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In reviving 42 U.S.C. § 1983 after a ninety-year dormancy, the Supreme Court in *Monroe v. Pape*[2] found itself in an unusual bind. It had to establish how to interpret an old, concise, and seemingly broad statute that was enacted after little substantive debate in order to enforce a constitutional amendment.[3] Though the Supreme Court must often deal with the various tensions of interpretation in hard cases, § 1983 seemed to pose a unique problem because of its obvious import, its consequences, its long dormancy, and its minimal record.[4]

In *Monroe*, the first major case that gave life to § 1983, the Supreme Court established the manner and order in which it would interpret the statute.[5] First, of course, it would look to the text of the statute.[6] But the statute is sparse – only 145 words – and can legitimately be read to be extraordinarily inclusive or highly restrictive without any serious semantical stretches, though the former option takes a little less imagination and

1. J.D., Chicago-Kent College of Law; M.A., University of Chicago; B.A., Pennsylvania State University. I would like to thank Professor Sheldon Nahmod for invaluable comments on an earlier draft of this paper.

2. 365 U.S. 167 (1961).
3. *See id*. at 168-73.
4. *See id*.; *see also* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 665 (1978).
5. *Monroe*, 365 U.S. at 168-92.
6. In *Monroe*, the first sentence of the Court's opinion is the recounting of § 1983. *Id*. at 168.

historical reckoning.[7] The Supreme Court next looked to the legislative record.[8] But there was little debate on § 1983[9] and the Civil Rights Act of which it was a part is expansive,[10] leaving the Court with the problem of how much of the Act and debate on the Act to extend to § 1983. The Court next looked to the common law in 1871 in order to form a baseline for which the statute was intended to affect.[11] But the Fourteenth Amendment and § 1983 were radical pieces of legislation, so it is difficult to know how much of the contemporaneous common law the statute was intended to adopt rather than revise.[12] Finally, the Court looked to the purpose of § 1983 – that is, to provide a remedy for constitutional violations pursuant to Congress's powers under Section 5 of the Fourteenth Amendment.[13] But this last part of the analysis is often missing from § 1983 statutory interpretation, with only a brief rejoinder that if the Supreme Court is wrong then Congress remains free to correct it.[14]

The Supreme Court wrestled with these fundamental issues in *Monroe v. Pape* and established several doctrinal rules that it has largely stuck with. This paper will focus on one that it has overruled – municipal liability – while focusing on the Court's exclusion of municipal respondeat superior

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7. 42 U.S.C. § 1983 states:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

8. *Monroe*, 365 U.S. at 171-90.

9. *See Monell*, 436 U.S. at 664-65.

10. *See* An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes (Civil Rights Act of 1871), ch. 22, 17 Stat. 13 (1871) (codified as amended at 18 U.S.C. § 241 (2000), 42 U.S.C. §§ 1983, 1985(3), 1986 (2000)).

11. *See Monroe*, 365 U.S. at 190-91.

12. This is similar to the way the Supreme Court has read the National Labor Relations Act (NLRA) in decisions such as NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). The NLRA confers rights on employees, without specifying that they must be employees of a particular employer. A broad reading would in essence allow all employees rights to organize at all employers, but the Supreme Court has read the term narrowly.

> It said 'employees' meant only the employees of a specific employer. This is the common meaning of the word, but the NLRA says exactly the opposite. The NLRA says that the term employee 'shall include *any employee*, and *shall not be limited to the employees of a particular employer*.' This definition is intended to promote and protect worker solidarity across workplaces.

Ellen Dannin, Taking Back the Workers' Law: How to Fight the Assault on Labor Rights, 13 (2006).

13. *Monroe*, 365 U.S. at 171.

14. *Id*. at 185.

liability. This paper will argue that the Supreme Court should not have excluded respondeat superior when it finally allowed for municipal liability under § 1983. The argument will begin with the strange history and path of municipal liability while describing its current contours in broad strokes. Next, the paper will outline some of the important historical arguments that have been made against the Court's decision. There has been a great deal of such criticism, on the exclusion of respondeat superior liability that is focused on the Court's poor historical analysis, some from the Justices themselves. This is likely because the Court focused almost exclusively on the legislative record of the relevant provisions of the Civil Rights Act in its opinions. This paper will then do what the Court has expressly said it would not do with this question; it will look at the policy concerns of the alternative options. In this sort of statutory analysis, the Court should go beyond looking at the statute, the legislative record, and the contemporaneous common law; the Court should instead focus on the purpose of the statute and how it relates to modern consequences of the several available interpretations. This paper will argue that the Court's rule concerning respondeat superior is problematic in normative terms, in economic terms, and in terms of the purposes of § 1983. This paper will focus largely on this purpose-based approach and will try to show that excluding respondeat superior from municipal § 1983 liability is contrary to the purpose of the statute.

This purpose-based approach will focus on both the contemporaneous mischief that the statute was intended to remedy and the current policy implications of the decision. Through both of these lenses this paper will show that although including respondeat superior in municipal liability is not a perfect solution it is more coherent than excluding it, and the consequences of inclusion are socially preferable to exclusion. Furthermore, the Court's refrain that because this is a question of statutory construction rather than constitutional analysis, Congress is free to change the statute, is more appropriate from the position of inclusion rather than exclusion.

THE STRANGE RIDE OF MUNICIPAL LIABILITY

In the seminal § 1983 case of *Monroe v. Pape*, thirteen Chicago police officers broke into Monroe's house in the middle of the night without a warrant and "routed [Monroe's family] from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers."[15] The detective struck Monroe several times with a

15. *Id*. at 169.

flashlight, while other officers pushed his wife and kicked his children, all the while yelling racial epithets such as "nigger" and "black boy" at him.[16] The officers then took Monroe to the police station, held him on "open" charges for ten hours, and never took him to any of several available magistrates.[17] Monroe was eventually released without any criminal charges and subsequently sued the officers and the City of Chicago under 42 U.S.C. § 1983, alleging several violations of his constitutional rights.[18]

The District Court dismissed Monroe's suit and the Court of Appeals affirmed on the grounds that the defendants were not liable under the Civil Rights Act.[19] The Supreme Court accepted that Monroe's constitutional rights under the Fourth Amendment had been violated,[20] and it had little difficulty in finding state action in the police officer's conduct.[21] The central question that the Court dealt with was whether the police officers were acting "under color of law" when they were so obviously violating the law.[22] Both the Court and the dissent seemingly agreed that the "night-time intrusion of the man with a star and a police revolver is a different phenomenon than the night-time intrusion of a burglar. The aura of power which a show of authority carries with it has been created by state government."[23] Though the Court performed a relatively involved analysis of the legislative history, it found the case to be relatively easy to decide because the critical phrase at issue had already been answered several times in previous cases and the statutes implicated were relatively analogous. In both *United States v. Classic* and *Screws v. United States*, the Court analyzed the phrase "under color of law" as it was used in the criminal counterpart to § 1983 found in –18 U.S.C. § 242 – and ultimately rejected the argument that "under color of law" was a narrower concept than state action, finding the concepts coextensive instead.[24] Justice Frankfurter even joined in the *Classic* decision – though in his *Monroe* dissent he admits that he did so mistakenly without having performed his own investigation of the legislative history.[25] The Court could have decided the case narrowly through stare decisis and an easy analogy to these other "under color of law" cases and ruled only on the issue of respondeat superior as it applies to

16. *Id*. at 203 (Frankfurter, J., dissenting).
17. *Id*. at 169 (majority opinion).
18. *Monroe*, 365 U.S. at 169.
19. *Id*. at 170.
20. *Id*. at 171.
21. *Id*. at 171-72.
22. *Id*. at 172.
23. *Monroe*, 365 U.S. at 238 (Frankfurter, J., dissenting).
24. *Id*. at 183-84.
25. *Id*. at 218 (Frankfurter, J., dissenting).

municipalities, leaving the greater question of municipal liability for another day. The officers were acting on their own and openly violating state law, so the state would have only been liable if the Court found the hiring decision sufficient for liability. The Court could have then left the question of municipal liability for another day when a case that required its answering arose.

