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Municipal Liability under 42 U.S.C. 1983 and the Ratification Theory of City of St. Louis v. Praprotnik: An Analysis of Federal Circuit Treatment;Note

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Municipal Liability Under 42 U.S.C. §1983 and The Ratification Theory of *City of St. Louis v. Praprotnik*: An Analysis of Federal Circuit Treatment

I. INTRODUCTION

Title 42, section 1983, provides a powerful means of redress for constitutional grievances and injuries inflicted by the government and its agents.[1] Section 1983 provides the possibility that the court will award a recovery of attorney's fees to the successful claimant.[2] Additionally, the doctrine of sovereign immunity does not protect cities and governmental entities (that are not arms of the state) from liability under §1983.[3] These advantages make a §1983 cause of action an attractive one to any attorney representing a plaintiff who claims to be injured at the hands of the government. The zealous advocate will seek any legal means to advance his client's claims under §1983 and actively search for new theories of establishing liability under the section.

One theory that civil rights attorneys have used to establish §1983 liability is a ratification theory. Under a ratification theory, the plaintiff argues, that because the municipality subsequently approved of conduct by its officials that deprived the plaintiff of his constitutional rights, the municipality should be liable under §1983. In *City of St. Louis v. Praprotnik*,[4] a plurality in the United States Supreme Court accepted this theory: when a final policy maker "approve[d] a subordinate's decision and the basis for it, their

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1. *See* 42 U.S.C. § 1983 (1994).

2. *See* The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (1994). The statute provides that:

> In any action or proceeding to enforce a provision of [section] . . . 1983 . . . the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction. *Id.*

3. *See* Howlett v. Rose, 496 U.S. 356 (1990) (holding that, because of the supremacy clause in the United States Constitution, Florida state law could not grant municipalities sovereign immunity from a claim under § 1983 when federal law excluded such immunity). Municipalities are not subject, however, to punitive damages under § 1983. *See* Case Comment, *Second Circuit Holds that Punitive Damages Are Unavailable Against Municipalities:* Ciraolo v. City of New York, 216 F.3d 236 (2d Cir. 2000). *See also* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

4. *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (plurality opinion).

ratification would be chargeable to the municipality."[5]

Regardless of the Supreme Court plurality's endorsement of the ratification theory, any application of it is likely to encounter judicial resistance because of a widespread judicial suspicion of §1983 claims. Access to attorney's fees and state tax coffers makes the §1983 cause of action a prime target for abuse by plaintiffs' attorneys. Many conservative groups, such as the Washington Legal Foundation, have been skeptical of §1983 actions as "'more likely to be frivolous than . . . other suits.'"[6] Stephen Ryals, of the Practicing Law Institute, characterized the judicial attitude to §1983 claims:

A plaintiff's claim of municipal liability in a section 1983 police misconduct case is cast into a sea of judicial reticence, skepticism and even hostility. One United States District Judge summed up the body of law, and perhaps the judicial view of municipal liability claims, in a case pending before her. When she was advised that [sic] plaintiff intended to prove municipal liability for the beating suffered by the plaintiff, she responded, with a tint of sarcasm, "Good Luck."[7]

In light of this atmosphere of suspicion and even hostility toward §1983 causes of action, particularly with regard to claims of police misconduct, any broad application of the ratification theory will meet judicial skepticism. While this skepticism may be partially justified by judicial concerns about abuse, such resistance should not frustrate a victim's ability to attain a full redress for constitutional injuries.

This note analyzes the judicial response to *Praprotnik*'s ratification theory in the federal circuits. Part II of the note traces the statutory and judicial development of municipal liability under §1983. Part III outlines the emergence of the ratification theory of municipal liability under §1983. Part IV sketches the different treatment of the ratification theory under §1983 within the different federal circuits. Part V criticizes the narrow application of the ratification theory by the majority of circuits, and suggests that these circuits adopt a more expansive application.

II. FACTUAL AND LEGAL BACKGROUND OF MUNICIPAL LIABILITY UNDER §1983

The Klu Klux Act of 1871,[8] codified as amended in 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., 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.[9]

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5. *Id.*

6. Brief for Washington Legal Foundation et al. as Amici Curiae at 17, cited in *Howlett v. Rose*, 496 U.S. at 379.

7. Stephen M. Ryals, Proof of Municipal Liability in Police Misconduct Cases, PLI Order No. HO-002B, 9 (November 1998).

8. Ku Klux Klan Act of 1871, Pub. L. No. 96-170, 17 Stat. 13 (codified as amended in scattered titles and sections of U.S.C.).

The Supreme Court summarized the statutory elements of a §1983 cause of action: "A plaintiff must prove (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."[10]

A person under §1983 includes individuals in their private capacity,[11] individuals in their supervisory capacity,[12] and municipalities.[13] A municipality is "merely a political subdivision of the State" or a "city deriving its authority from the State."[14] The eleventh amendment,[15] however, does not protect a municipality because it is not the state or an arm of the state.[16]

The standard for determining when a person (as defined *supra*) is acting under color of law §1983 is the same as the standard for determining when there is state action under the fourteenth amendment.[17] The Supreme Court has held that "a willful participant in joint activity with the State or its agents" may be liable under §1983.[18]

A §1983 claim must allege a violation of a right secured by the constitution or by federal law, a violation of state law is insufficient.[19] "The plaintiff must allege that some person has deprived him of a federal right."[20]

The final and crucial element in establishing §1983 municipal liability is proof that the municipality *caused* the constitutional violation. The Supreme Court noted, in *Monell v. New York City Dept. of Social Services*,[21] that the statutory language "*subjects or causes to be subjected*" contained in §1983 precluded the use of a *respondeat superior*

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9. 42 U.S.C. § 1983 (1994).

10. City of Oklahoma City v. Tuttle, 471 U.S. 808, 829 (1985).

11. *See* Adickes v. Hicks, 398 U.S. 144 (1970) (holding that, where the defendant was a private party who had allegedly denied the plaintiff service at a restaurant because of racial prejudice, a claim under § 1983 could be sustained if it alleged that the private party had reached a tacit agreement with the police).

12. *See* Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir.1999) (holding that a supervisor can be liable under § 1983 if he directly participated in the constitutional deprivation, after learning of the deprivation he failed to remedy the wrong, he created a policy or custom under which constitutional practices occurred, or he was grossly negligent in managing subordinates who cause the deprivation).

