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Municipal Liability Under Section 1983: The Rationale Underlying the Final Authority Doctrine

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NOTES

Municipal Liability Under Section 1983: The Rationale Underlying the Final Authority Doctrine

I. INTRODUCTION

The Reconstruction Congress passed section 1 of the Civil Rights Act of 1871 (Act), commonly known as the Ku Klux Klan Act,[1] to combat racial violence in the South where local police officers, in violation of the victims' constitutional rights, often failed to protect blacks from attacks by lynch mobs.[2] Although section 1 protects all citizens regardless of race, it was designed primarily to (1) prevent states from passing racially discriminatory laws, (2) provide blacks with redress for deprivations of civil rights when state law proved inadequate, and (3) enable victims to sue in federal court when state law remedies were, in practice, unavailable to blacks.[3] Currently codified at section 1983 of Title 42 of the United States Code,[4] section 1 does not create any substantive

1. The Act was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution to the United States, and for other Purposes." 17 Stat. 13 (1871). For the text of § 1 as codified in 42 U.S.C. § 1983 (1988), see *infra* note 4.

2. *See* Monroe v. Pape, 365 U.S. 167, 183 (1961), *overruled*, Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1325-28 (1952). *See generally* Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304, 308-09 (1979). Today, police officers acting in good faith are entitled to immunity from suit under § 1983. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982); *see also* Anderson v. Creighton, 483 U.S. 635 (1987) (holding that an officer was entitled to summary judgment if it was established as a matter of law that a reasonable officer could have believed the search was lawful). Also, the Act does not apply to state or federal governments. *See infra* notes 30-34 and accompanying text.

3. *Monroe*, 365 U.S. at 173-74; *see also* Burke & Burten, *Defining the Contours of Municipal Liability Under 42 U.S.C. § 1983:* Monell *Through* City of Canton v. Harris, 18 STETSON L. REV. 511, 512-13 (1989).

4. 42 U.S.C. § 1983 (1988). Section 1983 provides, in relevant part:

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

Id. The criminal counterpart to § 1983 for willful deprivations under color of law is 18 U.S.C. § 242 (1988), which provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by

rights. Instead, it provides a private right of action in federal court for the deprivation of federally protected rights.[5]

Since its passage, section 1983 has evolved into an all-purpose remedy for victims of official abuse. Whenever a local government violates a person's federally protected rights, the victim can sue the officer and the governmental entity for money damages under section 1983.[6]

Section 1983 does not provide a remedy for deprivations caused by federal actors or by states.[7] In 1978, however, the United States Supreme Court approved the recovery of damages directly from a municipality that ultimately was found responsible for the plaintiff's deprivation.[8] Section 1983 has become an effective means of redress for victims of official abuse and, consequently, appears to have altered the behavior of police, who frequently are placed in confrontational situations in which deprivations are most likely to occur.[9] A municipality, however, is not automatically liable when one of its officers or employees causes a deprivation.[10] This Note considers when a municipality is and should be liable for deprivations caused by its officers.

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reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Id.

5. Congress enacted § 1983 pursuant to § 5 of the fourteenth amendment, U.S. CONST. amend. XIV, § 5 (stating that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article"), to provide a private right of action in federal court. City of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985) (citing Baker v. McCollan, 443 U.S. 137, 140, 144 & n.3 (1979)); *see also* Note, *Municipal Liability Under* City of Oklahoma City v. Tuttle*: Federalism, Due Process, and the Implications of a Restricted Section 1983 Remedy*, 13 HASTINGS CONST. L.Q. 733, 733 & n.3 (1986).

6. *See, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (plurality decision). This Note does not discuss recovery from the officer because the prospect of recovery is insignificant compared to recovery from the governmental entity. *See infra* notes 23-29, and accompanying text. In any case, the officer may not be liable if he acted in good faith. *See* Pierson v. Ray, 386 U.S. 547, 555-57 (1967). The municipality, however, cannot claim the officer's good faith as a defense. *See* Owen v. City of Independence, 445 U.S. 622 (1980).

7. *See infra* notes 30-32 and accompanying text.

8. *See* Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978).

9. This Note does not suggest that police officers are inclined to violate the rights of others; rather, it recognizes that they often are placed in situations that are more likely to result in deprivations. *See* P. SCHUCK, SUING GOVERNMENT 60-61 (1983). Studies suggest that § 1983 has prompted police departments to screen, train, and supervise their police officers more carefully, and to separate unfit officers from public contact. One study suggests that civil actions, including those under § 1983, have halved the number of citizens killed by police in major metropolitan areas. *See* Note, *A Foreseeability-Based Standard for the Determination of Municipal Liability Under Section 1983*, 28 B.C.L. REV. 937, 978 & n.420 (1987) (citing Amicus Curiae Brief of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts at 28-35, Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985) (No. 85-1217), *cert. denied per curiam as improvidently granted*, 480 U.S. 257 (1987)).

10. *See, e.g., Pembaur*, 475 U.S. at 469 (plurality decision).

Section 1983 litigation is considered a species of tort law.[11] Under the tort law doctrine of respondeat superior, an employer is liable for the tortious acts of his employee performed within the scope of employment.[12] The Supreme Court, however, has rejected respondeat superior as a basis for section 1983 liability.[13] The Court reasoned that a municipality should be liable only when it is at fault, meaning that the municipality itself, not a mere employee, must deprive the plaintiff of a federally protected right for municipal liability to ensue.[14] The Court has determined that a municipality causes a deprivation only when the deprivation results from a decision made by a municipal official with final authority to make such decisions, a rule known as the final authority doctrine.[15] Therefore, if a police officer conducts an illegal search, the municipality is not liable unless the officer acts in conformity with instructions from a municipal official with final authority over the procedures governing police searches or, alternatively, if the search is conducted in a manner consistent with customary police practices, even if unauthorized.[16]

Determining liability for illegal conduct by a municipal employee requires first determining whether the municipality has authorized the act either directly or indirectly.[17] If so, the municipality is liable.[18] If the act was not authorized, the municipality is not liable.[19] If similar acts occur often enough, however, even if not expressly authorized, the conduct may be deemed authorized, and the municipality may be liable.[20] Although the Supreme Court consistently has applied the final authority doctrine when considering municipal liability under section 1983, the Court has been unable to reach consensus on how the doctrine should be applied, even when general agreement exists as to the proper result in a particular case.[21]

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11. *See infra* note 54 and accompanying text.
12. *See infra* notes 48-49 and accompanying text.
13. *See Monell*, 436 U.S. at 691; *see also infra* subpart III(B).
14. *Monell*, 436 U.S. at 691-95 & n.57.
15. *See* City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) (plurality decision).
16. *See, e.g., id.* at 140 (Brennan, J., concurring).
17. *See infra* subpart IV(B).
18. *See infra* note 73 and accompanying text.
19. *See infra* notes 73-79 and accompanying text.
20. *See infra* notes 167-71 and accompanying text.
21. *See, e.g., Praprotnik*, 485 U.S. at 112 (plurality decision); *Pembaur*, 475 U.S. at 469 (plurality decision); *see also* Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on* City of Oklahoma City v. Tuttle *and* Pembaur v. City of Cincinnati—*The "Official Policy" Cases*, 27 B.C.L. REV. 883, 898 (1986) (stating that the Supreme Court cannot reach a consensus on the application of the final authority doctrine). *See generally* Brown, *supra*, at 884 (stating that the final authority doctrine "may well make sense, but in operation it is a quicksand of uncertainty").

After a brief overview of individual and governmental liability under section 1983 in Part II, Part III of this Note explores the basis for the Court's disagreement on how to apply the final authority doctrine. Part IV submits that the doctrine's underlying rationale is to preclude municipal liability for random and unauthorized conduct.[22] Part V reviews principal cases in light of the underlying rationale.