The Supreme Court did not take these steps and instead reversed the Court of Appeals' judgment with regard to the individual officers but not the City of Chicago.[26] Through an entirely historical analysis of the debates surrounding the passage of the Civil Rights Act of 1871, the Court found that the 42nd Congress did not intend to include municipalities when it said that "every person" shall be liable.[27]

The Court's historical analysis centered on an amendment introduced by Senator Sherman of Ohio to the Civil Rights Act.[28] The Sherman Amendment – which was not part of §1 of the Civil Rights Act and is now coded as § 1983 – would have imposed liability on municipalities for conspiracies of private individuals that deprived another of his constitutional right.[29] The amendment was intended to impose strict liability on municipalities for Ku Klux Klan activity that deprived third parties of their constitutional rights.[30]

The Sherman Amendment was rejected by the House of Representatives, and the Supreme Court found that the rejection was indicative of Congress's rejection of municipal liability.[31] This conclusion is problematic for several reasons, including the Court's inference of broad congressional intent where alternative explanations are more reasonable, and the drawing of an analogy from an amendment that was debated and subsequently rejected to one that induced little debate and was quickly passed. Seventeen years later when the Court ruled on *Monell* and found municipal liability under § 1983, but no respondeat superior, it similarly focused on the Sherman Amendment to infer intent and analogize.[32]

In its finding of no municipal liability under § 1983, the Supreme Court expressly refused to consider the policy implications of its ruling,[33] and instead stated that if the result was undesirable Congress may change it.[34]

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26. *Id.* at 191-92.
27. *Id.* at 188-89.
28. *Monroe*, 365 U.S. at 188-89.
29. *Id.* at 188 n.38.
30. *Id.* at 190 n.38.
31. *Id.* at 190-91.
32. *See Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658 (1978).
33. *Monroe*, 365 U.S. at 191.
34. *Id.* at 186.

Justice Frankfurter found the majority's reasoning deeply problematic and even found it necessary to recount the facts of the case in full.[35] In a dissent almost twice as long as the Court's opinion, Justice Frankfurter looked at the same legislative history and found "under color of law" is a narrower concept than state action.[36] The concept of "under color of law," for Justice Frankfurter, applies only when the state actor is following a law or custom. It is the old view expressed by Chief Justice Fuller in *Barney v. City of New York* when he wrote that the act "was not only not authorized, but was forbidden by the legislation, and hence was not action by the State . . .within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction."[37] The majority, Justice Frankfurter stated, went too far because it feared that under a narrower model it would not reach those cases in which the official law is neutral, but the unofficial custom is violative of it.[38] He addressed these fears by saying that "under color of law" covers unofficial policy and custom because § 1983 expressly contained these added forms. [39]

For Justice Frankfurter the question of how broadly to read "under color of law" implicated deep issues of federalism. Ultimately one's answer to the question seems to rely on one's view of how the Reconstruction Amendments changed the balance of federalism. Justice Frankfurter is not shy about his answer in this regard:

> The Jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state Courts, not the federal Courts, would remain the primary guardians of that fundamental security of person and property, which the long evolution of the common law had served to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism.[40]

Frankfurter does not see the Reconstruction Amendments as having changed the federalism balance and therefore does not see § 1983 as a nationalizing statute. For Frankfurter, § 1983 only provides a remedy when the state or local government has an official policy or custom under color of which the state official is acting. Anything beyond that is a question of state law and not federal law.

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35. *Id.* at 202-05.
36. *Id.* at 224-26 (Frankfurter, J., dissenting).
37. Barney v. City of New York, 193 U.S. 430, 437 (1904).
38. *Monroe*, 365 U.S. at 235 (Frankfurter, J., dissenting).
39. *Id.*
40. *Id.* at 237.

MUNICIPAL LIABILITY AFTER *MONROE*

Following *Monroe*'s clear exclusion of municipal liability, plaintiffs tried three different routes to end-run *Monroe*.[41] The first was in racial discrimination employment settings in which plaintiffs have used 42 U.S.C. § 1981.[42] The second was using the rationale from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[43] in order to argue an implied cause of action under the Fourteenth Amendment.[44] And the third way was by using *Mt. Healthy City School District Board of Education v. Doyle*,[45] for federal jurisdiction in Fourteenth Amendment cases against municipalities under § 1331(a).[46]

In *Mt. Healthy*, the Court seemed to invite a case like *Monell* in order to answer the question of whether local governments were "persons" under § 1983.[47] When *Monell* was decided, it stood for four major propositions: 1.) contrary to the Court's holding in *Monroe*, municipalities are liable under § 1983;[48] 2.) municipalities can only be held liable for official policy or custom, whatever these might be;[49] 3.) municipalities cannot have absolute immunity;[50] and 4.) municipalities cannot be liable under the theory of respondeat superior.[51] These propositions, taken together, made municipalities liable under § 1983, but only in very limited circumstances in which the plaintiff can go through the arduous task of meeting the *Monell* standard as it has developed.

Monell was in many ways an easy case. The case grew out of an official New York policy that forced women to take maternity leave at the fifth month of pregnancy.[52] The suit was brought by a group of female employees at the New York Department of Social Services and the Board of Education against the Department, the Commissioner, the Board, the Chancellor, the City, and the mayor, and sought both injunctive relief and back-pay for periods of forced leave.[53] Though the Circuit Court found that there were constitutional violations, it provided summary judgment for the

41. KAREN M. BLUM, FROM MONROE TO MONELL: DEFINING THE SCOPE OF MUNICIPAL LIABILITY IN FEDERAL COURTS, 51 TEMP. L.Q. 409, 414 (1978).
42. *Id.* at 415-16.
43. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
44. BLUM, *supra* note 40, at 416-17.
45. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).
46. BLUM, *supra* note 40 at 419.
47. *See Mt. Healthy*, 429 U.S. at 279.
48. *Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658, 663 (1978).
49. *Id.* at 690-91.
50. *Id.* at 701.
51. *Id.* at 691.
52. *Id.* at 661.
53. *Monell*, 436 U.S. at 660-61.

defendants because of the *Monroe* rule of no municipal liability.[54] The Court of Appeals affirmed and the Supreme Court granted certiorari to reconsider whether municipalities were "persons" under § 1983.[55]

Monroe was a case involving a violation of official law and policy and could have been disposed of with an answer to the question of municipal liability under a respondeat superior theory.[56] A shallow, narrow holding would have sufficed.[57] *Monell* is in many ways the inverse; it involved only the question of municipal employees following official policy and therefore could have been disposed of without reference to the issue of respondeat superior.[58] The *Monell* Court could have "expressly [left] further development of this action to another day" as it does with so many other § 1983 issues.[59] Instead the Court, in reversing its errors in *Monroe*, performed what can best be described as a comedy – it unearthed all the mistakes of *Monroe* with a skeptical stance, only to make a sharp turn and repeat many of the *Monroe* missteps. The *Monroe* Court expressly disavowed a policy analysis of its holding and instead chose to perform a historical analysis based primarily on analogizing a rejected amendment to § 1983.[60] The *Monell* Court footnoted this statement and also excluded any view toward policy.[61]

Though it is difficult to criticize the *Monell* Court for looking to the same legislative history as the *Monroe* Court – because one can only look at the history you get rather than the history you want – one can criticize it for limiting itself largely to this inconclusive history. The *Monell* Court reexamined the speeches of Senator Sherman, Representative Shellabarger, and Representative Butler, and concluded that the legislators did not appear to bar municipal liability under § 1983 when they were speaking about a completely separate topic.[62] It further found that the contemporaneous Dictionary Act, which the *Monroe* Court found provided only an "allowable" definition of the word "person," in fact provided a "mandatory"

54. *Id*. at 661-62.