13. Formerly, the Court, held that Congress did not intend § 1983 to provide a cause of action against municipalities. *See* Monroe v. Pape, 365 U.S. 167 (1961). The Court revisited the legislative history of § 1983, however, and overruled *Monroe* in so far as that decision had held that for the purpose of the act, a "person" did not include municipalities as well as natural persons. *See* Monell v. New York City Dept. of Soc. Services, 436 U.S. 658, 663, 665, 690 (1978). The circuit courts have also consistently treated private corporations acting under color of state law as municipal corporations for the purposes of imposing § 1983 liability. *See* Austin v. Paramount Parks, Inc., 195 F.3d 715, 728 (4th Cir. 1999) (holding that principals of municipal liability "apply equally" to private corporations acting under color of state law).

14. United Bldg. and Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 215 (1984).

15. U.S. CONST. amend. XI.

16. *See Howlett*, 496 U.S. at 365, 378.

17. U.S. CONST. amend. XIV.

18. United States v. Price, 383 U.S. 787, 794 (1966).

19. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980).

20. *Id.*

21. Monell v. New York City Dept. of Soc. Services, 436 U.S. 658 (1978).

theory of liability against a municipality.[22] The Supreme Court held that "[t]he touchstone of the §1983 action against a government body is an allegation that official policy is responsible for the deprivation of rights protected by the Constitution."[23] The Court described the purpose of this touchstone: "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."[24] A municipality is responsible under §1983 only when its "final policy makers" create a "policy or custom" which actually "inflicts the [constitutional] injury."[25] Exactly how a municipality's final policymaker may inflict a constitutional injury was the issue that the Supreme Court addressed in *City of St. Louis v. Praprotnik*.[26]

III. *PRAPROTNIK* AND THE EMERGENCE OF THE RATIFICATION THEORY UNDER §1983

James H. Praprotnik was an architect employed by the Community Development Agency (CDA) of St. Louis. The CDA created a policy that required the agency's professional employees to obtain agency approval before taking private clients.[27] After Praprotnik accepted a private client without first obtaining approval, the director of the CDA suspended Praprotnik for violation of the policy. Praprotnik appealed his suspension to the Civil Service Commission and had his suspension reduced to a reprimand on the grounds that the penalty of suspension was excessively harsh. Subsequently, his performance evaluations became much less favorable in contrast to his previous evaluations.[28] The CDA transferred Praprotnik into a position of less responsibility, and eventually fired him.[29] Praprotnik filed a complaint against the City of St. Louis in federal district court that alleged that he had been fired in retaliation for exercising his first amendment rights before the Civil Service Commission.[30] The jury returned a verdict in Praprotnik's favor and the city appealed.[31] The Court of Appeals for the Eighth Circuit affirmed the verdict.[32] The circuit court stated that Praprotnik's supervisors were effectively the final policy makers for the city because they were not subject to *de novo* review by the Civil Service Commission and had fired Praprotnik in retaliation of exercis-

22. *Id.* at 692 (quoting 42 U.S.C. § 1983) (emphasis in court opinion).

23. *Id.* at 690.

24. *Id.*

25. *Id.* at 694.

26. The Supreme Court in *Monell* left the "full contours" of municipal liability under § 1983 to be developed "another day." *Praprotnik*, 485 U.S. 112, 123 (1988) (citing *Monell*, 436 U.S. at 695).

27. *See id.* at 114.

28. *See id.* at 115.

29. *See id.* at 116.

30. *See id.* at 114–17.

31. *See id.* at 117. Praprotnik had also presented a claim of violation of due process and the jury found the city liable on both theories. The Court of Appeals, however, vacated that part of the judgment. *See id.*

32. *See id.*

ing his first amendment rights.[33] The city appealed to the United States Supreme Court, which granted certiorari.[34]

The Supreme Court reversed and remanded the decision to the circuit court on the grounds that the supervisors were not the authorized final policymakers in the City's employment policy.[35] The plurality held that the question of whether an official has final policymaking authority is to be determined by reference to state law and is not a question of fact to be determined by the jury.[36] In Praprotnik's case, the City Charter "expressly [stated]" that the Civil Service Commission had the final authority over policymaking in matters of state employment.[37] The plurality noted that Praprotnik had presented no evidence to support the conclusion that the Civil Service Commission had played any role in developing a policy of retaliatory action.[38] Indeed, the only action the commission had taken was action favorable to Praprotnik.[39] Under the causation requirement of *Monell* and the principles of municipal liability, therefore, the city could not be held liable for causing him constitutional injury.[40]

The Supreme Court plurality issued its decision in *Praprotnik* for the express purpose of clarifying a confusion in the circuit courts as to when "a decision on a single occasion may be enough to establish an unconstitutional municipal policy."[41] In his concurrence, Justice Brennan, however, argued that the plurality holding effectively closed the door on municipal liability for single occasions of subordinate misconduct authorized by the municipality.[42] He stated that municipal policymakers (authorized by state law to make policy) could promulgate constitutional policies, but then delegate their policymaking authority to subordinates and refuse to review the subordinate's unconstitutional conduct for conformity with the original policy.[43] This would effectively protect the municipality from all liability because, under the plurality's ruling that policymaking authority was a question of state law rather than fact, only conduct done in conformity with the announced policy could subject the municipality to liability.[44] The subordinate official, not authorized to make policy by state law, could not subject the municipality to liability.[45]

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33. *See id.*
34. *See id.* at 118.
35. *See id.* at 118, 127.
36. *See id.* at 124.
37. *See id.* at 129 (citing ST. LOUIS CITY CHARTER, art. XVIII, § 7(d), App. 63).
38. *See Praprotnik*, 485 U.S. at 128.
39. *See id.*
40. *See supra* notes 21–26 and accompanying text.
41. *Praprotnik*, 485 U.S. at 123. The Supreme Court plurality stated: "Two Terms ago, in *Pembaur*, . . . we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. . . . Today, we set out again to clarify the issue that we last addressed in *Pembaur*." *Id.* at 123–24 (citing Pembaur v. Cincinnati, 475 U.S. 469, 480 (1986).
42. *See id.* at 132.
43. *See id.* at 145.
44. *See id.*
45. *See id.*

The plurality responded to Justice Brennan's criticism by pointing out different ways in which the Civil Service Commission could have created municipal liability for violating Praprotnik's constitutional rights:

> It would be a different matter if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker. It would also be a different matter if a series of decisions by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware. In both those cases, the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official.[46]

This passage lays out two particular ways a final policymaker may subject the municipality to liability: (1) if the policymaker consents to a custom or usage which causes a constitutional injury; or (2) if the policymaker approves a decision of a subordinate. The second manner of creating municipal liability is referred to in this Note as the ratification theory."