This Note submits that because the underlying rationale exemplifies the concerns present in all cases of municipal liability under section 1983—not just procedural due process claims—the Court could attain consistency by determining final authority, and therefore liability, in accordance with the doctrine's rationale. In sum, the rationale underlying the final authority doctrine should provide an anchor point for the rules that will develop as the courts revisit this area. Adherence to the rationale for the doctrine in each case will lead to a formulation of the final authority doctrine that is more consistent with the purpose of imposing municipal liability for deprivations of federally protected rights by municipal officers and employees.

II. Individual and Governmental Liability Under Section 1983

To recover under section 1983 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 right secured by the Constitution or laws of the United States."[23] When an individual acting "under color of state law"[24] deprives another of a federally protected right, the actor may be personally liable under section 1983.[25] The plaintiff, however, may be dissatisfied with an action

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22. This rationale may sound familiar—it is the rule applied in § 1983 claims for procedural due process violations. *See infra* notes 74-78 and accompanying text.

23. City of Oklahoma City v. Tuttle, 471 U.S. 808, 829 (1985) (Brennan, J., concurring); *see also* Note, *supra* note 9, at 961.

24. Generally, a person acts "under color of state law" when the person exercises a right or privilege created by the state and fairly can be called a state actor. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). The Supreme Court has developed various tests for determining when a person is a state actor. *See id.* (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (using the "joint action" test); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (using the "nexus" test); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970) (using the "public function" test); Marsh v. Alabama, 326 U.S. 501 (1946) (using the "state compulsion" test)).

25. Members of the executive branch are entitled to qualified immunity, which shields the individual from liability when acting in good faith. *See* Pierson v. Ray, 386 U.S. 547, 555-57 (1967) (granting the "defense of good faith and probable cause" to an officer in a § 1983 action). Members of the legislative and judicial branches are entitled to absoluto immunity for official actions. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (involving local legislators); Stump v. Sparkman, 435 U.S. 349 (1978) (concerning judges); Imbler v. Pachtman, 424 U.S. 409 (1976) (involving prosecutors); Gravel v. United States, 408 U.S. 606 (1972) (concerning federal legislators); Tenney v. Brandhove, 341 U.S. 367 (1951) (concerning state legislators). *But see* Forrester v. White, 484 U.S. 219 (1988) (holding that a judge is not entitled to

against the individual because of the reluctance of many juries to find against the typical defendant—a police officer portrayed by his attorney as hard working and underpaid.[26] Even if a jury does find that an officer is liable, it is likely to limit damages based on a perception of the defendant's inability to pay a large award.[27] Sympathy for an offending officer is less likely to sway a jury in an action against the municipality itself,[28] and the municipality probably will pay any award.[29] Even if an individual is found liable, though, recovery from the governmental entity will not follow automatically. The analysis of governmental liability depends first on whether the individual acted under color of federal, state, or local law.

Section 1983 applies only to deprivations caused by those acting under color of state or local law.[30] Thus, a deprivation under color of federal law does not create liability for the individual or the federal government under section 1983.[31] Individuals cannot sue states under section 1983 because states are not "persons" within the meaning of the statute.[32] The Supreme Court has determined, however, that municipalities[33] are "persons" subject to suit under section 1983 for deprivations caused by employees or agents.[34] The remainder of this Note addresses municipal liability under section 1983.

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absolute immunity for administrative acts); Pulliam v. Allen, 466 U.S. 522 (1984) (stating that judicial immunity does not bar prospective injunctive relief against a judicial officer). *See generally* Rosenberg, Stump v. Sparkman: *The Doctrine of Judicial Immunity*, 64 VA. L. REV. 833 (1978) (criticizing the Supreme Court's decision in *Stump*). Thus, recovery from the individual may be unlikely.

26. *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 456 (1978).

27. *See id.* at 456-57. In many cases the municipality will indemnify the employee for any damage award, but the jury will not be told of this. *Id.*

28. A jury is likely to consider an official policy case as more serious. *See* Taylor, *Municipal Liability Litigation in Police Misconduct Cases from* Monroe *to* Praprotnik *and Beyond*, 19 CUMB. L. REV. 447, 464 (1989).

29. *See* Newman, *supra* note 26, at 456.

30. *See* Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978); 42 U.S.C. § 1983 (1988).

31. The Supreme Court has recognized a similar right to sue persons acting under color of federal law. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *Bivens* actions are subject to different rules and will not be considered further here.

32. *See* Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989).

33. A "municipality" is a city, town, borough, county, or similar local governmental entity. *See* Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (counties are subject to suit under § 1983); O. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 7, at 19-20, 23-24 (1982); Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1059, 1061 & n.4 (1980).

34. *Monell*, 436 U.S. at 658; *see also infra* subpart III(A).

III. Municipal Liability Under Section 1983

A. *Municipalities Are "Persons" Subject to Suit Under Section 1983*

The Supreme Court found in *Monroe v. Pape*[35] that Congress did not intend to impose liability on municipalities under section 1983.[36] The Court held, therefore, that municipalities are not "persons" within the meaning of the statute.[37] The Court based its determination of intent chiefly on Congress's rejection of the Sherman amendment to the Civil Rights Act of 1871,[38] which would have imposed liability on a municipality for damages to property or persons caused by lawless mobs.[39] According to the Court, Congress rejected the amendment because it concluded that it lacked the constitutional power to impose civil liability on municipalities.[40]

The Supreme Court later reconsidered the status of a municipality under section 1983 in *Monell v. New York City Department of Social Services*.[41] After another review of the legislative history of the Sherman amendment, as well as section 1 of the Civil Rights Act of 1871, the Court overruled *Monroe* by holding that Congress did intend to include local governmental entities as "persons" subject to liability under section 1983.[42] To ensure that municipalities would not defeat the rule of *Monell*, the Court further held that a municipality was not entitled to absolute immunity.[43] After removing the shields that had protected municipalities for so long, the Court proceeded to define the character and scope of municipal liability under section 1983.

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35. 365 U.S. 167 (1961), *overruled*, Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978). Thirteen Chicago police officers entered the plaintiff's home without an arrest or search warrant, ransacked his home, and terrorized him and his family. 365 U.S. at 169. The police held the plaintiff in custody for 10 hours for interrogation about a two-day-old murder. *Id.* He was never brought before a magistrate and subsequently was released without being charged. *Id.*

36. *Id.* at 167.

37. *Id.*

38. 17 Stat. 13 (1871); *see supra* note 1 and accompanying text.

39. *See Monroe*, 365 U.S. at 188-92.

40. *Id.* at 190.

41. 436 U.S. 658 (1978). The New York Department of Social Services and Department of the City Board of Education adopted a policy that required pregnant employees to take unpaid leaves of absence after the fifth month of pregnancy, which is before it is medically necessary. *Id.* at 660-61 & n.2.

42. *Id.* at 690.

43. *Id.* at 701.

B. *The Basis of Liability: The Supreme Court Rejects Respondeat Superior*

The Supreme Court's rejection of absolute immunity potentially could have made municipalities liable for any deprivation of federal rights by their employees if the Court had continued to follow traditional tort law principles in determining section 1983 liability.[44] The Court in *Monell*, however, rejected the imposition of respondeat superior,[45] a traditional aspect of tort law.[46] In doing so, the Court narrowed the potentially enormous scope of municipal liability by requiring some finding of fault on the part of the local governmental entity before liability may be imposed.[47]

Under the doctrine of respondeat superior a master is liable for the negligent and intentional torts of his servant, even if the master was not negligent, and even if the master did everything possible to prevent the tort.[48] As long as the servant is intending to further the objectives of his employment, his master is vicariously liable.[49] The application of respondeat superior to section 1983 actions against municipalities would make them liable for virtually all torts committed by their employees.

The Court in *Monell* identified two traditional justifications for respondeat superior: To reduce accidents by giving employers a financial incentive to control the acts of employees, and to spread the risk of loss among the community.[50] The Court then offered two principal rationales for rejecting respondeat superior. First, the text of section 1983 states that a person is liable only for the deprivations that the person causes,[51] and a municipality does not cause a deprivation merely by employing a tortfeasor.[52] Second, application of respondeat superior under section 1983 unconstitutionally would impose a duty on the municipal-

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44. *See Monroe*, 365 U.S. at 187 (noting that § 1979, the precursor to § 1983, "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions").