55. *Id*. at 662.

56. *See generally Monroe v. Pape*, 365 U.S. 167 (1961).

57. See *generally* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35-61 (1996); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999), for a full discussion on the benefits of shallow and narrow decisions, or "incompletely theorized agreements."

58. *See Monell*, 436 U.S. at 660-63. This may explain Justice Stevens' terse concurrence, where he said that the holding on respondeat superior was "merely advisory and are not necessary to explain the Court's decision." *Id*. at 714 (Stevens, J., concurring).

59. *Id*. at 695 (majority opinion).

60. *See Monroe*, 365 U.S. at 187-91, 664 n.8.

61. *Id*. at 664 n.8.

62. *Id*. at 665-704.

definition of the term.[63] The *Monell* Court found on the basis of this same selected legislative history that municipalities were not intended to be excluded from liability under § 1983.[64] Since the Court did not address policy in either of these cases, nothing changed between *Monroe* and *Monell*; the Court simply said that it had misread history.[65] And, just as in *Monroe*, since this was a question of statutory construction and not constitutional law, Congress is free to correct the Court.[66]

In reaching this decision in *Monell* the Supreme Court not only expressly overruled the *Monroe* Court's holding with regard to municipalities, but in many respects it adopted Justice Frankfurter's minority view of "under color of law."[67] Frankfurter's view of "under color of law" was that it was not coextensive with state action and only covered those actions that were done pursuant to official policy or custom.[68] This view was tightly bound to Justice Frankfurter's view of federalism and the Fourteenth Amendment.[69] In *Monell*, the Court adopted this exact view, without attribution, to a large class of potential defendant's – officials in their official capacities and municipalities.[70] In expanding the scope of "every person," the Court diminished the scope of "under color of law," thereby defanging one of the most salient elements of § 1983 liability.[71]

THE HISTORICAL PROBLEM WITH *MONELL* MUNICIPAL LIABILITY

Many have criticized the historical analysis of the *Monell* Court.[72] Some have even criticized the historical analysis of the critics, but claim that the full picture still shows the shoddiness of the *Monell* holding.[73] The strongest of these arguments shows that the Supreme Court misunderstood nineteenth century common law and did not fully explore the complete contemporaneous rationale for respondeat superior liability.[74] But these

63. *Monell*, 436 U.S. at 689 n.53.
64. *Id*. at 690.
65. *Id*.
66. *Id*. at 695.
67. *Id*. at 663, 669-700.
68. *Monroe v. Pape*, 365 U.S. 167, 235-36 (1961).
69. *See id*. at 237.
70. *See Monell*, 436 U.S. at 690-92.
71. *See id*.
72. *See* Larry Kramer & Alan O. Sykes, *Municipal Liability Under §1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 255-61 (1988); Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 235-38 (1986); Eric A. Harrington, Note, *Judicial Misuse of History and §1983: Toward a Purpose-Based Approach*, 85 TEX. L. REV. 999, 1010-25 (2007).
73. *See* David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. §1983 and the Debate Over Respondeat Superior*, 73 Fordham L. Rev. 2183, 2229-30 (2005).
74. *See id*. At 2240-48.

arguments typically get into the same historical morass as the *Monell* Court and often end up with arguments that are just as complicated and convoluted as the Court's.[75]

Though the historical arguments against the *Monell* holding are more persuasive than those for it, the purpose-based and policy arguments are ultimately the most persuasive.[76] Ronald Dworkin succinctly describes policy as "that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)."[77] Justice Breyer describes how a purpose-based interpreter would interpret a statute:[78] "The judge will ask how this person [reasonable member of Congress] (real or fictional), aware of the statute's language, structure, and general objectives (actually or hypothetically), *would have wanted* a court to interpret the statute in light of present circumstances in the particular case."[79] This approach is preferred because where the statute and the historical record have not disposed of the matter, it is best to turn to the purpose of the statute and examine which interpretation is the most coherent.[80]

Monell attempted to do something that seems quite simple and appropriate when dealing with civil liability: it attempted to ascribe liability on the basis of fault.[81] This move is easy enough when it comes to individual tort liability, but it becomes somewhat strained when dealing with corporations, further strained when dealing with municipal corporations, and even more strained when dealing with municipal corporations that violate an individual's constitutional rights.[82] This is because of the problem of causation, issues of intent, and the seriousness that even a slight constitutional violation carries with it.[83] The problem of causation arises when trying to distinguish between direct causation and vicarious causation because a municipality only "acts" vicariously.[84] The problem of intent arises when trying to single out certain vicarious actions for which the municipality is at fault because, except for the case of a strict

75. *See* Harrington, *supra* note 74, at 1015.

76. *See id*. at 1018-26.

77. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (Harvard Univ. Press 1977).

78. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85-101 (2005).

79. *Id*. at 88.

80. *Id*. at 85-6, 98; Harrington, *supra* note 74, at 1018-26.

81. *See* Karen M. Blum, *Local Government Liability Under Section 1983*, *in* 1 25TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 145, 403 (2008).

82. *See generally* Whitman, supra note 71, at 225.

83. *See id*.

84. *Id*. at 254-55.

liability standard, a municipality does not evince the proper state of mind to find fault.[85] Finally, the severity of a constitutional violation perpetrated by precisely those that are there to protect the individual's rights harkens back to the very purpose of the Fourteenth Amendment and § 1983.[86]

Monell discussed none of these issues and instead makes a few distinctions that seem simple. It expressly left the question of qualified immunity and the exact contours of municipal liability for another day.[87] The Supreme Court and the circuit courts have struggled to coherently map out municipal liability.[88] Currently, it hangs in a precarious position with several Justices calling for a reexamination,[89] a great deal of criticism on its historical foundations, problems with how it fits in with § 1983, and the spawning of an extremely complex area of law from a proposition that was intended to be simple.[90]

The Supreme Court took a rejection of a very specific form of vicarious liability that is premised on the tenuous ground of the government's affirmative duty to act, generalized it, and said that Congress must have then intended to reject all forms of vicarious liability, including the very different respondeat superior liability.[91] This holding is based on two incorrect premises. First, the Court looked at only two of several groundings for the theory of respondeat superior and concluded that they were not accepted by the 42nd Congress.[92] Second, the Supreme Court assumed *sub silentio* that respondeat superior was not widely accepted at common law in 1871 and should not be read into § 1983.[93] Both of these premises are incorrect.

The Court looked at two groundings for respondeat superior[94] and a curious third in a footnote,[95] but a fuller examination would have led the Court to opposite conclusions. The Court looked at the theories that respondeat superior will help provide deterrence on the employer to avoid "accidents," the "insurance theory" that the costs of "accidents" should be

85. *Id*. at 225, 237-38 (1986).

86. *See* Mitchum v. Foster, 407 U.S. 225, 240-42 (1972).

87. *Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658, 702 (1978).

88. *See* SHELDON NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION §6:12, 6.35 -40 (4th ed. 2007), for a list organized by circuits.

89. Bd. of the Co. Comm'rs. of Bryan Co., Okla. v. Brown, 520 U.S. 397, 430-33 (1997) (Breyer, J., dissenting). This dissent was joined by Justice Ginsburg and Justice Stevens.

90. *See* sources cited *supra* note 71.

91. *Monell*, 436 U.S. at 690-95.

92. *Id*.

93. *See id*. The Court does not explicitly say that respondeat superior was not accepted at common law in 1871, but because the contemporaneous common law goes hand in hand with a review of the legislative history, one can infer the Court's assumption of the common law from its result.

94. *Id*. at 693-94.