The plurality made clear that, to establish liability under the ratification theory, more than "[s]imply going along with discretionary decisions made by one's subordinates" is required.[47] Furthermore, the plurality held that a final policymaker's ratification of an unconstitutional act will be chargeable to the municipality only if the plaintiff presents evidence that the final policymaker had "approved [the] subordinate's decision and the basis for it."[48] The final policymaker's approval, therefore, has to be a deliberate one. Where the final policymaker has announced a constitutional policy, the "mere failure to investigate the basis of a subordinate's discretionary decisions" is not enough to create liability.[49] The failure to investigate is consistent with the final policymaker's presumption that subordinates are faithfully carrying out the policies that guide them.[50] Nevertheless, if the policymaker has knowledge of an unconstitutional rationale, motive, or effect of the subordinate's conduct, a policymaker's "[r]efusals 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."[51] In such a situation, the policymaker will have ratified the unconstitutional conduct of the subordinate and subject the municipality to liability.[52]

The plurality intended the ratification theory of liability, combined with the custom and usage theory, to provide adequate safeguards against municipal attempts to shield themselves from liability by hiding behind state law. An analysis of federal circuit court

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46. *Id.* at 130.
47. *Id.*
48. *Id.* at 127.
49. *Id.*
50. *See id.*
51. *Id.*
52. *See id.* at 131. The Court noted, "[i]f such a showing were made, we would be contronted with a difference case than the one we decide today." *Id.*

treatment applying the ratification theory, however, reveals that their application of the theory may have seriously limited the relief available to victims of constitutional abuse.

A. Analysis of Federal Circuit Court Treatment of *Praprotnik*

The federal circuits, upon encountering the ratification theory of *Praprotnik*, were immediately faced with the dilemma of applying the common law of agency to a §1983 cause of action with the strict causation requirement imposed by *Monell*. They have handled this dilemma differently.

The Restatement (Second) of Agency defines ratification: "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him."[53] This definition does not require that the ratifier cause the action in any way. The ratifier, rather, merely grants authority that relates back to the time of the act and endorses it. Thus, when the common law of agency principle of ratification is applied to §1983 law, it creates the possibility of a direct conflict with the causation requirement of *Monell*.

The common law is only a tool in interpreting how the statute is to be applied. Justice Souter, in discussing the applicability of the common law of malicious prosecution to §1983 analysis, has pointed out that the common law is "merely a 'starting point' for the analysis under §1983."[54] Faced with the possibility of a conflict between common law principles of agency and §1983 liability, therefore, the courts should either adapt the principle to avoid the conflict or refuse to apply it in that situation.

There are some situations where it appears all circuits agree that there is no conflict between ratification and the statutory causation requirement defined by *Monell*. For example, when a constitutional injury is begun by a subordinate municipal officer but continued or finalized by a reviewing authorized final policymaker, there is a clear causal connection between the final policymaker's conduct and the constitutional injury. An example of this situation is that to which the Northern District Court of Georgia has suggested that the ratification theory of *Praprotnik* should be limited:

> This theory [of ratification] would more likely be applicable in a situation where a plaintiff was fired by a municipality. In such a situation, there is typically a decision made by a municipal employee who is not the final decisionmaker because his firing decisions are generally reviewable by a civil service board. In such an instance, although the original decision to fire by the plaintiff's supervisor is not the final decision on the matter, the subsequent approval by a review board would serve as the final decision chargeable to the municipality. This situation appears to be the type of situation contemplated by the Supreme Court in *Praprotnik*.[55]

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53. RESTATEMENT (SECOND) OF AGENCY, §§ 82, 218 (1958).

54. Heck v. Humphrey, 512 U.S. 477, 493 (1994) (Souter, J., concurring).

55. Thomas v. Clayton County Bd. of Educ., 94 F. Supp. 2d 1290, 1325 n.36 (N.D. Ga. 1999).

Like the Georgia court, all circuits agree that if there is evidence that the reviewing final policymaker ratified the subordinate's decision and the basis for it prior to the infliction of the injury or contemporaneously with the infliction, the municipality may incur §1983 liability.[56]

There are other situations, however, where the causal connection between the final policymakers ratification and the constitutional injury is not clear. For example, there may be a situation where a police officer uses excessive force in arresting someone and a superior deliberately refuses to investigate the incident, fails to reprimand the officer, or engages in a cover-up of the incident. While, in such an instance, the arresting officer's conduct appears to have been ratified by an authorized policymaker, the causal connection between the ratification and the infliction of the injury is tenuous. The circuits have struggled with the question of when, if ever, such *ex post facto* ratification is consistent with *Monell*'s holding that §1983 is subject to a strict causation requirement. Most circuits have found that it is not.[57] The Ninth, and possibly the Eighth Circuit, however, have found a way to adapt the agency principle of ratification to the causal requirement of *Monell* and permit *ex post facto* ratification in the context of §1983 liability.[58]

B. A Permissive Application of the Ratification Theory

1. The Ninth Circuit

The Ninth Circuit Court of Appeals makes the most broad application of *Praprotnik*'s the ratification theory. The circuit court has adopted the common law of agency on ratification into its theory of ratification liability under §1983 with a slight modification in rationale to escape a conflict with the *Monell* causation requirement.

The Circuit Court held in *Au Hoon v. City of Honolulu*,[59] held that a single instance

56. *See, e.g.*, Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183, 196 (4th Cir. 1994) (affirming the district court's ruling that the city, knowing of retaliation by its subordinates against an employee's exercise of her first amendment rights, could be liable under § 1983 for ratification of the injury); Meyers v. City of Cincinnati, 14 F.3d 1115, 1119 (6th Cir. 1994) (affirming the district court's allowing a § 1983 judgment against a city's civil service commission because it had ratified the firing of the plaintiff in violation of his first amendment rights when it refused to reverse the firing action taken at a lower level which it knew to be retaliatory); Fiorenzo v. Nolan, 965 F.2d 348, 351 (7th Cir. 1992) (affirming the district court's grant of summary judgment on plaintiffs' § 1983 claim because the final policymaker had been out of town and was not informed of the unconstitutional conduct of subordinates until after it had occurred); David v. City of Denver, 101 F.3d 1344, 1358 (10th Cir. 1997) (holding that a civil service commission could ratify personnel decisions and create § 1983 municipal liability); Pearson v. Macon-Bibb Hosp. Auth., 952 F.2d 1274, 1281 (11th Cir. 1992) (reversing the district court's grant of summary judgment on § 1983 claim because there was sufficient evidence to allow a jury to find that the employer had ratified the decision to fire the plaintiff *ab initio*).

57. *See infra* Part IV.B.

58. *See infra* Part IV.A.