45. *See Monell*, 436 U.S. at 691.

46. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS §§ 69-70 (5th ed. 1984) [hereinafter PROSSER & KEETON].

47. *See* City of Oklahoma City v. Tuttle, 471 U.S. 808, 818 (1985) (plurality decision) (stating that *Monell* requires a fault-based analysis for determining municipal liability); *id.* at 831 (Brennan, J., concurring) (stating that a municipality is not at fault for deprivations it could not have prevented). *See generally* Brown, *supra* note 21, at 897 (stating that *Tuttle* "recast *Monell* as establishing a fault-based approach to municipal liability under section 1983").

48. *See generally* PROSSER & KEETON, *supra* note 46, § 69, at 499.

49. *See id.* § 70, at 505.

50. *Monell*, 436 U.S. at 693-94. Proponents offered similar justifications for the rejected Sherman amendment that would have imposed liability on a municipality for acts of persons who are not employees of the municipality. The Court found that rejection of the amendment demonstrated Congress's rejection of those justifications. *See id.*

51. *See supra* note 4.

52. *See Monell*, 436 U.S. at 691-92.

ity to provide services.[53]

Section 1983 is a species of tort law that generally embodies tort law principles.[54] By rejecting respondeat superior, however, the court withdrew from section 1983 plaintiffs the traditional basis for finding vicarious liability. This rejection required the adoption of another rule to determine when a municipality is vicariously liable.[55] The *Monell* Court expressly left open the development of such a rule,[56] but did provide some guidelines for determining municipal liability.

C. *The Substitute for Respondeat Superior: The Final Authority Doctrine*

The Supreme Court in *Monell* stated that a municipality is liable for deprivations caused by employees or agents in the course of executing a municipal policy or custom.[57] Such a policy or custom could be made either by lawmakers or by those vested with the authority to make official policy.[58] The Court concluded that an official policy of the Department of Social Services and the New York City Board of Education compelling pregnant employees to take unpaid leaves of absence before it was medically necessary[59] unquestionably caused the constitu-

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53. *Id.* at 693. The Court noted that Congress found that imposing a duty to keep the peace was unconstitutional. *Id.* The Constitution imposes a duty on a state to provide services only for those persons it has taken into custody against their will. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200 (1989). Respondeat superior, however, requires protection of those persons with whom one has entered into a special relationship. *See* PROSSER & KEETON, *supra* note 46, § 70, at 506. The Court presumably infers that the Sherman amendment would create such a special relationship, rather than a constitutional duty.

Some commentators have criticized the Court's rejection of respondeat superior. *See, e.g.*, Comment, *Vicarious Municipal Liability: Creating a Consistent Remedial Policy for Local Government Violations of Civil Rights*, 16 CAL. W.L. REV. 58 (1980) (arguing for respondeat superior). *See generally* Brown, *supra* note 21, at 892-96 (summarizing the commentary). The commentators note that the justifications for adopting respondeat superior—making employers more careful and spreading risk—are as applicable to municipalities as to private companies. *See generally id.* Other commentators argue that a municipality should have a duty to provide services. *See generally id.* The Court's rejection of respondeat superior is considered below in light of the underlying rationale for the final authority doctrine, which the Court adopted in place of respondeat superior. *See infra* subpart III(C).

54. *See supra* note 44. In City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), the Supreme Court held that municipalities are not subject to punitive damages, another traditional aspect of tort law.

55. *See* Brown, *supra* note 21, at 896-98 (noting that the *Monell* Court "may have settled on official policy by a process of elimination").

56. *See Monell*, 436 U.S. at 695.

57. *Id.* at 694.

58. *Id.*

59. *See id.* at 661. The district court had determined that the policy was unconstitutional under Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). *Monell*, 436 U.S. at 661-62 (citing 394 F. Supp. 853, 855 (S.D.N.Y. 1975)).

tional violation in *Monell*.[60] After *Monell* the Court routinely has imposed liability on a municipality when an official decision made by the lawmakers caused the deprivation.[61]

A more difficult case is presented when an individual city employee causes the deprivation. A plurality of the Supreme Court in *Pembaur v. City of Cincinnati*[62] found that a deprivation caused by the decision of any municipal official, not just the city council, is sufficient to impose liability on the municipality if that official possessed final authority to make policy in that area of the city's business.[63] Later, the plurality in *City of St. Louis v. Praprotnik*[64] stated that as long as the decision is in an area in which the official or body could have made policy governing future municipal conduct, the decision should be treated as that of the

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60. *Monell*, 436 U.S. at 694.

61. *See, e.g., Fact Concerts, Inc.*, 453 U.S. at 247 (holding municipality liable after the city council revoked concert permit for content-based reasons); Owen v. City of Independence, 445 U.S. 622 (1980) (finding municipal liability after city council fired chief of police without a pretermination hearing).

The Court has not required that lawmakers adopt a rule of generalized application because even the first and only victim of the illegal policy should be entitled to recovery. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 480-85 (1986). Therefore, a decision that would apply only to a single incident is sufficient to impose liability. *See id.* at 480. The Court thus has determined that a "policy" does not mean a rule of generalized application—it means a choice from among various alternatives. *Id.* at 481-84 & n.9.

62. 475 U.S. at 481-83 (plurality decision).

63. *See id.* at 481-84 (plurality opinion of Brennan, J., joined by White, Marsball, and Blackmun, JJ.). Deputy sheriffs attempting to serve capiases at the plaintiff's office were not allowed to enter. *Id.* at 472. The deputies requested instructions from the assistant prosecutor, who told them to go in and get the suspects. *Id.* at 472-73. The deputies chopped down the plaintiff's door witb an axe, but did not find the suspects. *Id.* at 473. The district court held this to be a violation of the fourth and fourteenth amendments under Steagald v. United States, 451 U.S. 204 (1981). *Pembaur*, 475 U.S. at 474-75.

If a city council establishes an employment policy delegating the discretion to hire and fire police department employees to the chief of police, as long as the city retained the power to reverse the chief's illegal employment decisions, the city would not be liable if the chief exercised the authority in violation of federal law because his decisions are not decisions of the city council. *See, e.g.*, City of St. Louis v. Praprotnik, 485 U.S. 112, 140 (1988) (Brennan, J., concurring) (citing *Pembaur*, 475 U.S. at 483 n.12 (plurality opinion of Brennan, J.)). If, however, the chief of police is given final authority to make such decisions, so that they cannot be reversed by the city council, those decisions can give rise to city liability. *See, e.g., id. See generally* Case Note, *Under the Civil Rights Act, Municipal Liability May Be Imposed for a Single Decision by Municipal Policymakers Under Appropriate Circumstances*—Pembaur v. City of Cincinnati, 36 DRAKE L. REV. 465 (1987); Case Comment, *Municipal Liability Extended to Include Single Acts of Official Decisionmakers*—Pembaur v. City of Cincinnati, 21 SUFFOLK U.L. REV. 237 (1987).

The key to determining whether an official has final authority seems to be whether decisions made by that official are reviewable by the city council or another body of local government. Lower courts have found, for example, that not even the chief of police has final authority in the area of police work because the mayor, as the chief executive, can review the chief's decisions. *See, e.g.*, Lacey v. Borough of Darby, 618 F. Supp. 331, 338 (E.D. Pa. 1985).