95. *Id*. at 694 n.58.

spread to the community, and then briefly at the "control theory" where liability flows from the right to control the tortfeasor.[96] The Court rejected the deterrence argument because opponents of the defeated Sherman Amendment used it as justification.[97] Finally, the Court concluded that it has already rejected the "control theory" in *Rizzo v. Goode*.[98]

The Court confused the current understandings of respondeat superior with the nineteenth century views throughout its brief analysis of the purported history of the theory. This began with the Court's use of two twentieth century tort treatises in order to find the nineteenth century rationale.[99] Then, in its use of *Rizzo v. Goode*,[100] the Supreme Court rejected the "control theory," even though the case never discussed how the 42nd Congress viewed this grounding of respondeat superior.[101] *Rizzo* only expressed modern disapproval of the control theory.[102] The Supreme Court similarly rejected the insurance theory but grossly overstated the theory's historical importance.[103] David Achtenberg performed a comprehensive survey of nineteenth century cases discussing respondeat superior and could not find a single case that employed the insurance theory.[104] Furthermore, Achtenberg argues that when Representative Butler raised the argument that the Sherman Amendment was for "mutual insurance,"[105] he did not use it in its current meaning.[106] Rather, Representative Butler was referring to the concept that "benefit and liability [should be] reciprocal," which stands as a very different grounding than the insurance theory.[107] Finally, the Court's rejection of the theory that vicarious liability would help prevent accidents does not lead to a rejection of respondeat superior.[108] The Court's finding that the members of the 42nd Congress looked at this rationale and did not accept it is uniquely tied to the specific facts of the Sherman Amendment.[109] Members of Congress were concerned that imposing strict vicarious liability on municipalities for the action of private groups would impose an affirmative duty on municipalities to create and expand police forces.[110]

96. *Monell*, 436 U.S. at 693-94.
97. *Id*.
98. *Id*. at 694 n.58 (citing Rizzo v. Goode, 423 U.S. 362 (1976)).
99. *Id*. at 693.
100. 423 U.S. 362 (1976).
101. *See Monell*, 436 U.S. at 694 (citing *Rizzo*, 423 U.S. at 370-71).
102. *Rizzo*, 423 U.S. at 378-80.
103. Achtenberg, *supra* note 72, at 2205.
104. *Id*.
105. *Monell*, 436 U.S. at 693.
106. Achtenberg, *supra* note 72, at 2205.
107. *Id*. at 2205-06.
108. Id. at 2210.
109. *Id*.
110. *Id*. at 2210.

Many legislators were concerned that this federal imposition would be adjudged as unconstitutional and therefore rejected the loss prevention rationale.[111]

Rather than the three rationales for respondeat superior offered up by the *Monell* Court, Achtenberg found that there were in fact four rationales for respondeat superior liability – with only slight overlap to the Court's two – in the nineteenth century and several of these would have been compatible with respondeat superior but not the Sherman Amendment.[112] This means that it is easily reconcilable that members of Congress could have rejected the rationales in relation to the Sherman Amendment but accepted them in regard to respondeat superior. The four rationales were: "liability based on the legal unity of servant and master,"[113] "liability based on the master's legal power to control and direct the servant,"[114] "liability based on [the] implicit warranty of [the] servant's good conduct,"[115] and "liability based on the reciprocal relationship between benefits and liabilities."[116] Even a cursory look at these reasons for vicarious liability brings forth the profound difference between the rationales regarding the Sherman Amendment and those of respondeat superior. There is no fictional unity between the Klan and the municipality. There is no claim to control with regard to private Klan action and there is no reciprocal flow of benefits and liabilities with regard to Klan riots, thus the municipality offers no implicit warranties with regard to private action.

Similar to the Court's misreading of history regarding the nineteenth century rationales for respondeat superior, the Court misread history when it assumed that respondeat superior was not widespread at common law in 1871.[117] Though the doctrine was not as developed as it is today, most legislators of the 42nd Congress would have been familiar with the doctrine. Therefore, the baseline the Court should have used was one in which legislative silence on the doctrine meant adoption due to its prominence at common law rather than its exclusion.

After *Monell*'s holding that municipalities are persons under § 1983 and can be sued when the constitutional violation is a result of official policy or custom, the district courts struggled to apply the *Monell* doctrine to harder cases.[118] Though *Monell* used cause in fact terminology, it is properly

111. Achtenberg, *supra* note 72, at 2210.
112. *Id.* at 2197-2202.
113. *Id.* at 2197.
114. *Id.* at 2198.
115. *Id.* at 2200.
116. Achtenberg, *supra* note 72, at 2202.
117. *See Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658, 693 (1978).
118. *See* NAHMOD, *supra* note 87, §6:9, 6-28-6-29.

conceived as a case involving duty.[119] The official policy or custom gives rise to a duty and the breach of that duty, when it leads to a constitutional violation, is what leads to municipal liability.[120] Soon after *Monell* was handed down, the question of what – other than official written policy – may constitute policy or custom needed to be resolved.

Since *Monell*, there have been four basic routes to municipal liability. The first is the official policy standard explicated in *Monell*.[121] In *Monell*, the official policy was a written policy which made for an easy case.[122] In *Pembaur v. City of Cincinnati*, the Court held that the policy need not be written so long as it is promulgated by an official policymaker with regard to the particular matter.[123]

The second route is through custom. The *Monell* Court adopted the *Adickes* definition and reasoning behind custom. "[B]ecause of the persistent and widespread discriminatory practices of state officials," the Court quoted *Adickes*, "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."[124] This standard is exceptionally hard to meet, as was shown in *Webster v. City of Houston*, in which the Court vacated the district court's judgment that the city was liable because of policy based on custom.[125] The Fifth Circuit vacated in spite of compelling evidence, including proof that the custom of placing a "throw down" gun near an unarmed suspect shot by police officers in order to justify the shooting.[126] The plaintiffs in *Webster* proved that the "throw down" gun was used almost universally in the police department, recruits learned the practice while still in the academy,[127] that in the instance in question a large group of officers stood around discussing whether to use a "throw down" gun,[128] and the practice was widely known to high officials in the department and was never ordered to be stopped.[129]

A third route is through the failure to train, as described in *City of Canton v. Harris*.[130] The Court held that "inadequacy of police training may serve as the basis of § 1983 liability only where the failure to train

119. *Id.* §6:6, 6-22.
120. *Id*. at §6.6, 6-23 to 6-24.
121. *Monell*, 436 U.S. at 691-93.
122. *Id.* at 661 n.2.
123. Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).
124. *Monell*, 436 U.S. at 691 (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 166-67 (1970)).
125. Webster v. City of Houston, 735 F.2d 831, 840 (5th Cir. 1984).
126. *Id*. at 856.
127. *Id.* at 856.
128. *Id*. at 843.
129. *Id*. at 852.
130. City of Canton, Ohio v. Harris, 489 U.S. 378, 387 (1989).

amounts to deliberate indifference to the rights of persons with whom the police come into contact."[131] Furthermore, the plaintiff must show a close causal link between the particular training deficiency and the constitutional violation.[132]

The last route is the rare case of hiring leading to municipal liability. This was announced as a possibility in *Board of County Commissioners v. Brown*,[133] but the facts of the case were not sufficient to meet the high standard it set forth. The Court said that a hiring decision could only lead to liability in the rare circumstance:

> where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right [such that] the official's failure to adequately scrutinize the applicant's background constitute[s] "deliberate indifference."[134]

Each of the four routes to municipal liability requires the finding of a policymaker. This has become a harder task than one might first imagine. *Monell* left open the question of who constitutes a policymaker and left it to subsequent cases to explore the contours of this inquiry.[135] *Pembaur* held that the question is one of state law.[136] *Pembaur* further established that it was a functional inquiry, and the official had to be a policymaker with regard to the particular matter.[137] A footnote in *Pembaur* excluded as policymakers officials that have discretion in executing policy but do not establish the parameters of the policy themselves.[138] *City of St. Louis v. Praprotnik* held that even if policymakers affirm a policy made by subordinates, they are not liable unless they affirm the rationale behind the policy as well.[139]

Parratt v. Taylor distinguished between policy and a "random and unauthorized act by a state employee" and found that the latter is not attributable to the government.[140] This rule was affirmed in *City of Oklahoma City v. Tuttle* a year later when the Supreme Court found that a