59. K. Au Hoon v. City of Honolulu, No. CV-88-0172-ACK, 1991 WL 1677 (9th Cir. Jan. 10, 1991).

of *ex post facto* ratification may create §1983 liability.[60] A city prosecutor indicted Au Hoon for first degree assault based on the victim's perjured testimony.[61] The prosecutor learned of the perjured testimony before trial, but did not reveal the perjury until the opening arguments.[62] The court determined to proceed with the trial despite the use of perjured testimony.[63] Before sentencing, the first deputy prosecuting attorney evaluated the case including the statement of perjury by the victim, but did nothing.[64] After Au Hoon spent thirteen months in prison, the Hawaii Supreme Court reversed the conviction and released Au Hoon. Au Hoon then brought a §1983 action against the prosecutor, the first deputy prosecutor, and the City and County of Honolulu.[65] The district court granted summary judgment in favor of Honolulu, in part, because it concluded that no authorized policymakers had ratified the actions of the prosecutor.[66] In support of this conclusion, the district court stated that there was no evidence that the first deputy prosecution actually participated in the challenged decisions.[67]

The Ninth Circuit Court of Appeals reversed the district court. The court noted that "[a] review of the transcript of proceedings below makes apparent that the district court believed that 'ratification' could not apply to actions that had already been taken at a lower level. That was error."[68] The court of appeals disagreed, stating:

> [I]t is not correct to say that only actions approved in advance are 'ratified' for purposes of imposing liability on a municipality under section 1983. To do so confuses decisionmaking authority with policymaking authority, and further ignores the fact that ratification demonstrates that the act was consonant with the policy of the entity.[69]

In support of its holding in *Au Hoon*,[70] the court of appeals cited two cases from the Sixth Circuit: *Marchese v. Lucas*[71] and *Leach v. Shelby County Sheriff*.[72] The Ninth Circuit's broad application of the ratification theory, however, is inconsistent with the

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See also Christie v. Iopa, 176 F.3d 1231, 1240 (9th Cir. 1999) (reversing the district court's grant of summary judgment on a § 1983 claim against a supervising prosecutor because there was evidence that he had ratified his subordinate's selective prosecution of the plaintiff); Larez v. City of Los Angeles, 946 F.2d 630, 645 – 47 (9th Cir. 1991) (holding that the city's police chief, as final policymaker, could subject the city to § 1983 liability under a ratification theory when he sent a letter stating that the plaintiff's complaints about excessive force would not be sustained).

60. *Au Hoon*, 1991 WL 1677, at *4.
61. *See id.* at 1.
62. *See id.*
63. *See id.*
64. *See id.*
65. *See id.*
66. *See id.* at 2.
67. *See id.* at 4.
68. *Id.*
69. *Id.*
70. *See id.*
71. 758 F.2d 181, 188–89 (6th Cir. 1985); *see infra* notes 111–12 and accompanying text.
72. 891 F.2d 1241, 1248 (6th Cir. 1989); *see infra* notes 113–14 and accompanying text.

Sixth Circuit's own treatment of these cases because it allows a single instance of subsequent ratification to create liability. The Sixth Circuit has subsequently clarified its opinions in these cases to exclude the position taken by the Ninth Circuit.[73] The Ninth Circuit citation of the Sixth Circuit's *Marchese* line of cases to support of its position, therefore, appears to have been off base. The Eighth Circuit is the only other circuit to follow broad application of the ratification theory.

2. The Eighth Circuit

In the Eighth Circuit, there are only three district court opinions that mention the ratification theory of *Praprotnik* and none of them deal with the issue extensively.[74] The district cases suggest that the courts in Eighth Circuit have reached a modified version of the Ninth Circuit's approach.[75] These cases allow *ex post facto* ratification, but place strict formality requirements on what conduct counts as ratification.

In *Copper v. City of Fargo*,[76] the plaintiffs argued that "the City of Fargo is liable for plaintiffs' constitutional claims . . . because the City of Fargo ratified Niemann's unconstitutional arrest of plaintiffs after learning about the extent of plaintiffs' picketing route." [77] The city admitted that during discovery that the "defendant Niemann acted pursuant to the City's official policies, customs, practices, and procedures when he arrested plaintiffs."[78] The district court entertained the possibility of *ex post facto* ratification but declined to find it in this case. The district court noted that the admissions were "not the equivalent of an affirmative decision, cast in the form of a policy statement, to ignore training deficiencies or completely omit training about the proper enforcement of the residential anti-picketing ordinance."[79]

The position taken by the Ninth and Eighth Circuits is a minority one. Most other circuits have adopted the position that allowing subsequent ratification to create municipal liability under §1983 permits vicarious liability in violation of *Monell*.

C. A Limited Application of the Ratification Theory

1. The Third Circuit

In *Looney v. City of Wilmington*,[80] a district court in the Third Circuit addressed the

73. *See infra* notes 115–118 and accompanying text.

74. *See* Springdale Educ. Ass'n v. Springdale Schl. Dist., 133 F.3d 649 (8th Cir. 1998); Westborough Mall, Inc. v. City of Cape Girardeau, 901 F.2d 1479 (8th Cir. 1990); Williams v. Butler, 863 F.2d 1398 (8th Cir. 1988).

75. *See infra* notes 76–79 and accompanying text.

76. Copper v. City of Fargo, 905 F. Supp. 703 (D.N.D. 1995).

77. *Id.* at 708.

78. *Id.*

79. *Id.* (citations omitted).

80. Looney v. City of Wilmington, 723 F. Supp. 1025 (D. Del. 1989).

possibility of a conflict between an *ex post facto* application of *Praprotnik*'s ratification theory and the causation requirement of *Monell*.[81] The district court decided to avoid running afoul of *Monell* by refusing to allow the ratification theory of *Praprotnik* to apply to *ex post facto* situations.

In *Looney*, the plaintiff claimed that the city had ratified an illegal search and use of excessive force by its police officers when its final policymaker reviewed a report of the incident and found that the arresting officers had not violated city policy.[82] The district court granted summary judgment because the alleged incidence of ratification occurred after the infliction of any constitutional injury and, therefore, could not be the cause of the injury.[83] The district court noted the problem presented in attempting to apply the ratification theory as it was announced in *Praprotnik*: "[T]he Supreme Court has never explained exactly what it meant by the ratification theory set forth in *Praprotnik*. Does ratification mean approval of a subordinate's action *before* those actions are taken, or does it mean approval *after* the subordinate has acted?"[84] The district court concluded that "the Supreme Court's emphasis on the element of causation in actions involving municipal liability" required that the "ratification of an employee's actions must occur prior to when the employee acts" because "[c]learly, a government's later ratification of an employee's actions could not in any sense be viewed as the cause of those actions."[85]

2. *The Eleventh Circuit*

The Eleventh Circuit Court of Appeals has successfully avoided the question raised by the ratification theory of *Praprotnik*.[86] The district courts in the circuit, however, have followed the Delaware district court's decision in *Looney*[87] and boldly opposed the

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81. The only time that the Court of Appeals of the Third Circuit has considered the ratification theory was in *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990), and did not involve any dispute about the causation requirement of *Monell*.

82. *See Looney*, 723 F. Supp. at 1036.

83. *See id.* at 1037.