64. 485 U.S. 112 (1988) (plurality decision).

municipality.[65]

The Court's rejection of respondeat superior stems from the helief that a municipality should be held liable only when it is at fault.[66] A municipality is not at fault for merely employing a tortfeasor,[67] but only if, as articulated in *Monell*, the deprivation results from the municipality's official policies.[68] A plaintiff may recover only for injuries resulting from acts officially sanctioned by the municipality.[69] The Court in *Pembaur* found that decisions of the municipal lawmaking body certainly constitute official sanctioning.[70] Likewise, decisions of individual officials with the authority to dictate official policy also are deemed to be official policy.[71] Consequently, the Court in *Pembaur* articulated the final authority doctrine, stating that liability attaches to a municipality when an official with the final responsibility for the subject matter at issue created the policy that caused the deprivation.[72] The Court thus replaced the traditional rule of respondeat superior with the final authority doctrine.

IV. The Rationale Underlying the Final Authority Doctrine: The Municipality Is Not Liable for Random and Unauthorized Conduct

Since the development of the final authority doctrine, the Court has been unable to agree on how to apply the new rule. The disagree-

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65. *See id.* at 140 (plurality opinion of O'Connor, J, joined by Rehnquist, C.J., White, and Scalia, JJ.). James Praprotnik was a city architect who claimed he was fired in violation of the first and fourteenth amendments in retaliation for appealing his suspension. *Id.* at 114-17 (plurality decision).

66. *See* City of Oklahoma City v. Tuttle, 471 U.S. 808, 831 (1985) (Brennan, J., concurring).

67. *See Praprotnik*, 485 U.S. at 139 n.3 (Brennan, J., concurring) (citing *Monell*, 436 U.S. at 658).

68. *See, e.g., id.* at 137-38 (Brennan, J., concurring). Justice Brennan noted in *Praprotnik* that the official policy doctrine as such is intended " 'to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.' " *Id.* at 138 (Brennan, J., concurring) (emphasis in original) (quoting *Pembaur*, 475 U.S. at 479-80).

Justice Brennan suggested in *Tuttle*, 471 U.S. at 831 (Brennan, J., concurring), that the municipality must be at fault to be liable. This proposition leads to the question of what constitutes fault in this context. Is a municipality at fault merely for creating the police department that employed the officer who acted illegally, or must the city council actually review and approve the decision? *See, e.g., id.* at 823 (plurality opinion); *id.* at 833 n.9 (Brennan, J., concurring). Imposing liability on the basis of fault essentially begs the question of when a municipality should be liable.

69. *Pembaur*, 475 U.S. at 480.

70. *Id.* (citing *Fact Concerts, Inc.*, 453 U.S. at 247 (stating that "City Council canceled license permitting concert because of dispute over content of performance") and Owen v. City of Independence, 445 U.S. 622 (1980) (stating that the "City Council passed resolution firing plaintiff without a pretermination hearing")).

71. *Id.*

72. *Id.* at 483-84.

ment apparently stems not from any fundamental differences about when the rule should apply, but from a failure to state clearly why the final authority doctrine is the proper way to determine fault. This Note suggests that the final authority doctrine determines fault appropriately by requiring that those ultimately responsible be on notice of an impending deprivation before liability can attach. If the municipality is on notice and fails to prevent the deprivation, then it is at fault.

Requiring notice insulates the municipality from liability for the random and unauthorized conduct of its agents. If conduct is authorized, notice is not a factor, and the municipality should be liable.[73] On the other hand, if conduct is random and not authorized, notice is a problem, and the municipality generally will not be liable. If the conduct is sufficiently widespread so that it would not be considered random, however, the municipality is arguably on notice. Therefore, certain widespread conduct should be deemed authorized, making the municipality liable for any resulting deprivation.

A. Borrowed from Due Process Cases

This underlying rationale, based on the principle of notice, is borrowed from cases addressing actions for violations of procedural due process brought under section 1983. For example, in *Parratt v. Taylor*[74] the Court stated that the loss of an inmate's property because of the negligence of prison guards was the result of random and unauthorized conduct.[75] Because the loss did not result from a state procedure, the state could not predict when the loss would occur.[76] Therefore, the state could not provide a predeprivation hearing.[77] The state consequently did not violate fourteenth amendment procedural due process because it provided the prisoner with as much process as was possible; in this case a postdeprivation hearing was sufficient to satisfy the requisites of due process.[78]

The notice rationale applies equally well in determining municipal

73. The following chart depicts when § 1983 should impose liability on a municipality:

	Random	Not random
Authorized	Always	Always
Unauthorized	Never	Only if custom or usage

74. 451 U.S. 527 (1981).
75. *See id.* at 541.
76. *Id.*
77. *Id.*
78. *Id.*

liability under section 1983.[79] It also appears to be the underlying rationale for the Court's rejection of respondeat superior, which would not require notice, and the adoption of the final authority rule, which does require notice. After setting forth the details of this rationale, this Note reviews the cases that created disagreement among the Justices of the Supreme Court. The review demonstrates how adherence to the underlying rationale can resolve the differences among the Justices in the application of the final authority doctrine.

B. What Is Authorized: The Municipal Power Structure

The final authority doctrine imposes liability on the municipality for all authorized conduct.[80] To determine what constitutes authorized conduct, one first must define the municipal power structure. This task requires tracing the flow of municipal authority from the citizens who must pay for municipal liability to the municipal employee who ultimately inflicts the deprivation.[81] The citizens of the municipality elect persons who are entrusted with the power to spend the citizens' money and to speak as the citizens' voice.[82] In many municipalities, the community vests this power in an executive, typically the mayor, and in a legislative branch, typically the city council.[83]

The executive and legislative branches represent the top tier of authority and have the discretion to delegate power to subordinates.[84] The top tier may find it useful to delegate complete authority to officials with expertise in a particular area of the municipality's business.[85] When the top tier delegates final authority to an official, by definition the official receives the municipality's power in that area of the munici-

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79. *See, e.g.*, Bandes, Monell, Parratt, Daniels, *and* Davidson*: Distinguishing a Custom Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 104 (1986) (stating that "[w]here causation by the government ends, random and unauthorized acts of its employees begin").

80. *See supra* note 73 and accompanying text.

81. *See generally* Brown, *supra* note 21, at 897.

82. *See* O. REYNOLDS, JR., *supra* note 33, § 7, at 21-22; Brown, *supra* note 21, at 897.

83. In most states, municipalities derive their power from state statutes that enable them to execute certain functions. *See* O. REYNOLDS, JR., *supra* note 33, § 49, at 135-39. Enabling statutes often provide for the form of municipal government, typically calling for a mayor and a city council. *Id.* § 7, at 49-50.

84. *See id.* § 56, at 161-62 (stating that a municipality must delegate tasks to its agents if it is to function at all); *id.* § 57, at 166 (stating that the city council need not inspect and approve the soil before a sewer pipe is installed; it can delegate that decision to the city engineer). The same rules of delegation apply when the city council delegates power to its own committees. *Id.* § 57, at 168.

The citizens may elect other persons to represent them in specific areas of the municipality's business, such as the water department or the school board. It follows that these representatives are the top tier decisionmakers in those areas and likewise are empowered to delegate that authority in their discretion.

85. *See supra* note 84.

pality's business.[86] The official thus has the power to act on behalf of the municipality. When the top tier authority has not retained the power to reverse a lower official's decisions, it is responsible for obligations the official creates for the municipality.[87] Therefore, the municipality is liable when a person or body possessing final authority adopts a policy that causes a deprivation of federally protected rights.[88]

Taxpayers enjoy a certain degree of safety because they typically elect a legislative branch comprised of members empowered to act only as a group, minimizing the possibility that the lawmaking branch will act in a random and unpredictable way.[89] When citizens elect a mayor empowered to act individually, they increase the possibility of hasty actions and, consequently, increase the risk of municipal liability.[90] In that case the community's remedy is to elect a new mayor, but the electorate can minimize the risk of illegal conduct by limiting the mayor's authority, possibly by shifting more responsibility to the lawmaking body for areas of municipal business with high potential for illegal conduct.[91]

The top tier has similar safeguards available to it when it delegates authority. It can narrow the scope of an official's power,[92] or it can retain the authority to review and reverse any decision made, in effect removing final authority.[93] In any event, the top tier can fire the official or remove the power if the official causes or appears likely to cause a deprivation.