131. *Id.* at 388-89.
132. *Id.* at 391.
133. Bd. of the Co. Comm'rs. of Bryan Co., Okla. v. Brown, 520 U.S. 397, 404-05 (1997).
134. *Id.* at 411.
135. *Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658, 694 (1978).
136. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 498 (1986).
137. *Id.* at 482-84.
138. *Id.* at 483 n.12.
139. City of St. Louis v. Praprotnik, 485 U.S. 112, 145 (1988).
140. , 451 U.S. 527, 541 (1981).

single incident was not enough to find a policy of training, "unless it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."[141] One year later, the Supreme Court found in *Pembaur v. City of Cincinnati* that one incident may be enough to establish liability when it was caused by a policymaker.[142] In *Pembaur*, Cincinnati police officers tried to serve third party capiases and were denied access by the plaintiff.[143] The officers called the prosecutor for instruction on what to do.[144] He instructed them over the phone to "go in and get the witnesses."[145] The officers obtained an axe and forcibly entered the premises.[146] There was no official policy concerning the serving of capiases on third party's property, and the Sheriff could not recall a previous instance of such forcible entry.[147] The Supreme Court reasoned that the prosecutor had authority to make policy with regard to the serving of capiases, and in this instance he had created official policy over the phone.[148] The analysis was functional, similar to an absolute immunity analysis, wherein the Court asks not only if the person was a policymaker but looks to state law to see if he is a policymaker with respect to the specific area of policy created.[149] The Court said that "municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered."[150] This question is ultimately a question of state law.[151]

Looking into state law in order to find policymaking can be difficult, and seemingly inconclusive, as was the case in *McMillian v. Monroe County, Alabama.*[152] In *McMillian* it was necessary to determine whether the Monroe County Sheriff was a county policymaker or a state policymaker.[153] This issue was dispositive because if he was found to be a state policymaker then he could not be sued in his official capacity since states are not liable persons under § 1983.[154] The Court found that though the sheriff appeared in many respects to be a county policymaker, he was in

141. City of Okla. v. Tuttle, 471 U.S. 808, 823-24 (1985).
142. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).
143. *Id.* at 472.
144. *Id*. at 473.
145. *Id.*
146. *Id.* at 473.
147. *Pembaur*, 475 U.S. at 474-75.
148. *Id.* at 480-81.
149. *Id.* at 483.
150. *Id.* at 481-82.
151. *Id.* at 483.
152. McMillian v. Monroe Co., Ala., 520 U.S. 781 (1997).
153. *Id.* at 783.
154. Will v. Mich. Dept. of St. Police, 491 U.S. 58, 71 (1989).

fact a state policymaker.[155] As Justice Ginsburg pointed out in her dissent, the Alabama County Sheriffs are "each elected, paid, and equipped locally, each with countywide, not statewide, authority."[156] The Court found that the sheriff was a state policymaker largely based on the fact that the sheriff has a mandate with "complete authority to enforce the state criminal law in [his] county."[157] *McMillian* showed how difficult it can be to find policymaking authority in the layers of municipal administration in instances in which ideal official policymaking routes are not simply and explicitly provided in state law.

If official policy is difficult to locate, proving custom is a daunting task for a plaintiff. The *Monell* Court has defined custom as "practices of state officials … so permanent and well settled as to constitute 'custom or usage' with the force of law."[158] Since official policy need not be written or occur more than once, a plaintiff would likely allege custom when she has no proof of any policymaker's actual knowledge of the practice. In other words, she must prove constructive knowledge. Therefore, in addition to having to take the difficult steps of figuring out who the policymaker was for the particular conduct, the plaintiff must also prove that the policymaker had deliberate indifference of the custom alleged. The custom route is used mostly in failure to train cases, and the plaintiff must prove that it was the failure to train that actually led to the constitutional violation.

PURPOSE-BASED PROBLEMS WITH *MONELL*

Municipal liability is no small matter under § 1983. Without municipal liability, a plaintiff is often stuck suing the official in her personal capacity and the amount one can recover is often limited by the defendant's ability to pay.[159] In addition, the individual official may be protected from suit by absolute immunity[160] or protected from liability by qualified immunity,[161]

155. *McMillian*, 520 U.S. at 791.

156. *Id.* at 797 (Ginsburg, J., dissenting).

157. *Id.* at 790.

158. *Id*. at 691.

159. This paper does not consider the possibility that the municipality will indemnify the employee for several reasons. First, there does not appear to be comprehensive statistics concerning how common the practice is throughout the nation, and how broad the indemnification is. Secondly, if it turns out that the practice of employee indemnification is widespread, then the argument for including direct respondeat superior liability may be strengthened because the process of indemnification end-runs many of its consequences.

160. Tenney v. Brandhove, 341 U.S. 367 (1951) (establishing absolute immunity for legislators when performing legislative function); Pierson v. Ray, 386 U.S. 547 (1967) (establishing absolute judicial immunity when acting in judicial capacity); Imbler v. Pachtman, 424 U.S. 409 (1976) (establishing absolute prosecutorial immunity when prosecutor is acting in advocative role).

meaning that although the official may have caused a constitutional violation no one may be held liable.[162] Furthermore, there is the issue that although the official's actions may have been caused by systematic problems, the lone official may become the "fall guy," and no systematic change will be affected. These are all serious concerns with the current state of municipal liability and its strict no respondeat superior approach, but the first issue that must be addressed is that it is not a good fit with the purposes of § 1983.

As discussed above, the Supreme Court first excluded municipal liability in *Monroe*,[163] and then included it without respondeat superior liability in *Monell* by looking primarily at the legislative history of certain sections of both the passed and rejected Civil Rights Act.[164] But the Court did not perform an analysis of § 1983 in order to come to its decision of how best to treat the question of municipal liability.[165] Had the Court done so, it would have been on a more solid grounding, and its holding would have likely been different.

The title of § 1983 is a good place to begin in this inquiry because it is clear and instructive. The statute was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."[166] In *Washington v. Davis*, the Court said that "the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."[167] The Ku Klux Klan's activities and threats were on the rise in the years following the Civil War and preceding the passage of the Civil Rights Act of 1871 throughout much of the South.[168] The Klan publicly proclaimed that it intended to target "'the scum of the earth, the scrapings of

161. Harlow v. Fitzgerald, 457 U.S. 800 (1982) (establishing qualified immunity for certain government officials when law not clearly established at time of the action).

162. Granting absolute immunity for all municipal employees in conjunction with including respondeat superior municipal liability stands out as an attractive policy alternative because it would satisfy the dual goals of §1983 of making the victim whole and deterring constitutional violations. Furthermore, it would simplify the highly complicated area of law that deals with absolute and qualified immunities for various positions and functions. But as attractive as this option is on policy grounds, it would lead to a bizarre situation where "every person" includes none of those usually included in the category of "persons," and only includes corporate bodies. In addition it is unlikely that the Congressional Globe will reveal that the intent of the 42nd Congress was to exclude municipal employees entirely from liability. Through joint and several liability, it is likely that even where the employee is sued together with the municipality, that it will be the municipality that will have to pay the judgment.

163. *Monroe v. Pape*, 365 U.S. 167, 191-92 (1961).

164. *Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658, 690 (1978).

165. *Id*. at 701.

166. *Monroe*, 365 U.S. at 171 (citing 17 Stat. 13 (1871)).