84. *Id.*

85. *Id.* at 1037 (citing *Monell*, 436 U.S. 658, 692). The district court in *Looney*, however, did not base its decision to grant summary judgment solely upon this reasoning. The court considered two other factors. First, the district court noted that other Circuits had only applied the ratification theory to instances of ratification that occurred prior the completion of the injury. *Looney*, 723 F. Supp. at 1036 (citing Melton v. City of Oklahoma City, 879 F.2d 706, 725 (10th Cir. 1989) (holding the city was liable under § 1983 for the unconstitutional firing of its employee by a subordinate official where its final-policy maker expressly approved the dismissal)). Second, the *Looney* court pointed out that in the case before them, the report before the final policymaker only reflected the offending officer's version of the facts and not the plaintiff's version. The city official, therefore, could not have knowingly approved the basis of the unconstitutional behavior of the officer because he had no reason to suspect its existence. *See Looney*, 723 F. Supp. at 1037.

86. *See* Mandel v. Doe, 888 F.2d 783, at 793–94 n.17 (11th Cir. 1989) (holding that because the municipality's final policymaking authority had delegated authority over medical assistance of prisoners to a physician's assistant who directly caused a constitutional injury, there was no need to consider the question of whether a final policy maker ratified the conduct of the physician's assistant).

87. *See supra* notes 80–85 and accompanying text (discussing the Third Circuit's decision in *Looney v. City of Wilmington*, 723 F. Supp. 1025 (D. Del. 1989)).

ex post facto application of the ratification theory to §1983.[88]

In *Gainor v. Douglas County*,[89] the plaintiff brought a §1983 action in the Northern District of Georgia based on a violation of his fourth amendment rights by a county police officer.[90] The plaintiff claimed that the county supervisor had ratified the officer's conduct in a subsequent public statement of approval and that this was sufficient to create liability under the Supreme Court's decision in *Praprotnik*.[91] Citing the Delaware district court's opinion in *Looney* as support,[92] the United States District Court for the Northern District of Georgia held that:

> [T]he Supreme Court has clearly held that a municipality can only be liable if its policy was the moving force behind a constitutional violation. A post hoc approval of an action already taken could not possibly be the motivating force for causing the action to be taken. Thus, in order to impose liability under a ratification based theory, it is necessary to show prior ratification of the policy giving rise to the action alleged to have violated the plaintiff's federal rights, such that the ratification of that policy could be said to be the moving force behind the alleged constitutional violation. Thus, plaintiff's ratification theory of liability is denied.[93]

The district court could not have been clearer: the ratification theory of *Praprotnik* was only to apply to contemporaneous or prior approval of unconstitutional conduct.

Apparently, however, the district court had not been clear enough. In the year thereafter, the district court faced a virtually identical claim in *Thomas v. Clayton County Board of Education*.[94] In *Thomas*, a student brought a §1983 action in the district court against the city based on an allegedly unconstitutional strip search at school.[95] The plaintiff claimed that the city had ratified the strip search and could be held liable under the ratification theory of *Praprotnik*, because the school district conducted a cursory investigation and took no corrective action after hearing of the complaint.[96] The district court held true to its position in *Gainor*: "Plaintiff's reliance on *Praprotnik* is misplaced. . . . In the instant case, the searches were concluded, and no after-the-fact approval or disapproval could change the fact that the searches had already occurred."[97] After-the-fact (or *ex post facto*) ratification, according to the district court, may not create §1983 liability.[98]

The district court in *Gainor* did sketch out a situation where subsequent ratification

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88. *See infra* note 92–93 and accompanying text.
89. Gainor v. Douglas County, 59 F. Supp. 2d 1259 (N.D. Ga. 1998).
90. *See id.* at 1268.
91. *See id.* at 1292.
92. *Id.* at 1293 (citing *Looney*, 723 F. Supp. at 1037).
93. *Id.* (internal citations omitted).
94. Thomas v. Clayton County Bd. of Educ., 94 F. Supp. 2d 1290 (N.D. Ga. 1999).
95. *See id.* at 1298.
96. See *id.* at 1325.
97. *Id.*
98. *See id.*

of unconstitutional conduct could create liability. The district court stated that if the plaintiff presented evidence that the county police officers had previously made the decision to use excessive force and had gone unpunished for these decisions by the final policymaker, this would be evidence that a "custom or usage existed for [the final policymaker] to ratify."[99]

This idea that subsequent ratification of unconstitutional conduct requires evidence of a prior custom or usage of the same type of conduct has been reaffirmed by other district courts in the Eleventh Circuit. In *Mizell v. Lee*,[100] another district court in the circuit confronted a case in which the plaintiff brought a §1983 action against the city on the theory that it had subsequently ratified the use of excessive force against him by failing to investigate the incident.[101] The city made a motion for summary judgment against the plaintiff. The court denied the motion, holding that:

> Standing alone, the failure of the City to investigate the allegations leveled by plaintiff . . . in no way establishes a policy or custom on the part of the City to acquisce to the alleged unconstitutional actions of [the defendant police officer]. . . . Plaintiffs, however, have alleged that the City not only acquiesced to the actions of [the defendant police officer] in the present case, but that the City also acquiesced in a prior case involving the use of excessive force by [the same defendant police officer]. Therefore, in accordance with the Supreme Court's decision in *Praprotnik*, a genuine issue of material fact exists as to whether a custom existed on the part of the city council to acquiesce to the use of excessive force by [the defendant police officer].[102]

Thus, while the courts in the Eleventh Circuit oppose the idea that a single incident of subsequent ratification can create §1983 liability, they are willing to impose liability if the incident of subsequent ratification is combined with prior instances sufficient to show a policy or custom.[103]

3. The Seventh Circuit

The Seventh Circuit Court of Appeals has also noted the ambiguousness of *Praprotnik*. The Court of Appeals stated in *Cornfield v. Consolidated High School Dist. No. 230*,[104] "[a]rguably, the endorsement or ex post authorization could create liability for

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99. Gainor v. Douglas County, 59 F. Supp. 2d . 1259, 1292 (N.D. Ga. 1998).

100. Mizell v. Lee, 829 F. Supp. 1338 (M.D. Ga. 1993).

101. *See id.* at 1341–42.

102. *Id.* at 1342.

103. *See, e.g.*, Samarco v. Neumann, 44 F. Supp. 2d 1276, 1289 (S.D. Fla. 1999) (holding that to survive summary judgment on a theory of ratification under *Praprotnik*, the plaintiff had to present evidence that demonstrated the "existence of a custom which caused a deprivation of federal rights, and that the custom was so widespread that [the final policymaker], although aware, acquiesced in the unlawful custom").