The municipality acts through this power structure.[94] This structure is, therefore, the framework for analyzing whether the municipality authorized policy so as to put itself at risk of liability. In sum, a municipality is liable only for acts of the top tier authorities, or those granted final authority from the top tier. The underlying rationale for the final authority doctrine, however, also has a second component: randomness.

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86. By definition an official with final authority possesses the power to make decisions that cannot be changed by others. *See infra* notes 135-36 and accompanying text.

87. *See infra* notes 135-42 and accompanying text.

88. *See, e.g.*, City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) (plurality decision).

89. If legislation is arbitrary or whimsical, it is ultra vires and the municipality itself will not be liable for it. *See* O. REYNOLDS, JR., *supra* note 33, § 53, at 153-54.

90. *See generally infra* notes 95-101 and accompanying text.

91. *See generally supra* note 89 and accompanying text.

92. *See* O. REYNOLDS, JR., *supra* note 33, § 57, at 170 (stating that the municipality should not delegate unbridled power, but should circumscribe the power by reasonable legislative guidelines); *see also infra* notes 149-50 and accompanying text.

93. *See infra* notes 143-48 and accompanying text.

94. *See* O. REYNOLDS, JR., *supra* note 33, § 56, at 161 (stating that "[l]ike a private corporation, a municipal corporation can only act through its various officers and employees").

C. *Authorized and Random Conduct: Is the Municipality Liable for Personally Motivated Acts by Final Decisionmakers?*

A municipality may not be liable for acts of even a final decisionmaker if the individual acts with personal or vengeful motives. The Supreme Court has not dealt with the issue, and its existing decisions provide little guidance on how the Court would resolve it. For example, Justice William Brennan stated in *City of Oklahoma City v. Tuttle*[95] that imposing municipal liability for the actions of a mentally unbalanced police officer would amount to respondeat superior, which the Court consistently has rejected. In a footnote, however, Justice Brennan emphasized that the individual was not a final decisionmaker but a low-level police officer.[96] Justice Brennan stated that the municipality may not escape liability for actions of sufficiently high-ranking officials.[97] Would this impose a form of respondeat superior liability for all acts of final decisionmakers?

The answer depends on whether the final decisionmaker is more analogous to a master or a servant. If the final decisionmaker is more like a master, the municipality would be liable for injuries the official causes without respondeat superior. Conversely, if the role of the final decisionmaker is more like that of a servant, holding the municipality liable for injuries would be the equivalent of respondeat superior. The question is best answered by putting aside these technical distinctions and referring instead to the purpose of imposing liability on the municipality.

The central goals of imposing municipal liability are to deter the deprivation of federally protected rights and to compensate the victims of those deprivations.[98] Imposing liability for a personal or vengeful act would not deter deprivations because the municipality cannot prevent those acts except by not delegating any authority.[99] Recovery against the municipality for unauthorized conduct would be fortuitous for the victim because the conduct is essentially a personal act, rather than an act of the municipality.[100] The core purposes of section 1983, however,

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95. 471 U.S. 808, 831 (1985) (Brennan, J., concurring).

96. *Id.* at 830 n.5 (Brennan, J., concurring).

97. *Id.* (Brennan, J., concurring).

98. *See* Note, *supra* note 9, at 976 & n.407 (citing Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 10-11 (1974)).

99. It may be impossible for the top tier to retain actual plenary review power over all actions by the employees. *See supra* notes 84-86.

100. The individual may have used the instrumentalities of the municipality, but that is true in the police brutality cases when liability is not imposed. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961), *overruled*, Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978). The question of instrumentality asks whether the person was a state actor, not whether the governmental entity was blameworthy. *See id.*

probably preclude an exception from liability for personal or vengeful conduct.

Section 1983 arguably was intended to compensate all victims of official abuse. Congress enacted the predecessor to section 1983 to fight racism by government officials—especially police officials who did not attempt to stop racial violence by the Ku Klux Klan.[101] Did those officials act on personal or vengeful motives? If hatred of blacks was not personal, what was it? These considerations make it unlikely that the Reconstruction Congress intended any exception for personally motivated acts.

V. How an Official Policy Causes a Deprivation: The Principal Cases Viewed in Light of the Underlying Rationale

A municipality is liable for deprivations caused by its official policies. A municipality makes official policy when: (1) the top tier authority adopts a policy; (2) the top tier authority delegates final authority to a subordinate who makes a policy; (3) either one fails to prevent a deprivation that it could have prevented; or (4) a practice is so widespread that it constitutes a custom or usage representing official policy.[102]

A. The Top Tier Authority Adopts a Policy

When the top tier authority of a municipality, typically the city council, adopts a rule that causes a deprivation, the Supreme Court has had little difficulty finding municipal liability even if the rule is applied only once.[103] Imposing liability on the city in this case is consistent with the underlying rationale for the final authority doctrine because the highest municipal authority authorized the conduct. The conduct rarely is random because the lawmakers can act only as a group and must follow established rules when adopting policies.[104] Other top tier decisionmakers typically possess final authority in areas of the municipality's business in which deprivations are less likely.[105]

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101. *See generally* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 664-89 (1978).

102. *See infra* notes 103, 135-42, 152-60, 167-80 and accompanying text.

103. *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (imposing liability on the city after the city council revoked a concert permit for content-based reasons); Owen v. City of Independence, 445 U.S. 622 (1980) (imposing liability on the city after the city council fired the chief of police without a pretermination hearing). The Court often refers to this situation as the easy case. *See, e.g.*, *Monell*, 436 U.S. at 658.

104. *See supra* note 89 and accompanying text.

105. *See supra* note 84.

B. *The Top Tier Authority Delegates Final Authority to a Subordinate Official*

When top tier authorities give policy-making authority to subordinate officials—who then can hire, fire, and establish routines and rules of conduct—the city risks liability because these decisions require sensitivity to federally protected rights and are likely to result in deprivations.[106] The municipality is liable in delegation of authority cases only if the decision constitutes an exercise of final authority; mere exercises of discretion are not final decisions.[107] The distinction turns on whether another authority could review the decision.[108] Before that issue can be resolved, however, it is necessary to determine the source of the decisionmaker's power: must a statute grant the power to exercise authority, or is it better to examine the facts of each case, making a statutory grant just one factor? This crucial area of section 1983 municipal liability has been difficult and controversial.[109]

1. Is Final Authority a Question of Law or Fact?

A plurality of the Supreme Court in *City of St. Louis v. Praprotnik*[110] further limited municipal liability by deciding that state law determines whether someone is a policy-making official.[111] The *Praprotnik* plurality stated that the fact finder is not free to place final authority someplace other than where the law puts it.[112] The plurality conceded that state law may not always be clear, but dismissed the difficulty by stating that the lower courts could resolve such issues.[113] Making this question one of state law has the advantage of enabling courts to dispose of some claims on summary judgment.[114]

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106. *See id.*

107. *See infra* notes 135-37 and accompanying text.

108. *See infra* subpart V(B)(2).

109. Even the Supreme Court has been unable to produce a majority opinion. *See infra* notes 110-11 and accompanying text.

110. 485 U.S. 112 (1988) (plurality decision). Justice Sandra Day O'Connor announced the judgment of the Court, joined by Chief Justice William Rehnquist and Justices Byron White and Antonin Scalia. *Id.* at 114 (plurality opinion). Justice William Breunan filed an opinion concurring in the judgment, in which Justices Harry Blackmun and Thurgood Marshall joined. *Id.* at 132 (Brennan, J., concurring). Justice John Paul Stevens filed a dissenting opinion. *Id.* at 147 (Stevens, J., dissenting). Justice Anthony Kennedy took no part in the consideration or decision of the case. *Id.* at 132.

111. The Court followed the plurality in Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), stating that "the identification of policymaking officials is a question of state law." *Praprotnik*, 485 U.S. at 124 (plurality opinion of O'Connor, J.) (citing *Pembaur*, 475 U.S. at 483 (plurality opinion of Brennan, J.)).