167. Washington v. Davis, 426 U.S. 229, 239 (1976).

168. David Everitt, *1871 War on Terror*, 26 AM. HIST., 27 (2003).

creation' and that they intended to do everything possible to oppose 'negro rule, [African-American] bayonets, and a miserably degraded and thievish set of lawmakers."[169] Some have described the Klan's activities as having set up its own "legal regime through the use of force."[170] In the 1868 revised and amended prescript of the Klan, the organization described its purpose in three parts.[171] The second and third exclaimed that the Klan was organized to "protect and defend the Constitution of the United States . . . to aid and assist in the execution of all constitutional laws, and to protect the people from unlawful seizure[.]"[172] Article 5 of this document described the Klan's judiciary, replete with the composition of its Courts, appellate procedures, due process, and the right to prescribe penalties.[173] This occurred while the "[l]egal institutions were of little help to the Freedmen victimized by the domestic terrorists: '[I]f a white man kills a colored man in any of the counties of this State,' lamented a Florida sheriff, 'you cannot convict him.'"[174] The Klan did not wish to achieve anarchy, but rather sought to impose its own dominant legal regime, sometimes by creating a parallel system of "justice" and sometimes by subordinating the state system.[175]

The situation became so bad that the President sent a special message to Congress to describe the state of affairs and encourage national action.[176] In response, a joint congressional committee was established in order "to inquire into the conditions of affairs in the late insurrectionary states . . . so far as regards the execution of the laws and the safety of the lives and property of the citizens of the United States."[177] The state courts were unable or unwilling to enforce the provisions of the Fourteenth Amendment or even to keep the freedmen safe in many instances, so § 1983 was passed as part of the Civil Rights Act of 1871 to provide a remedy to individuals whose constitutional rights were violated. Section 1983 was a nationalizing statute intended to insert the Federal Government between the individual and the state.[178] The original federalist balance of the States as the protectors of individual liberty was inverted in § 1983. It was now the

169. *Id.*

170. Harrington, *supra* note 74, at 1004.

171. MICHAEL NEWTON, THE KU KLUX KLAN: HISTORY, ORGANIZATION, LANGUAGE, INFLUENCE AND ACTIVITIES OF AMERICA'S MOST NOTORIOUS SECRET SOCIETY 428 (2007).

172. *Id*.

173. *Id.* at 430.

174. Harrington, *supra* note 74, at 1005.

175. *Id.* At 1004-05 (2007).

176. *Monroe*, 365 U.S. at 172-73 (citing CONG. GLOBE, 42d Cong., 1st Sess., 244 (1871).

177. Francis B. Simkins, *The Ku Klux Klan in South Carolina, 1868-1871*, 12 J. Negro Hist. 4, 640 (1927).

178. *Mitchum v. Foster*, 407 U.S. 225, 240-42 (1972).

States that were the sources of tyranny, and § 1983 provided protection for the individual and deterrence toward the State. In *Mitchum v. Foster*, the Court described the purposes of § 1983:

> It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against State action, . . . whether that action be executive, legislative, or judicial.' . . . Proponents of the legislation noted that state Courts were being used to harass and injure individuals, either because the state Courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights[.]
>
> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the State and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state Courts[.]
>
> The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'[179]

Section 1983 was intended to achieve this through a system of civil remedies that both made the victim whole while also deterring further constitutional violations.[180] The statute tried to do this by shifting the burden of enforcing the Fourteenth Amendment to the federal system from the state system.[181] In so doing, it was perhaps inevitable that the federal judiciary would have to get involved in matters of traditional local concern. Issues that often arise under § 1983 are Fourth Amendment issues of police enforcement, Eight Amendment issues involving prison administration, educational concerns, and administration of local government. All of these involve areas of local concern that are perhaps best handled by local legislation. But, under § 1983, the federal judiciary stands guard and must

179. *Id*. at 240-42.
180. *Id*. at 242.
181. *Id*.

ensure that these matters are handled fairly in accordance with the principles set forth in the Fourteenth Amendment.

The Supreme Court's constant limitations on the force of § 1983 work against the principles and broad language of § 1983. The statute is expansive in its language, with phrases such as "*every* person," "under color of *any* statute, ordinance, regulation, custom, or usage," "*subjects, or causes to be subjected*," and "to the deprivation of *any* rights, privileges, or immunities secured by the Constitution and laws."[182] On each of the issues regarding liability, the actor's relationship to the state, causation, and types of violations covered, the statute mentions almost every alternative possible. And in each of the instances, the Supreme Court has advanced an argument of how each of the phrases is severely limited by other considerations not found in the text or the legislative history. In addition to the strange case of municipal liability, these have included insertions of layers of absolute and qualified immunities for officials where none existed in the text or the history of the statute.[183] The delicate issue of federalism has pervaded every major decision of the Court with regard to § 1983, where the Court must choose which paradigm of federalism would best fit with § 1983.

One thing that is often missing from this analysis is the policy implications of the Court's choice. Beyond the question of what the 42nd Congress wanted or would have wanted, the Court should inquire which interpretation of the statute best effectuates the goals of the statute.[184] Some have suggested doing away with the *Monell* rule regarding respondeat superior on efficiency grounds in which efficiency is used in the "Hicks-Kaldor sense: [where] liability rule A is more efficient [than] liability rule B if the members of society who prefer A to B can compensate the members of society who prefer B to A and remain better off themselves, whether or not such compensation is actually paid."[185] According to this type of efficiency analysis of municipal liability under a theory of respondeat superior, there are three separate analyses that must be performed. First, one must look at the "efficiency of the precautions or deterrent measures that result under alternative liability rules."[186] This inquiry looks to the goals of the statute and investigates under which regime they are best achieved. Second, one must look at "the effect of alternative liability rules on scale of activity."[187] This inquiry diverges with respect to private and

182. 42 U.S.C. § 1983 (emphasis added).
183. *Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658, 690-92 (1978).
184. Kramer & Sykes, *supra* note 71, at 267.
185. *Id.* at 251 n.7.
186. *Id.* at 267.
187. *Id.* at 268.

public corporations. Many may agree that a private business that has to scale back because it cannot be as profitable as another private business with respect to liability is a necessary and perhaps positive consequence of the market. This same market-based approach is not as appealing to many but the most radical libertarians when it concerns municipalities that provide essential services such as police protection, education, and hospitals. Finally, one must look at "the effect of different liability rules on the efficiency of risk bearing."[188] This inquiry hopes to place liability on the right person in order to ensure that certain risks are still taken while others are mitigated.

Applying this economic analysis to the question of municipal liability, Larry Kramer and Alan Sykes have concluded that the least efficient of all possible alternatives is the path that the Supreme Court has taken in *Monell* and its progeny.[189] The authors examine three alternatives: no respondeat superior, respondeat superior under its usual strict liability application, or a sort of middle ground of respondeat superior with a negligence standard. The negligence approach, which has never been seriously considered by the Court, would essentially adopt the Learned Hand formula of *Carroll Towing* as applied to common law torts[190] in which "if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL."[191] As applied to municipal liability under § 1983, the Court would have to perform a cost-benefit analysis of training programs, hiring decisions, and other administrative matters. The plaintiff would have to show that the probability of the specific injury and the gravity of the injury were greater than the burden imposed by preventing it. The authors prefer this approach because it provides for a form of municipal liability that is based on fault but is not as restrictive as the *Monell* rule.[192] In addition, they foresee a great deal of useful information flowing from these lawsuits that municipalities could use to structure their affairs.[193]

The *Monell* rule is also inefficient due in part to the issue that Justice Breyer raised in *Bryan County*, that the exclusion of respondeat superior from § 1983 municipal liability has created an area of law that is too complicated for its own good. Justice Breyer said:

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188. *Id.*
189. *See* Kramer & Sykes, *supra* note 71, at 249-51.
190. *Id.* at 285.
191. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2nd Cir. 1947).
192. *See* Kramer & Sykes, *supra* note 71, at 281-85.
193. *Id.* at 285.

