at 1305 (Powell, J., dissenting) for the Supreme Court Justices’ debate concerning the definition of official policy. See also notes 204–28 and accompanying text for a discussion of Pembaur.

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

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

Monell, 436 U.S. at 691.

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

E.g., compare id. at 824 (“considerably more proof than the single incident will be necessary in every case to establish both the requisite fault ... and the causal connection”) with id. at 822 (Brennan, J., concurring) (“A § 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims.”).

Id. at 824.
the proposed foreseeability standard. According to this standard, on one end of the spectrum an officially adopted municipal policy leads to liability under section 1983 when it is reasonably foreseeable that the policy would violate the plaintiff's constitutional rights. At the other end of the spectrum, a municipality is not liable under section 1983 for constitutional deprivations resulting from the unilateral actions of a municipal agent. In the center of the spectrum lies municipal custom. Because custom is more difficult for municipal policymakers to apprehend and oversee, the standard imposes liability only when such customs are the result of the policymakers' gross negligence, and evidence a lack of the exercise of even slight care.

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

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

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588 This is consistent with the Monell Court's rejection of respondeat superior liability for municipalities under § 1983. See supra note 114 for a discussion of the theory of respondeat superior liability.
589 See Tuttle, 471 U.S. at 823.
591 See supra notes 221 and 314 and accompanying text for a discussion of the lower courts' conflict over the proper application of the official policy standard.
592 42 U.S.C. § 1983 (1982) ("acting under color of any . . . custom, or usage, of any State"). Congress recognized that unwritten law, or custom, can dictate behavior in a given situation with the same force as statutory law. The Supreme Court also acknowledged the power of custom in the Monell decision. See Monell, 436 U.S. at 690-91 & n.56.
593 Many lower courts have adopted a gross negligence standard:
If a municipality completely fails to train its police force, or trains its officers in a reckless or grossly negligent manner so that future police misconduct is almost inevitable, the municipality exhibits a "deliberate indifference" to the resulting violations.
lack of even slight care by municipal officials, courts may justly impute both knowledge and responsibility to the municipality.\textsuperscript{594} This standard recognizes that it is essential that municipalities are held liable for constitutional injuries resulting from municipal custom in order fully to effectuate the language of section 1983.

Finally, the proposed standard clarifies the Court's affirmative link or causal connection requirement.\textsuperscript{595} The standard attempts to reconcile the congressional directive that no person, acting under color of state law, shall subject, or cause to be subjected, another person to the deprivation of a constitutional right\textsuperscript{596} with the difficult problem of ascertaining the "true" cause of a constitutional injury.\textsuperscript{597} Because fundamental rights are at stake, deterring constitutional violations is of paramount importance. The standard encourages municipal policymakers to continually evaluate officially adopted municipal policies and stimulates inquiry into municipal custom.

The Supreme Court has not clearly addressed the role of causation in section 1983 actions against municipalities.\textsuperscript{598} The Court has stated that lower courts should read section 1983 in light of tort principles.\textsuperscript{398} The Supreme Court Justices have disagreed over the requirements of section 1983's causation element, however.\textsuperscript{400}

The issue of "proximate cause," or more accurately, legal cause, has been framed as whether the defendant is under any duty to the plaintiff, or whether the duty encompasses protection against plaintiff's specific injury.\textsuperscript{401} Clearly, the disagreement concerning causation among the Justices of the Supreme Court, and among the circuits, of a citizen's constitutional rights. In such a case, the municipality may fairly be termed as acquiescing in and implicitly authorizing such violations. Leite v. City of Providence, 463 F. Supp. 585, 590 (D.R.I. 1978). See also Voutour v. Vitale, 761 F.2d 812, 820 (1st Cir. 1985); Wellington v. Daniels, 717 F.2d 932, 937 (4th Cir. 1983); Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir. 1982); Herrera v. Valentine, 653 F.2d 1220, 1224 (8th Cir. 1981); Turpin v. Mallet, 619 F.2d 196, 202 (2d Cir. 1980).

\textsuperscript{594} Gross negligence is defined as the lack of even slight care. W. KEETON, supra note 114, § 42 at 211. When municipal policymakers do not use even slight care in overseeing the implementation of municipal custom, it is foreseeable that constitutional deprivations will result.

\textsuperscript{595} See supra notes 173–84 and accompanying text for a discussion of the Court's affirmative link or causal connection requirement.

\textsuperscript{596} See supra note 3 for the text of § 1983.


\textsuperscript{598} The Court has stated that there must be a "causal connection" or "affirmative link" between a municipal policy or custom and the resulting constitutional violation before municipal liability will attach under § 1983. See supra notes 173–84 and accompanying text. The Court has not, however, defined that connection.