112. *Praprotnik*, 485 U.S. at 124 & n.1 (plurality opinion).

113. *Id.* at 125-26 (plurality opinion).

114. *See* Welch & Hofmeister, Praprotnik, *Municipal Policy and Policymakers: The Supreme Court's Constriction of Municipal Liability*, 13 S. ILL. U.L.J. 857, 887 (1989).

Justice William Brennan, joined by Justices Thurgood Marshall and Harry Blackmun, concurred in the judgment, but found the plurality's theory of municipal liability overly narrow and unrealistic and expressed concern that municipalities would be able to insulate themselves from almost all liability.[115] Justice Brennan stated that state law would be an appropriate starting place to find where final decisionmaking power lies, but that the law might not reflect the actual power structure or may provide no answer at all.[116] Justice Brennan concluded that the fact finder must determine who actually has final authority and not simply who the law says should have it.[117]

Unlike Justice Brennan, the plurality would not look beyond state or local law to determine with whom final authority lies.[118] This decision would seem to allow a municipality formally to retain the top tier's power to review all decisions of its subordinates, thus making the municipality liable only when the top tier approves of the decision and its basis.[119] Recognizing this danger, the plurality stated that the custom or usage doctrine precludes egregious attempts to insulate the municipality from liability.[120] Apparently, therefore, formal review power will not control if the subordinate's decision is so permanent and well settled as to have the force of law.[121] The plurality's rule should allow the plaintiff in each case to present facts showing that the practice is widespread. Both the plurality and Justice Brennan agree that state law is the place to start. The plurality, however, requires that the practice be perma-

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115. *Praprotnik*, 485 U.S. at 132 (Brennan, J., concurring). Justice Brennan noted that the plurality requires the courts to refer exclusively to applicable state statutory law to identify municipal policymakers. *See id.* at 142-43 (Brennan, J., concurring). Justice Brennan claimed that "the plurality cites no authority for this startling proposition, nor could it, for we have never suggested that municipal liability should be determined in so formulaic and unrealistic a fashion." *Id.* at 143 (Brennan, J., concurring). The plurality, however, was citing Justice Brennan's plurality opinion in *Pembaur* for the proposition that a final decisionmaker is to be identified by state law. *See id.* at 124 (plurality opinion) (citing *Pembaur*, 475 U.S. at 483 (plurality opinion)). Justice Brennan replied that no member of the *Pembaur* Court stated that reliance on extra-statutory sources would be in any way improper. *Id.* at 143 (Brennan, J., concurring).

116. *See id.* at 143 (Brennan, J., concurring).

117. *See id.* (Brennan, J., concurring).

118. *Id.* at 124 (plurality opinion). The plurality stated that "the identification of policymaking officials is not a question of federal law, and it is not a question of fact in the usual sense." *Id.* (plurality opinion). The plurality did not explain what it meant by "in the usual sense," but it appears to leave some room for considering facts in at least two situations discussed below. *See infra* notes 119-21 and accompanying text.

119. *See Praprotnik*, 485 U.S. at 127 (plurality opinion).

120. *Id.* (plurality opinion). Under the plurality's rule the trial judge is forced either to find that the state law is an egregious attempt to evade liability, or to follow a state law he knows is inaccurate but does not amount to an egregious attempt to evade liability. That big area between egregious attempts to evade liability and state law that explicitly gives authority inevitably will be decided incorrectly on occasion.

121. *See id.* at 144 (Brennan, J., concurring).

nent and well settled, whereas Justice Brennan requires only that the fact finder be convinced that the decisionmaker had actual final authority.

Under either theory, establishing that a practice is permanent and well settled necessarily would require that the particular decisionmaker be shown to have exercised final authority many times.[122] Some officials may not make many final decisions in their careers, however, and as the Court has noted, even the first victim of an official policy should be entitled to recovery.[123] Consequently, the municipality should be liable for the first deprivation caused by an official actually exercising final authority.

The plurality stated that an elegant line may not be possible,[124] but the line the plurality drew appears to be based on a distrust of the jury.[125] A better line can be drawn if it is based instead on the underlying rationale for the final authority doctrine. The rationale requires that a municipality will be liable only for authorized acts.[126] State law should not dictate whether an act is in fact authorized. If authorization were a question of law, a municipality conceivably could avoid liability by passing a law stating that officials are not authorized to commit illegal acts, thus making any illegal act an unauthorized act.[127] The plural-

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122. *See infra* note 171 and accompanying text.

123. *See Praprotnik*, 485 U.S. at 144 (Brennan, J., concurring). Justice Brennan noted that the plurality's awareness that relying on the custom or usage doctrine to forestall only egregious attempts by the municipality to evade liability would allow some deprivations for which the municipality should be liable, but that the doctrine would prevent the most deliberate attempts by the municipality to insulate itself from liability. *Id.* at 144 n.6 (Brennan, J., concurring). Justice Brennan responded that § 1983 does not simply provide redress for most violations and is not limited to violations that are egregious. *Id.* (Brennan, J., concurring).

124. *Id.* at 127 (plurality opinion).

125. *See id.* at 131 (plurality opinion). The plurality's distrust of the jury system is apparent from statements like "[w]e cannot accept . . . that a jury should be entitled to define for itself which officials' decisions should expose a municipality to liability." *Id.* This statement appears to misconstrue the argument for allowing reference to facts, which does not allow the jury to "define" final authority; it allows the jury to apply the Court's definition of final authority to the facts of the case. *See id.* at 143 (Brennan, J., concurring) (stating that juries should not be given open-ended discretion; instead, they must find the predicate facts necessary to determine whether the official has final authority). Another example is the plurality's statement that it would be capricious "to hold a municipality responsible for every decision that is perceived as 'final' through the lens of a particular factfinder's evaluation of the city's 'actual power structure.'" *Id.* at 124 n.1 (plurality opinion). The plurality seems to believe that the fact finder's "lens" often is distorted. This distrust also prevents a judge, when sitting as finder of fact, from considering such facts. *See id.* (plurality opinion). The plurality's effort to keep the facts from the jury underscores the egregious facts frequently seen by the Court in municipal liability cases under § 1983, but does not further § 1983's goal of preventing and compensating such deprivations.

126. *See supra* note 73 and accompanying text.

127. *See Praprotnik*, 485 U.S. at 145 n.7 (Brennan, J., concurring). Justice Brennan argued that under the plurality's approach "a municipal charter's precatory admonition against discrimination or any other employment practice not based on merit and fitness effectively insulates the

ity rejected this argument[128] and deferred the issue by stating that such a flagrant attempt to reject all responsibility for the illegal acts of a city's employees would present a different case than the one before the Court in *Praprotnik*.[129] Thus, the plurality apparently conceded that state law is not the only source of final authority and that actual practice is relevant, at least in some cases.[130] Therefore, although state law is the place to begin the inquiry,[131] it may not settle the question of who holds final authority.

The plurality expressed concern in *Praprotnik* that retaliation or other personal goals motivated the subordinate's illegal decision.[132] Under the final authority doctrine those random acts will not create municipal liability.[133] When one with final authority causes the deprivation, however, randomness probably should not be considered.[134] In sum, the underlying rationale for the final authority doctrine would have the fact finder decide where final authority lies by referring to state and local law as well as the facts in each case.

2. When Is Authority Final?

The plurality in *Praprotnik* reiterated that only a final decision constitutes a municipal policy.[135] Therefore, the plurality reasoned, when a decision of an official is subject to review by the final decisionmakers, the subordinate's decision is not final until a final decisionmaker approves the decision and its basis.[136] The plurality maintained that final authority is generally a question of state law,[137]

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municipality from any liability based on acts inconsistent with that policy." *Id.* (Brennan, J., concurring).

128. The plurality stated: "Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced." *Id.* at 131 (plurality opinion).

129. *See id.* (plurality opinion).