> The *Monell* "no vicarious liability" principle rested upon a historical analysis of § 1983 and upon § 1983's literal language – language that imposes liability upon (but only upon) any "person." Justice STEVENS has clearly explained why neither of these rationales is sound[.]
>
> Without supporting history, it is difficult to find § 1983's words "[e]very person" inconsistent with *respondeat superior* liability. In 1871 "bodies politic and corporate," such as municipalities, were "person[s]." Section 1983 requires that the "person" either "subjec[t]" or "caus[e]" a different person "to be subjected" to a "deprivation" of a right. As a purely linguistic matter, a municipality, which can act only through its employees, might be said to have "subject[ed]" a person or to have "cause[d]" that person to have been "subjected" to a loss of rights when a municipality's employee acts within the scope of his or her employment. Federal Courts on occasion have interpreted the word "person" or the equivalent in other statutes as authorizing forms of vicarious liability.
>
> Second, *Monell* 's basic effort to distinguish between vicarious liability and liability derived from "policy or custom" has produced a body of law that is neither readily understandable nor easy to apply.[194]

Justice Breyer is referring to, among other matters, the difficult path that courts must follow in order to end up at municipal liability, including using state law to find out who qualifies as a policymaker for the specific function in question, whether or not official policy was made before or at the time of the action, and if there is no official policy, whether there was any practice that could constitute "well established" custom.

Justices Ginsburg and Stevens joined in Justice Breyer's dissent in *Bryan County*, while Justice Souter ended his dissent with cautious agreement that it is time to reexamine *Monell*.[195] Justice Souter said,

> I had not previously thought that there was sufficient reason to unsettle the precedent of *Monell*. Now it turns out, however, that *Monell* is hardly settled. That being so, Justice Breyer's powerful

194. Bd. of the Co. Comm'rs. of Bryan Co., Okla. v. Brown, 520 U.S. 397, 431-33 (1997) (Breyer, J., dissenting) (citations omitted).

195. *Id.* at 429 (Souter, J., dissenting).

> call to reexamine § 1983 municipal liability afresh finds support in the Court's own readiness to rethink the matter.[196]

The *Monell* rule is also inefficient because it leaves personal liability as the only option available to plaintiffs in many cases. Many defendants are judgment proof, either through absolute immunity, qualified immunity where the law was not clearly established at the time, or through their inability to pay the large awards that often attach in § 1983 cases.[197] But even if the victim recovers nothing because the individual defendant is unable to pay, the defendant must still defend himself in court and, if ruled against, would likely have to declare bankruptcy. This may lead to extremely risk-averse behavior in many jobs where risk is an important function in the discretionary calculus. The Supreme Court has repeatedly stated that it does not want to infringe on the independent judgment of officials who must often make tough decisions in extreme situations.[198] Shifting the burden of risk here is at odds with the wide degree of latitude the Court grants those "on the ground" and is at odds with the rationale of the granting of immunity where the Supreme Court has praised independent judgment and has expressed its desire not to second-guess those on the ground.[199]

Furthermore, though the form of cost externalization that results from immunizing the employer and making the employee personally liable may have some benefits in the private sector, it has fewer in the public sector.[200] In the private sector, it is inefficient to shift all of the burdens to the individuals when the company is in the best position to mitigate risk, either through insurance or other risk shifting devices.[201] But a company would still often prefer to bear none of the risks and costs associated with the actions of their employees because it would be more profitable.[202] In the public sector, a municipality is also in a better position than the individual to mitigate risk, but it ultimately does not have the same incentives to externalize costs in order to maximize profits.[203] This is because a

196. Quoting *id.* at 430.

197. *See generally Tenney v. Brandhove*, 341 U.S. 367 (1951) (establishing absolute immunity for legislators when performing legislative function); *Pierson v. Ray*, 386 U.S. 547 (1967) (establishing absolute judicial immunity when acting in judicial capacity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (establishing absolute prosecutorial immunity when prosecutor is acting in the role of an advocate).

198. *See* Whitley v. Albers, 475 U.S. 312, 320-22 (1986).

199. *See* Kalina v. Fletcher, 522 U.S. 118, 124-27(1997).

200. *See generally* Kramer & Sykes, *supra* note 71, at 277-83.

201. *Id.* at 277-78.

202. *Id.* at 278.

203. *Id.*

municipality is not a profit-seeking enterprise.[204] When it externalizes costs, it does so to those very individuals whom it is charged to serve and protect.[205] This is similar to an orphanage externalizing costs to the children. Though it would seem like a cost-saving tool in the short run, eventually the orphanage would end up bearing those costs.

This disincentive is furthered by the political realities of municipalities where the costs are externalized to the voters who will take out their frustrations on elected officials who have no control over whether § 1983 liability extends to municipalities.[206] As a result of cost externalization, § 1983 may end up being doubly ineffective. Not only will it fail to provide proper compensation to the victims to whom it was intended to supply a remedy,[207] but it will also fail to serve its deterrence function on the municipality.[208] By not having to bear the costs of all of its employees' actions, the municipality will have significantly less incentive to take preventative measures.[209]

Sykes and Kramer ultimately prefer a form of vicarious liability that is based on negligence. The negligence approach to municipal liability would "require the plaintiff to prove that municipal employees with supervisory authority over the wrongdoer failed to adopt some cost-effective measure to avert the constitutional tort and that the absence of such a measure proximately caused the injury."[210] Sykes and Kramer argue that this is not vicarious liability because it is based on a duty of care by the supervisor and is therefore preferable to respondeat superior liability on its face.[211] Although the liability that is based on the fault of the supervisor is not vicarious, the moment that she is sued in her official capacity and the state is required to pay, then the fault must be attributed to the state, and it falls back into the category of vicarious liability. The big advantage is that the liability is not strict but rather based on a supervisor's fault.

This negligence approach to municipal liabilities has several attractive features, including holding the municipality liable on something less than a difficult deliberate indifference standard. Furthermore, a plaintiff would not have to prove well-settled custom in instances where there was no official policy. After the first instance of wrongdoing, the municipality's failure to take appropriate action, especially in the form of training or notice of

204. *Id.* at 278.
205. Kramer & Sykes, *supra* note 71, at 279.
206. *Id.*
207. *Id.* at 281.
208. *Id.* at 280.
209. *Id.* at 280.
210. Kramer & Sykes, *supra* note 71, at 283.
211. *Id.* at 283.

disapproval or reprimand to other employees, would likely be considered negligent. In spite of these features, the negligence standard presents several serious problems that make it unlikely that the Court would ever take it seriously. First, it inserts a state of mind requirement into § 1983 when the Court has expressly said that none exists.[212] Instead, § 1983 adopts the state of mind requirement of whatever constitutional provision for which it is serving as a remedy, i.e. deliberate indifference for Eighth Amendment offenses and intentional discrimination in Fourteenth Amendment equal protection cases.[213] Second, it contemplates a standard that was never considered by the 42nd Congress and may even be at odds with other parts of §1983. Third, it falls into one of the same pitfalls as *Monell* as it attempts to employ the metaphorical language of intent onto corporate bodies.[214] Finally, it inserts the federal judiciary in the middle of local affairs in a way that few would be happy with.

Under a negligence standard, federal courts would have to constantly dissect the minutia of municipal training and hiring decisions in order to see if there was perhaps a better way to have performed them. This approach would greatly raise the transaction costs of lawsuits, as every instance of improper state action would lead to a full analysis of the municipality's policies and customs in order to balance it out on a negligence standard. The negligence standard brings to an extreme some of the worst elements of the current *Monell* approach and in making a better fault standard brings tension to other parts of the model.

The negligence standard suggested by Sykes and Kramer also suffers from its move further in the direction of tort language, which poses unique problems in the realm of constitutional torts. Problems already arise with the Supreme Court's artificial attempts to make meaningful attribution of fault distinctions in *Monell*. Christina Whitman has described this as "the false promise of *Monell*."[215] The Court blindly adopted the language of individual common law tort liability and applied it to municipalities by making an artificial distinction between the actions of one set of employees and another, and simply stating that the actions of one can be attributed to the municipally.[216] "The true alternative to *respondeat superior* is not to search for those few officials whose actions can be described as 'official

212. See *Parratt*, 451 U.S. at 535.

213. See Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 784 PRACTICING L. INSTIT.: LITIG. 11, 16 (2008).

214. *See* Whitman, *supra* note 71, at 236-38.