104. *See* Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) (dismissing the plaintiff's claim that the municipality's school principle had ratified an allegedly unconstitutional search of its students).

any unconstitutional searches."[105] Yet, the circuit court has all but stated that it believes *ex post facto* ratification, without any direct evidence of causation, is not a permissible application of the *Praprotnik* ratification theory.

In *Kernats v. O'Sullivan*,[106] the Seventh Circuit Court of Appeals held that an *ex post facto* ratification of unconstitutional conduct, with no evidence of causation, is not sufficient to establish §1983 liability.[107] In *Kernats*, the plaintiff alleged that the police, cooperating with her landlord, conducted an unconstitutional search and seizure of her person and property.[108] The plaintiff sought to establish municipal liability for the alleged constitutional injury because a supervisor ratified the police officer's actions.[109] The Court of Appeals stated:

> The complaint simply states that Wade 'ratified' O'Sullivan's conduct when he met with the Kernats several days later and when he wrote them a letter attempting to explain and justify O'Sullivan's actions. By this time, of course, any unconstitutional seizure that may have taken place had been accomplished and Wade could have done nothing to undo that fact. Wade's *ex post* attempt to dissuade the Kernats from taking their case to the media (or the courts) by rationalizing O'Sullivan's behavior is not the type of involvement in a constitutional violation that gives rise to §1983 liability.[110]

While this holding leaves open the possibility that some *ex post facto* affirmative approval of unconstitutional conduct beyond a persuasive effort not to go to the media might create municipal liability, the opinion's strong emphasis on the irreversibility of the harm suggests that the possibility of such a holding is closed in fact, if not in actuality.

4. The Sixth Circuit

In a pre-*Praprotnik* decision, *Marchese v. Lucas*,[111] the Sixth Circuit Court of Appeals affirmed a district court's ruling in favor of a plaintiff who alleged that the city had ratified two custodial beatings that constituted excessive force against the plaintiff.[112] The circuit court reaffirmed the continued validity of this decision after *Praprotnik* in *Leach v. Shelby County Sheriff*.[113] In *Leach*, the Court of Appeals, following *Marchese*, affirmed the district court's decision in favor of the plaintiff on the theory that the supervisory official had ratified the unconstitutional acts of his subordinates, depriving the plaintiff of needed medical attention while in jail, and could be liable, therefore, under

105. *Id.* at 1326.
106. Kernats v. O'Sullivan, 35 F.3d 1171 (7th Cir. 1994).
107. See *id.* at 1182–83.
108. *See id.* at 1173.
109. *See id.* at 1182–83.
110. *Id.*
111. Marchese v. Lucas, 758 F.2d 181 (6th Cir. 1985).
112. *See id.* at 188–89.
113. Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th Cir. 1989).

§1983.[114]

The Sixth Circuit, however, has distinguished the *Marchese* line of cases in *Dyer v. Casey*.[115] In *Dyer*, the plaintiff appealed summary judgment on his claim that he had been subjected to an unreasonable strip search by a police officer and that the county had ratified the conduct by a failure to investigate.[116] The plaintiff relied upon the theory set out in *Marchese* and *Lucas*, that a "failure to investigate or discipline amounts to a "ratification" of the officers conduct."[117] The circuit court affirmed the district court's grant of summary judgment, distinguishing the cases relied upon by the plaintiff. According to the circuit court in these cases, "the responsible governmental entity took *absolutely no action* in the face of several prior incidents which should have required an investigation into the employee's conduct. Here, however, the [police] department conducted meaningful investigations into the incidents involving Casey."[118] Because there was no evidence of a previous custom of insufficient investigation or discipline of the defendant police officer, the circuit court believed it could not find ratification under §1983.

The Sixth Circuit explicitly denied the possibility of *ex post facto* ratification in *Williams v. Ellington*.[119] In *Williams*, the plaintiff claimed that the city had ratified an unconstitutional search of a school student by a teacher.[120] The circuit court accepted that the city had ratified the search, but skeptically remarked that the plaintiff's "only grasp at evoking municipal liability under §1983 is to show that this subsequent ratification is sufficient to establish the necessary causation requirements."[121] The circuit court went on, after noting the lack of any prior instances of unconstitutional searches approved by the board, to find that the School Board could not be liable "for the ratification of the search in question, because this single, isolated decision can hardly constitute the "moving force" behind the alleged constitutional deprivation."[122]

The position adopted by the courts in the Third, Sixth, Seventh, and Eleventh Cir-

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114. *Id.* at 1248.

115. Dyer v. Casey, No. 94-5780, 1995 WL 712765, *2 (6th Cir. Dec. 4, 1995) (per curiam).

116. *See id.*

117. *Id.*

118. *Id.*

119. Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991).

120. *See id.* at 884.

121. *Id.* This holding in *Williams* has been subsequently followed by other decisions within the circuit. *See* Feliciano v. City of Cleveland, 988 F.2d 649, 656 n.6 (6th Cir. 1993) (stating that even where an unconstitutional drug test might have been ratified, the plaintiff would still have to prove that the ratification was the moving force of the violation to establish § 1983 liability); Caron v. City of Oakwood, 1993 WL 1377512 (S.D. Ohio 1993) (explaining that even if there had been a subsequent ratification of a sheriff's possibly unconstitutional seizure of depictions of nude adults, this ratification could not have been the moving force of the violation) (citing *Monell*, 436 U.S. at 694); *see also*, Fisher v. City of Cincinnati, 753 F.Supp. 681 (S.D. Ohio 1990) (holding that the plaintiff alleging that a city ratified unconstitutional conduct by its police officers must prove causation in order to recover on a § 1983 claim).

122. *Williams*, 936 F.2d at 885.

cuits appears to be that shared by the First,[123] Second,[124] and Fourth[125] circuits as well, although they have not addressed the causation question as directly. Thus, this position constitutes the majority opinion of the circuits. The positions taken by the Fifth,[126]

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123. The First Circuit Court of Appeals has also found that ratification must occur prior to the completion of the act to preserve the causal connection required by *Monell*. In *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980), the First Circuit upheld a district court's dismissal of the plaintiff's §1983 claim alleging that the City of Warwick had ratified the use of excessive force against him by failing to investigate the incident. *See id.* at 739. The Court of Appeals disposed of this claim in a footnote:

> We fail to see . . . how section 1983 liability can be predicated on a ratification theory in the context of this case. Holding the municipalities liable here would ignore the fundamental requirement that there be a causal connection between the action or inaction on the part of the municipality and constitutional wrongs visited on the plaintiff.

Id. at 747 n.7 (citing *Monell*, 436 U.S. 658, 692).