130. For all its effort to add predictability to municipal liability under § 1983, the plurality has left open this crucial question. *See id.* (plurality opinion) (stating that "ad hoc searches for officials possessing such '*de facto*' authority would serve primarily to foster needless unpredictability in the application of § 1983") (emphasis in original).

131. *Id.* at 143 (Brennan, J., concurring).

132. *Id.* at 130 (plurality opinion).

133. *See supra* notes 95-101 and accompanying text.

134. *See id.*

135. *See Praprotnik*, 485 U.S. at 127 (plurality opinion). The plurality found that an official's decision is not final if it is constrained by official policies because the final decisionmakers establish municipal policy and any departure by the subordinate from such policy is not final. *See id.* (plurality opinion).

136. *Id.* (plurality opinion).

137. *See id.* at 131 (plurality opinion). The plurality noted that imposing municipal liability for the mere exercise of discretion would be indistinguishable from respondeat superior liability. *Id.* at 126 (plurality opinion).

but allowed departures in two cases: First, when the formality surrounding the subordinate's decision gives it the appearance of an official policy statement and the supervising policymaker expressly approves the decision's issuance,[138] and second, when a subordinate official frequently makes policy decisions so that the supervisor is on notice of the conduct and cannot claim that it was random.[139] Justice Brennan agreed that retaining the power to review can prevent the subordinate's decision from being final, but stated that the fact finder should consider whether review power actually is exercised and whether the reviewing authority actually could alter a decision in practice.[140]

Under the final authority doctrine, a decision is authorized when it is made or approved by an official with final authority to make such decisions. At some point a decision either must become final, or must be subject to approval by a final decisionmaker; therefore, the municipality is liable if the final decisionmaker approved it,[141] or could not have changed it.[142]

a. Retained Power to Review

The plurality in *Praprotnik* noted that if officials with final authority could insulate the municipality from liability by delegating all of their authority to subordinates, section 1983 could not serve its intended purpose.[143] Under the plurality's formulation the municipality would not be liable unless the official explicitly approved the decision and its basis.[144] This standard, however, allows the delegating authority to avoid municipal liability by simply not approving the decisions expressly. The plurality's answer is that egregious attempts to insulate the municipality are covered by the doctrine of custom or usage, which attributes the decisions of subordinates to the municipality if a long-standing practice of similar decisions has not been reviewed or actually has been approved.[145] Arguably, a municipality could defeat the rule by approving some decisions, particularly those that are unlikely to cause deprivations. As Justice Brennan noted, section 1983 was not intended to provide relief only for "most" violations, nor was it intended to reach

138. *Id.* at 130 (plurality opinion).
139. *See id.* (plurality opinion).
140. *Id.* at 144-45 & n.7 (Brennan, J., concurring).
141. *See id.* at 127 (plurality opinion).
142. *See infra* notes 149-51 and accompanying text.
143. *Praprotnik*, 485 U.S. at 126 (plurality opinion); Case Comment, *supra* note 63, at 245-46 (*Pembaur*'s single-decision rule may cause municipalities to strip discretionary power from subordinates).
144. *See Praprotnik*, 485 U.S. at 127 (plurality opinion).
145. *See id.* (plurality opinion).

only egregious conduct.[146]

The plurality in *Praprotnik* stated that acquiescing in the discretionary decisions of a subordinate does not constitute a delegation of policy-making authority.[147] It is unclear how the Court would apply this reasoning in practice, but the plurality implied that a municipality could escape liability even if a final decisionmaker is aware of an illegal decision and is in a position to overrule it. Thus, the plurality's rule is contrary to the rationale for the final authority doctrine, which would impose liability for conduct of which the final decisionmaker had notice. If a final decisionmaker knew of the decision, and could have overruled it but did not, the municipality was as much on notice as if the final decisionmaker made the decision. When a final decisionmaker knows of the decision and acquiesces in it, it is fair to infer that the decisionmaker has approved it. In this situation the conduct is neither random—the final decisionmaker obviously expected it—nor unauthorized—the final decisionmaker in fact approved the decision. The plurality's requirement of explicit approval, thus, appears to be another manifestation of its distrust of the jury because it does not allow the jury to determine whether the decision was approved implicitly by the final decisionmaker's acquiescence.[148] The final decisionmaker may have approved the decisions with a wink and a nod that may be difficult to prove—but the plaintiff ought to be given the chance.

b. Scope and Standard of Review

The plurality in *Praprotnik* noted the court of appeals' finding that the Civil Service Commission—by statute the final decisionmaker—exercised only circumscribed power to review the decisions of alleged subordinates and, thus, gave substantial deference to those officials.[149] The plurality stated that just because the review power is circumscribed, the final decisionmaker is not deemed to have approved the subordinate's decision.[150] Unfortunately, because it summarily rejected the idea that the failure to exercise review could be equated with authorization, the plurality failed to expound its analysis of the review power. The scope of the final decisionmaker's power to review, however, is necessarily relevant. If the scope of an official's power is not matched by a superior's power to review, the subordinate becomes a final decisionmaker with respect to those areas in which he has authority to

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

147. *Id.* at 130 (plurality opinion).

148. *See supra* note 125 and accompanying text.

149. *See Praprotnik*, 485 U.S. at 129 (plurality opinion) (citing 798 F.2d 1168, 1174-75 (8th Cir. 1986)).

150. *See id.* (plurality opinion).

make decisions not subject to review. If the official has the power to make a decision that cannot be changed, it is by definition final.

The standard of review is also relevant when determining review power. If the final decisionmaker retains power to review the subordinate's decisions, but is confined to a higher standard of review than de novo, it must be determined whether the final decisionmaker could have changed the decision.[151]

C. *The Final Decisionmaker Fails to Prevent a Deprivation that It Could Have Prevented*

A municipality sometimes can be liable for failing to prevent a deprivation. The Supreme Court has considered this issue only in the context of failure-to-train cases and has set a very high standard for plaintiffs to meet. The Court in *City of Canton v. Harris*[152] held that the failure to train can lead to municipal liability only when training was so obviously necessary to prevent the violation of constitutional rights that municipal policymakers are perceived as indifferent to the need.[153] The Court held that deliberate indifference is required to find a municipality liable for such inaction.[154]

The reason for the heightened standard is that municipal liability attaches only when an official policy causes the deprivation.[155] An official policy is one deliberately chosen from various alternatives.[156] The deliberate indifference cases, by contrast, involve inaction. Thus, the Court has decided that the inaction must amount to more than mere negligence to constitute an official policy.[157] Justice Sandra Day O'Connor also would impose municipal liability when policymakers fail to limit police discretion, the exercise of which results in a known pat-

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151. The court of appeals in *Praprotnik* relied in part on standard of review, but a plurality of the Supreme Court found this to be an insufficient basis for finding liability in *Praprotnik*. *Id.* at 117, 129 (plurality opinion) (citing 798 F.2d at 1173-75).

152. 489 U.S. 378 (1989).

153. *Id.* at 392. The plaintiff claimed that the city's policy, allowing police officers to determine when persons in custody require medical treatment, deprived her of due process when she was arrested. *See id.* at 381. The plaintiff fell down and passed out, but the police did not seek medical attention for her. *See id.* The plaintiff claimed that the city was liable for failing to train its officers properly. *See id.* at 382.

154. *See id.* at 389, 392.

155. *See id.* at 389.

156. *See id.* (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84 (1986) (plurality opinion)).

157. *See id.* at 388 & n.7 (noting the division among the courts of appeals as to what degree of fault must be evidenced by the inaction before municipal liability attaches). When "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, . . . the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390.

tern of constitutional violations.[158] The plaintiff also must prove that the deficiency in training caused the deprivation.[159] Thus, the plaintiff must prove that a different training policy would have prevented the deprivation.[160]

The Court's failure-to-train decisions are consistent with the underlying rationale for the final authority doctrine.[161] When the final decisionmaker is aware of great potential for deprivations, but does not take reasonable precautions to avoid injury, the municipality is on notice and should be liable. The rule avoids liability for random conduct by requiring that the failure to train likely will result in the violation of constitutional rights. In determining whether an act is authorized, the Court has struck a balance that falls somewhere between actual approval and custom or usage. This balance is necessary because the cases involve inaction, which is not approval, and conduct not so permanent and well settled that it constitutes a custom or usage.[162] The Court could extend this rationale beyond failure-to-train cases, although failure to train is the most frequently encountered problem resulting from inaction.