215. *Id*. at 245.

216. *See id*. at 244-45.

policy,' but to ask questions about how institutions can, as institutions, cause injuries."[217]

The negligence standard is, of necessity, a question of state of mind. And since the municipality cannot have a state of mind, then one is still in the position of having to locate a class of employees and attribute their states of mind to the municipality. Even if municipalities, and other corporations are better suited to perform the ideal calculus envisioned in a negligence analysis, the tort model is based on individual injury caused by individuals. It is unable to deal effectively with "issues that are unique to institutional behavior – for example, problems of massed power, of cumulative injury, and social planning."[218] If the purpose of the analogy is ultimately to attribute fault in a fair manner, it fails if the assumption is that the behavior should have been performed differently had it been an individual who was acting.

Though Sykes and Kramer would prefer a negligence standard for municipal liability, they also found that a strict-liability respondeat superior standard would be preferable to the *Monell* rule.[219] This is because it has many of the advantages of the negligence model, only more coarsely applied because it is not done on a case-by-case method.[220] For instance, both regimes would shift the costs from employees and victims, who are inefficient risk-bearers, to the municipality.[221] But strict vicarious liability would do this automatically, even in the small number of instances in which it may be less efficient, whereas the negligence approach would discriminate in its burden-shifting.[222]

The two serious problems that may arise under a strict-liability respondeat superior theory are the public employees' loss of personal incentive to be careful and the possibility of a reduction in municipal services.[223] The first issue, that public employees will have little incentive to show due care if they can shift the costs of liability to their employers, assumes that all disincentives arise externally. The law and the judiciary are but one set of disincentives for employees to perform their job functions recklessly, and it is perhaps the least efficient path.[224] Employers can, and probably should, create internal mechanisms to handle problems and remedy reckless behavior. These include disciplinary procedures, special

217. *Id.* at 245.
218. *Id.* at 253.
219. Kramer & Sykes, *supra* note 71, at 251.
220. *See id.* at 292-93.
221. *Id.* at 284.
222. *Id.* at 285-86.
223. *Id.* at 287.
224. *See* Kramer & Sykes, *supra* note 71, at 288.

training following specific employment problems, linking promotions to job performance, bonuses for proper behavior, and termination for repeated problems or egregious behavior.[225] Though these are not as serious as bankrupting an employee for wrongdoing – which may lead to morale problems at work – they provide disincentives that most rational individuals will respond to accordingly. In addition, they allow the matter to be solved without recourse to federal courts.

The second issue – that respondeat-superior municipal liability may result in a reduction of municipal services – is not so easily answered. Private employers who face this problem can be answered that it is a net positive created by the market: If they cannot bear the costs of doing business, they should probably not be doing business, leaving only more efficient corporations in the marketplace. But municipalities cannot be so blithely informed that they should simply scale back police protection or hospital services to deal with the high costs of liability. Municipalities provide essential services, and cutbacks may fall disproportionally on the poor and others who are often left out of the political process. Though municipal liability will likely lead to better preventative measures and greater efficiencies thereby lessening certain costs, it will necessarily lead to higher liability costs on the municipality in the form of litigation costs, settlements, and awards. No matter how efficient the municipality becomes, bearing higher costs is the reality of this form of cost-shifting. In response, many municipalities may choose to cut services offered, many of them essential. This is a serious concern, and is related to perhaps the most serious concern about the implementation of respondeat superior liability on municipalities. Many municipalities already face serious financial strains without the additional burden of strict liability for the constitutional violations caused by all of their employees. It may be argued that such burden-shifting will make it impossible for many municipalities to continue to function in a satisfactory capacity.

These are fair concerns, which may fall within the realm of possibilities. The best response to this is that this is a political concern that can best be handled by the political process. Municipalities must, and do, find ways to balance their own budgets and this is simply one more cost that they must account for. If a municipality offers a service then it should bear the full cost of that service, including liability for malfeasance. Citizens and interest groups must decide through the political process if they are willing to bear the true costs of various services and decide if it is preferable to cut certain non-essential services. Though those worst off are likeliest to suffer

225. *See id*. at 288, 290.

under service cuts, it may be the case that those worst off already suffer under the *Monell* rule.[226] Constitutional violations involving the Fourth and Eighth Amendments disproportionally affect poor and minority populations, while discrimination cases also affect minorities and women disproportionally.[227]

Furthermore, victims of constitutional violations will have a collective action problem in affecting change that benefits them.[228] Many members of this group will not have the money, time, and organizational structure to band together. This is because the group is not bound by anything but their role as a victim.[229] There may be issues in finding each other. And any legislative change that they affect will not be retroactive, meaning that they will not personally benefit from any of their activities.[230]

If the worst-case scenario under respondeat superior municipal liability transpires and municipalities are simply not able to function, then Congress may amend § 1983. The question is one of statutory construction and not constitutional law, so Congress may pass a statute changing any Supreme Court decision. Indeed, this has been the Supreme Court's refrain in excluding respondeat superior liability for municipalities. In situations such as these, where the legislative history and the statute are not dispositive and the Supreme Court relies on congressional action to evidence political preferences, the Court should choose the position in which preferences are likely to cause change. Lack of action is not evidence of preference, and collective action issues often lead to scenarios in which majority preferences are disregarded in favor of well-organized minorities. In such instances, the Court should choose the alternative in which legislative action is most likely to succeed political preferences. This would further representation reinforcement goals and would allow the Court to make statutory mistakes with greater likelihood that Congress will correct its errors. Therefore, since municipalities will be better represented than victims of constitutional violations, the Court should allow for respondeat superior municipal liability. If after a period, this option proves untenable and municipalities cannot function under the rule, they will have little

226. *Id*. at 279.

227. *See generally* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083 (2003).

228. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965); JAMES S. COLEMAN, INDIVIDUAL INTERESTS AND COLLECTIVE ACTION (1986).

229. OLSON, *supra* note 227, at 7.

230. *See id*. at 21.

trouble organizing and making their positions heard to Congress. As it stands, it is unlikely that victims of constitutional violations can band together and have their voices heard with the same effect.

In statutory construction questions, where the legislative history and statutory text lead are not dispositive, the Court should be wary about passing judgment that is detrimental to those who are in the worse position to affect political change. Using John Rawls's "difference principle" this may indeed be considered the only just outcome.[231] Though Rawls does not address this issue directly, the difference principle explains that in social decisions involving economic redistributions, the just option is the one that benefits those who are worse off.[232] In the balance between the municipalities and the victims of constitutional violations, the victims occupy the space of those worse off. When the statute and legislative history are not dispositive, the Supreme Court should rule to the benefit of those worse off.

CONCLUSION

The Supreme Court in *Monell* established a rule that can be attacked on all sides. The historical reading was flawed; the statutory construction was strained; the common law understanding was weak; and there was no discussion of policy when policy should have been a significant factor in the outcome. Section 1983 does not live in a vacuum, where the unearthing of the slight tendencies of members of the 42nd Congress are dispositive, thereby closing the statutory question. The statute was passed in order to provide a remedy for widespread constitutional violations and political violence that had obtained state sanction. The statute, along with the Reconstruction Amendments and the Civil Rights Act of 1871, was a radical inversion of the old federalism. It was intended to protect those who had become victims of the state – the very entity that was charged with their protection. Section 1983 should still be treated as a broad statute intended to protect those victimized by the state and as deterrence for state action that leads to unconstitutional violations. The Supreme Court subverted these ends by drawing the borders for municipal liability so narrowly that it effectively provides broad immunity for the municipality and leaves a great number of victims without a remedy. Thirty years have now passed since *Monell*; perhaps the true "false promise" of *Monell* is that it has not lived up to the spirit of the original case and reexamined its groundings.

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231. *See* JOHN RAWLS, A THEORY OF JUSTICE 75-83 (1971).
232. *Id.*