\textsuperscript{599} Monroe, 365 U.S. at 187. The Court stated, "[s]ection (1983) should be read against the background of tort liability that makes [one] responsible for the natural consequences of [one's] actions." Id. It may well be, however, that the Court meant that § 1983 should be applied in light of such fundamental tort principles as deterring future misconduct and compensating for past injury. See, e.g., Nahmod, supra note 87, at 9–11. Professor Nahmod argues that "[b]ecause tort law and section 1983 might serve different purposes and protect different interests, this federal common law should be developed with a view to effectuating the purposes of section 1983." Id. at 9. He lists as § 1983's two major functions: compensation, especially when there is no adequate state remedy; and deterrence, which, "because constitutional interests are at stake, . . . might be more important under section 1983 than it is under tort law." Id. at 10–11.

\textsuperscript{600} See Tuttle, 471 U.S. at 823–24; id. at 829–31 (Brennan, J., concurring).

\textsuperscript{601} See W. KEETON, supra note 114, § 42 at 275. "Duty" has been described as "a duty, or obligation recognized by law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risk." Id., § 30 at 164.
is less a question of fact than a question of the proper legal policy in each case. Thus, the standard of conduct\textsuperscript{402} that the Court should impose on municipalities for the protection of constitutional rights must address the principles and purposes underlying section 1983.\textsuperscript{403}

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

3. Effectuation of the Policies Implicit in Section 1983

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

The determination of proximate or legal cause is necessarily based on policy considerations\textsuperscript{406} and commentators have identified two major policies as central to section 1983: deterring deprivations of constitutional rights and compensating such deprivations.\textsuperscript{407} Section 1983 accomplishes its goals by deterring future deprivations of constitutional rights and compensating victims of past constitutional violations.\textsuperscript{408} Thus a standard for determining municipal liability under section 1983 should promote deterrence of and compensation for violations of constitutional rights.

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

\textsuperscript{402} W. Keeton, supra note 114, § 42 at 273–75.

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

\textsuperscript{404} See supra note 3 for the text of § 1983. See supra notes 30–70 and accompanying text for a discussion of § 1983's legislative history.

\textsuperscript{405} See supra note 3 for the text of § 1983.

\textsuperscript{406} See W. Keeton, supra note 114, § 42 at 274.

\textsuperscript{407} Nahmod, supra note 87, at 10–11.

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

\textsuperscript{409} See Nahmod, supra note 87, at 10–11.
In addition, the standard of conduct applied to municipalities must recognize the gravity of the harm that section 1983 seeks to prevent. Tort principles hold that the gravity of harm must be balanced against the utility of the conduct which creates the risk.410 Because of the gravity of constitutional violations, the Court must articulate strict standards which balance the potential violation against the public utility of a municipality's policy or custom.

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

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

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

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

410 W. Keeton, supra note 114, § 43 at 298.

411 See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (immunity for prosecutors); Pierson v. Ray, 386 U.S. 547 (1967) (immunity for judges); Tenney v. Brandhove, 341 U.S. 367 (1951) (immunity for legislators). It should be noted that the various immunities extended by the Court have limited drastically the situations in which a damages remedy may be available against an individual municipal officer under § 1983. In cases where a municipal policy has caused the deprivation, a municipal officer may rely on a defense of good faith to protect him or her from liability. Malley v. Briggs, 106 S. Ct. 1092, 1095-96 (1986); Brandon v. Holt, 469 U.S. 464 (1985); Owen, 445 U.S. at 638 (citing cases). It is only in cases of "knowing and malicious acts" that an official may be liable individually. Fact Concerts, 453 U.S. at 207.

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

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

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

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413 Id.
414 Tuttle, 471 U.S. at 822-23.
415 W. Keeton, supra note 114, § 43 at 297.
417 Id.
418 See id.
419 Id.
420 The A.C.L.U. brief in Kibbe listed five positive effects resulting from suits brought under § 1983 against municipal police departments. The first positive effect of these suits is an emphasis on background investigations to eliminate applicants with violent or other negative propensities from police department hiring. Second, these suits have led to the use of administrative leave or seclusion to separate officers accused of misconduct from the public. In addition, § 1983 actions have encouraged prompt termination of unfit officers from municipal police forces. Furthermore, these actions have led to the development of specialized training for supervisory personnel which emphasizes potential liability for negligent failure to adequately supervise subordinates. The final positive effect of § 1983 suits, according to the A.C.L.U., is the fact that they may have made municipalities liable under § 1983 for inadequate training of officers, and that no good faith defense is available. Id. at 31-32 (citing Schmidt, Section 1983 and the Changing Face of Police Management, in Police Leadership in America 235 (W. Geller, ed. 1985)).
CONCLUSION

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

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