After delaying resolution of the issue and making conflicting statements,[163] the Court in *Harris* held that the policy itself need not be unconstitutional.[164] The Court concluded that if employees apply a valid municipal policy illegally because they were trained improperly,

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158. *Id.* at 397 (O'Connor, J., concurring in part and dissenting in part).

159. *Id.* at 391.

160. *See id.*

161. *See supra* Part IV.

162. *See infra* subpart V(D).

163. The plurality in City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (plurality opinion), expressed no opinion on whether a municipality could ever be liable for a deprivation caused by a constitutional policy, *see id.* at 824 n.7 (plurality opinion), but noted that for municipal liability to attach, a plaintiff would have to prove that the policy caused considerably more than a single deprivation. *See id.* at 823-24 (plurality opinion). The plurality thus would appear to require either deliberate indifference by the policymakers, or a widespread and permanent practice that would constitute a "custom or usage." *See infra* subpart V(D). Justice Brennan stated that he did not understand the plurality's "metaphysical distinction between policies that are themselves unconstitutional and those that cause constitutional violations." *Id.* at 833 n.8 (Brennan, J., concurring). Justice Brennan concluded that when a municipality takes an action that causes a deprivation, § 1983 is an available remedy. *Id.* (Brennan, J., concurring). The debate continued in City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) (plurality opinion). Justice O'Connor's plurality opinion stated that the municipality is not liable unless there is an unconstitutional municipal policy. *See id.* at 128 (plurality opinion). This position is in contrast to the plurality opinion Justice O'Counor joined in *Tuttle*, 471 U.S. at 824 (plurality opinion), which stated that a municipality may be liable for a constitutional policy under certain circumstances. *See generally* Welch & Hofmeister, *supra* note 114, at 877. Justice Brennan replied in *Praprotnik* that this issue was not before the Court. *See Praprotnik*, 485 U.S. at 147 (Brennan, J., concurring). The decision finally was made in *Harris*.

164. *Harris*, 489 U.S. at 386-87.

the municipality's failure to train caused the constitutional wrong, and the municipality should be liable.[165] This holding probably applies only to cases of inaction by the final decisionmaker because the municipality is liable only for actions of the final decisionmaker.[166] Thus, if a final decisionmaker makes a policy and delegates the discretion to his subordinates to carry it out, the final decisionmaker has authorized only constitutional conduct. Any unconstitutional conduct by subordinates is unauthorized and, thus, not attributable to the municipality.

D. A Practice Is So Widespread that It Constitutes a Custom or Usage Representing Official Policy

A municipality can cause a deprivation by acquiescing in a practice so permanent and well established that it constitutes a custom or usage with the force of law.[167] The Supreme Court has held that the text of section 1983 mandates liability for this acquiescence should it result in a deprivation of a federally protected right.[168] This liability was presumably one of the most important aspects of the statute for fighting discriminatory practices accepted, but never formally adopted, by city officials. Acquiescence by government officials is at least as dangerous as formally adopted rules.[169] This doctrine is most useful for combatting more subtle but common forms of deprivation by persons acting under color of state law.[170] The plaintiff, however, must prove that the practice is permanent and well settled, which means that other victims also may have been deprived of their federally protected rights and denied a remedy.[171]

In *Adickes v. S.H. Kress & Co.*[172] a Kress store in Hattiesburg, Mississippi refused restaurant service to a white schoolteacher accompanying six young black students.[173] The students were served, but the teacher was arrested and charged with vagrancy.[174] The Supreme Court held that custom or usage means a practice engaged in by state officials; it does not mean that a municipality is liable for acquiescing in the

165. *See id.*

166. *See supra* subpart III(C).

167. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970).

168. *See* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690-91 (1978).

169. Such informal rules of conduct may be difficult to root out and may be more deeply ingrained in the society. *See Monell*, 436 U.S. at 691 n.56 (stating that "[d]eeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text" (quoting Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 369 (1940))).

170. *See infra* notes 172-80 and accompanying text.

171. It is conceivable, though unlikely, that a practice could be well settled without having caused any deprivations; thus, even the first victim could be compensated.

172. 398 U.S. 144 (1970).

173. *Id.* at 146-47.

174. *Id.*

customs of its citizens, such as Kress.[175] Justice Brennan contended that any "widespread and long-standing practice, commonly regarded as prescribing norms for conduct, and backed by sanctions" that need not be imposed by the state constitutes custom or usage.[176] Justice Brennan argued that section 1983 liability should fall on the municipality when "a person acts under color of a custom or usage of a State."[177] This reading, however, may broaden the reach of section 1983 to cases in which no state action whatsoever exists.

The underlying rationale for the final authority doctrine does not justify municipal liability for random and unauthorized conduct.[178] The rationale, however, does support the imposition of liability on the municipality when the conduct, although not authorized explicitly, is so widespread that the final decisionmakers can be deemed on notice of, and acquiescing in, illegal conduct.[179] In *Adickes* it would be difficult to find authorization unless the government's involvement went beyond an arrest for vagrancy. The plaintiff would have to show that the final decisionmaker knew of Kress's practices and authorized the officers to arrest whites accompanying blacks in those situations.[180] If the plaintiff could show an illegal practice by the police, the conduct would not be random and the final decisionmaker could be deemed to have authorized the conduct implicitly. The municipality certainly can be said to be on notice when its employees engage in the practice, but when private citizens are the only actors, the municipality may not be able to control their activities sufficiently. This doctrine is useful in cases in which the deprivation results from conduct that is too subtle to support a finding that the final decisionmaker was deliberately indifferent to the rights of those persons with whom subordinates come in contact. Acquiescence in the subordinates' conduct by the final decisionmaker, rather than deliberate indifference, should suffice to impose municipal liability for that custom or usage.

VI. Conclusion

The underlying rationale for the final authority doctrine is to avoid municipal liability under section 1983 for random and unauthorized conduct. This rationale distinguishes acts of the municipality from acts

175. *See id.* at 166-67.

176. *Id.* at 224-25 (Brennan, J., concurring in part and dissenting in part).

177. *Id.* at 227 (Brennan, J., concurring in part and dissenting in part).

178. *See supra* notes 73-79 and accompanying text.

179. *See id.*

180. Moreover, the action must have been "under color of law," which means that a Kress employee and a police officer must have had an understanding that whites who accompanied blacks would be arrested or denied service. *See Adickes*, 398 U.S. at 152.

of its employees by requiring that the deprivation result from a decision made by a person authorized by the municipality to make such policies and by requiring that the act be one that the municipality could have prevented. If the municipality gave the official unreviewable power to make policy decisions, it is on notice that deprivations may result. If one of those decisions causes a deprivation, the municipality is at fault for not preventing it. Therefore, as with claims for violations of procedural due process, a municipality is not liable for the random and unauthorized acts of its employees.

A municipality can cause deprivations in several ways, and courts should view each case through the rationale for the final authority doctrine. The Supreme Court has settled on the final authority doctrine, but in some cases it has not agreed on how to apply the doctrine. This Note submits that the Court could apply the doctrine more consistently by referring to the underlying rationale when determining whether municipal liability should attach in a given situation. Although the Court's application generally is consistent with the rationale, the Court has deviated on occasion, especially in the area of determining final authority as a matter of law.[181] Anchoring the doctrine to its rationale will result in a more consistent analytical framework for determining when the municipality is at fault and, therefore, should be liable for any injuries that result.

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181. *See supra* subpart V(B)(1).

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