The First Circuit Court of Appeals then entertained the theory that the City could be held liable for its failure to investigate a charge of perjury brought against one of the police officers who had been involved in the incident and, therefore, become liable for any damage that resulted from the continuing conspiracy to cover-up of the incident by the police officers. *Landrigan*, 628 F.2d at 747. The court stated, "We do not believe that a municipality's failure to investigate this isolated charge of perjury growing out of civil litigation between a policeman and a citizen would be sufficient, by itself, to establish its liability for the conduct here in question." *Id.* This opinion suggests that if there had been evidence of prior instances of a failure to investigate the police officer for perjury, the municipality could be liable for having ratified a policy of non-investigation that caused the constitutional injury.

124. The courts in the Second Circuit use the word "acquiescence" to describe the ratification theory to connote that the theory requires contemporaneous or prior approval and that subsequent ratification would be insufficient. Sorlucco v. New York City Police Dep't., 971 F.2d 864 (2nd Cir. 1992) (stating that the city could be liable under § 1983 if the plaintiff proved that the discriminatory practices of subordinates were so manifest as to demonstrate constructive acquiescence by the city's senior policymaking officials). *See also* Ariza v. City of New York, 1996 WL 118535 (E.D.N.Y. 1996) (holding that the city could be liable under a § 1983 ratification theory if its Commissioner, as final policymaker, approved of a custom of retaliatory discrimination against the plaintiff).

125. An analysis of the Fourth Circuit Court of Appeals' opinion in *Hall v. Marion Sch. Dist. No. 2* reveals that the appellate court would require that any liability imposed under the ratification theory occur prior to the constitutional injury so that it could be said to have "participated" in causing the injury. Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183, 196 (4th Cir. 1994) (affirming the district court's ruling that the city, knowing of retaliation by its subordinates against an employee's exercise of her first amendment rights, could be liable under § 1983 for ratification of the injury).

A district court in the Fourth Circuit has imposed severe requirements on an application of the ratification theory under § 1983, requiring that in order to establish municipal liability under the ratification theory the city must have not only ratified the decision and the basis for it but also "made a calculated choice to follow the course of action deemed unconstitutional." Green v. Fairfax County Sch. Bd., 832 F. Supp. 1032, 1043 (E.D.Va. 1993) (quoting Pachaly v. City of Lynchburg, 897 F.2d 723, 726 (4th Cir. 1990)). The district court, in support of its holding, also cited a Sixth Circuit holding in *Williams* that a "single isolated decision by a school board to ratify [a] warrantless strip search made pursuant to lawful policy was insufficient to establish § 1983 liability." *Green*, at 1043 (citing Williams v. Ellington, 936 F.2d 881, 884–85 (6th Cir. 1991)); *see supra* notes 119–22 and accompanying text. It appears that, in the Fourth Circuit, a single instance of ratification of an unconstitutional act by a subordinate is insufficient to establish liability.

126. The Court of Appeals for the Fifth Circuit has only looked at the ratification theory presented by *Praprotnik* once. In that case, an owner of a towing service alleged that his first amendment rights had been violated when a license to use a police radio frequency in his business had been revoked by the police chief, and that the city had ratified the injury caused by the police chief. The court of appeals reversed the dismissal of the ratification claim by the district court. *See* Blackburn v. City of Marshall, 42 F.3d 925, 935 (5th Cir. 1995).

Tenth,[127] and District of Columbia[128] Circuits are unclear, while the Ninth and Eighth Circuits eschew the majority position and hold that *ex post facto* ratification is not necessarily subject to a causal deficiency under *Monell*.[129]

IV. CONCLUSION

The circuits that disagree with the Ninth and Eighth Circuits' position on the ratification theory do so for two reasons. First, they believe that subsequent ratification, by itself, is irreconcilable with the causation requirement of *Monell* and is, therefore, not contemplated by the plurality in *Praprotnik*. Second, they believe that allowing one simple instance of subsequent ratification of an employee's improper conduct to create liability will subject the municipality to the difficulty of choosing between litigation and supporting a possibly valuable employee.[130] In the end, the first reason is chimerical; and the second is insufficient. The position taken by the Ninth and Eighth Circuits is more consistent with a close reading of the plurality's reasoning in *Praprotnik* and a concern for the rights of persons upon whom the state inflicts constitutional injury.

The majority of circuits believe that subsequent ratification, by itself, necessarily conflicts with the *Monell* requirement of causation. This position, however, is inconsistent. As the Ninth Circuit has remarked, the First Circuit Court of Appeals has pointed out that the Supreme Court, "'has never held that inferences about what customs or policies existed in a city before an event could not be drawn from subsequent actions."[131]

In a recent district court opinion, the theory of subsequent ratification was directly laid out: "[a] sherriff cannot be held vicariously liable for the acts of subordinates or deputies unless he ratifies the wrongful acts of the subordinates or deputies." The court refused to hold the sherriff liable because, "nothing in the record establishes that Sheriff Harris was the cause of this extended stay [in prison]." Campbell v. Harris, 2000 WL 349746, *9 (N.D. Tex. 2000) (citing Brown v. Byer, 870 F.2d 975 (5th Cir. 1989)). *But see* C-1 v. City of Horn Lake, 775 F. Supp. 940, 949 (N.D. Miss.1990). In *City of Horn Lake*, the district court implied that direct causation would not be necessary. A group of middle school students made § 1983 claim, alleging fourth and fourteenth amendment violations against themselves by a police officer. *See id.* at 943. They further alleged that the supervising police officer ratified the violations as a final policymaker in his decision to prosecute the children and thereby subjected the municipality to liability. *See id.* at 949. Based upon this evidence of subsequent ratification, the court denied the motion for summary judgment on the ratification claim. *See id.*

127. The Tenth Circuit has not sufficiently addressed the causal requirements of the ratification theory under § 1983 to predict its stance on this issue. *See* Harris v. Williams, 1994 WL 446772, *1 (10th Cir. 1994); David v. City of Denver, 101 F.3d 1344, 1358 (10th Cir. 1996). One district court case in the circuit, however, has suggested that subsequent ratification is sufficient to establish liability. *See* L.B. v. Washington County, 905 F. Supp. 979, 985 and n.7 (C.D. Utah 1995) (remarking that a Sheriff's subsequent review of a subordinate's reports that confirmed that the procedures used by police officers were in accord with city policy would be sufficient to establish § 1983 municipal liability).

128. The only case discussing the ratification theory of *Praprotnik* in the federal circuit for the District of Columbia sheds little light on the circuit's stance on whether or not an *ex post facto* ratification may create § 1983 municipal liability. *See* Carter v. District of Columbia, 14 F. Supp. 2d 97 (D.D.C. 1998).

129. *See supra* Part IV.A.

130. *See infra* note 137 and accompanying text.

131. Henry v. County of Shasta, 132 F.3d 512, 519 (9th Cir. 1997) (quoting Bordano v. McLeod, 871 F.2d 1151, 1166–67 (1st Cir. 1989)).

Accordingly, many circuits, including the First[132] and Second[133] Circuits, in the context of a custom or usage theory of municipal liability, have held that subsequent conduct by a final policymaker is relevant to establishing the existence of a policy that caused a prior unconstitutional action by a subordinate.[134] Admittedly, these circuits, in that context, require that a plaintiff also show some prior instances of unconstitutional conduct to establish a custom or usage. Yet, to admit that subsequent conduct by a final policymaker has *any* relevance admits the proposition set forth by the Ninth Circuit: in the context of ratification theory liability, evidence of subsequent ratification may "demonstrate[] that the act was consonant with the policy of the entity."[135] Once that is admitted, it is possible to infer from the fact that a constitutional violation was consonant with municipal policy, that the municipal policy caused the act.

Furthermore, the position of the majority of circuits is inconsistent with the Supreme Court plurality's primary objective in establishing the ratification theory in *Praprotnik*. Most circuits have conflated the ratification theory with the "custom or usage" theory. These circuits demand that the plaintiff make some showing of prior instances establishing a custom or usage when attempting to prove liability by subsequent ratifica-

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132. *Id.* at 519 (citing *Bordano*, 871 F.2d at 1167).

133. *Id.* (citing Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985)). The court of appeals in *Henry* quoted *Grandstaff*:

> [I]n the aftermath of [a shooting that constituted excessive force], there were no reprimands, no discharges, and no admissions of error. The officers testified at the trial that no changes had been made in their policies. If that episode of such dangerous recklessness obtained so little attention and action by the City policymaker the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do . . . was not acceptable to the police chief, changes would have been made.
>
> This reaction to so gross an abuse of the use of deadly weapons says more about the existing disposition of the City's policymaker than would a dozen incidents where individual officers employed excessive force. The policymaker's disposition, his policy on the use of deadly force, after [the date of the shooting] was evidence of his disposition prior to [that date]. As subsequent conduct may prove discriminatory motive in a prior employment decision, and subsequent acts may prove the nature of a prior conspiracy, so the subsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy.

Henry, 132 F.3d at 519 (quoting *Grandstaff*, 767 F.2d at 171) (citations omitted by Ninth Circuit).

134. *Henry*, 132 F.3d at 519. The Ninth Circuit noted:

> [The First Circuit concluded] that such inferences were proper. Id. at 1167. See also Black v. Stephens, 662 F.2d 181, 190–91 (3d Cir. 1981) (police chief's failure to institute adequate investigatory procedures for determining when police officers should be disciplined constituted official policy encouraging excessive use of force); Jones v. City of Chicago, 787 F.2d 200, 207 (7th Cir. 1986) (had prior complaint in companion case not been thoroughly investigated by city, reasonable inference could be drawn regarding city's deliberate indifference to safety and well-being of patients at public health clinic).

Id.

135. K. Au Hoon v. City of Honolulu, No. CV-88-0172-ACK, 1991 WL 1677, *1 (9th Cir. Jan. 10, 1991).

tion. This runs directly contrary to the objective of the ratification theory set out in *Praprotnik* to outline an instance where a single decision by a final policymaker may subject the municipality to liability. The plurality, expressly remarked that, "[r]efusals 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. If such a showing were made, we would be confronted with a different case than the one we decide today."[136] The plurality's remark demonstrates that, under its reasoning in *Praprotnik*, it believed that liability could be imposed under §1983, where, in a single instance, a final policymaker refuses to conduct a proper investigation when it is aware that that policy has been violated.

Perhaps the position of the majority of circuits may simply be interpreted as a higher bar of evidence applied to cases where the ratification claim rests on evidence of subsequent ratification. The courts have, in fact, advanced good policy reasons for such a higher standard of evidence:

> There are also strong public policy reasons for this holding. If a municipality could be held liable merely for approving of an officer's actions on the occasion under attack, each time a §1983 suit were filed, the municipality would be forced to choose between risking taxpayers' dollars and undermining a good employee who may have done nothing wrong. The law does not force such a choice upon municipalities.[137]

The courts are afraid to subject municipal policymakers to the fear that a single instance of upholding the conduct of an employee may subject them to liability.

The municipality's concern about vulnerability to §1983 liability should be properly balanced against the victim's right to redress under §1983. In a concurring judgment joined by Justices Marshall and Blackmun, Justice Brennan sharply accused the plurality's holding that the question of who was a final policymaker was determined by state law. Brennan stated that the holding enabled municipalities to shield themselves from all liability under §1983.[138] He argued that final policymaking authorities could delegate their policymaking authority to subordinates and thereby permit municipalities to insulate themselves from all liability.[139] When the policymaker's subordinates inflict a constitutional injury, the municipality would be protected from liability because of the plurality's ruling that final policymaking authority was a question of state law and not fact. Justice Brennan stated:

> Under the plurality's theory, therefore, even where an official wields policymaking authority with respect to a challenged decision, the city would not be liable for that official's policy decision unless reviewing officials affirmatively approved both the "deci-

136. City of St. Louis v. Praprotnik, 485 U.S. 112, 131 (1988) (plurality opinion).
137. Gainor v. Douglas County, 59 F. Supp. 2d 1259, 1293 n.41 (N.D. Ga. 1998).
138. *See Praprotnik*, 485 U.S. at 132.
139. *See id.*

> sion and the basis for it." Reviewing officials, however, may as a matter of practice never invoke their plenary oversight authority, or their review powers may be highly circumscribed. Under such circumstances, the subordinate's decision is in effect the final municipal pronouncement on the subject. Certainly a §1983 plaintiff is entitled to place such considerations before the jury, for the law is concerned not with the niceties of legislative draftsmanship but with the realities of municipal decisionmaking, and any assessment of a municipality's actual power is necessarily a factual and practical one.[140]

The ratification theory proposed by the plurality was crucial to its response to Brennan's criticism. The plurality pointed out that if a policymaker refused to carry out stated policies, such as failing to invoke proper review of a subordinate's conduct (the example suggested by Brennan), could create liability because such a refusal would demonstrate that the actual policy was different than the constitutional one formally announced by the policymaker.[141] Thus, the plurality stated that it did not believe that it had left a "'gaping hole' in §1983 that needs to be filled with the vague concept of 'de facto final policymaking authority.'"[142]

The circuit courts should reconsider their bright line rule against *ex post facto* ratification. A categorical denial of relief in these instances weakens this protection and may result in the realization of the fears of the concurrence in *Praprotnik*: that municipalities will shield themselves from all liability for the isolated unconstitutional acts of their subordinates by refusing to review their conduct even when the policymakers are aware of the possible unconstitutionality of these acts.

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140. *Id.* at 145.

141. *Id.* at 131.

142. *Id.* at 131 (quoting the concurrence at 145 n.7).

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