LOCAL SOVEREIGN IMMUNITY

Fred Smith[*]

When governmental actors offend federal rights, victims are often left with no one to hold accountable in federal courts. This Article explores this accountability gap in cases involving local officials' violations of the Constitution. Local government, after all, is the layer of government that is often closest to our daily lives, from law enforcement to education. This Article argues that as a descriptive matter, contrary to the conventional account, a form of sovereign immunity protects local governments from federal constitutional suits. And this immunity unduly obstructs constitutional accountability.

Local sovereign immunity operates primarily through two doctrines that, together, prevent remedies for violations of federal rights. First, a special, stringent causation requirement often prohibits recovery against local governments, even when that government's agent violates federal constitutional rights. This causation requirement shares core historical and ideological commitments with the Supreme Court's state sovereignty jurisprudence. The requirement also shares historical roots with common law doctrines barring or limiting suits against local governments for traditional torts. Second, like federal and state officials, local actors are often entitled to qualified and absolute immunities, blocking suits against such actors in their individual capacities. Qualified and absolute immunities have roots in the doctrine of sovereign immunity.

This Article observes that the version of state sovereignty that infuses these immunity doctrines is inflected with concerns about republicanism, representative government, federalism, and autonomy. It concludes by advocating for reforms that would narrow the rights–remedies gap for constitutional violations, while showing due respect for

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* Assistant Professor, University of California, Berkeley Law School; Visiting Professor, Emory Law School. Tremendous thanks to Ty Alper, Michelle Anderson, Kenneth Bamberger, Andrew Bradt, Dorothy Brown, Jesse Choper, Sujit Choudry, Charlton Copeland, Richard Craswell, David Engstrom, Dan Farber, Richard Ford, Richard Freer, David Gamage, Jamal Greene, John Jeffries, Pamela Karlan, Prasad Krishnamurthy, Mark Lemley, Katerina Linos, Michael McConnell, Anne Joseph O'Connell, James Pfander, Russell Robinson, Bertrall Ross, Andrea Roth, Jane Schacter, Peter Schuck, Neil Siegel, David Shraub, Norm Spaulding, A. Benjamin Spencer, Rachel Stern, Stephen Sugarman, Karen Tani, Amanda Tyler, Jennifer Urban, John Yoo, and Ernest Young for reading earlier drafts or otherwise providing helpful guidance. Thanks are also due to participants of the Jerome Culp Colloquium at Duke Law School; the John Mercer Langston Workshop at the University of California, Irvine; the Federal Courts Junior Faculty Workshop at William and Mary Law School; the Faculty Workshop Series at Stanford Law School; and the Faculty Workshop Series at the University of California, Berkeley. Caitlin Bedsworth, Gregory Miller, Swati Prakash, and Shira Teva provided stellar research assistance.

the values that undergird this American jurisprudence of "republican sovereignty." Potential reforms include permitting suits against local governments when there is no other federal remedy available and placing restrictions on the execution of judgments instead of restricting the availability of suits.

INTRODUCTION

Constitutional torts take many forms. Sometimes the victim is an innocent person formerly on death row, convicted after a team of local prosecutors has illegally withheld exonerating evidence.[1] Far more often, the aggrieved is a person who was unjustifiably and excessively beaten, tasered, or shot in violation of the Fourth Amendment's command against unreasonable seizures. Such individuals often file federal suits, relying on the broad promise of 42 U.S.C. § 1983, which creates a private cause of action against state and local actors who violate federal rights.[2] But these victims of lawless conduct often find that even when they properly allege violations of federal rights, and even when they produce evidence of government abuse, they are left with no one to hold accountable in federal court.[3]

Federal courts have drawn in part upon principles of sovereignty and federalism to provide broad protection to local governments and their agents. With few exceptions, local governments are not liable for the federal constitutional violations committed by their agents.[4] Further, governmental actors serving in a prosecutorial, judicial, or legislative function are absolutely immune from suit in their individual capacities.[5] Like state and federal officials, other local governmental actors are also often immune from suit under a concept called "qualified immunity."[6] This stands in contrast to common law suits against local governments, where state courts and legislatures have often shed or softened these municipal immunities in favor of increased government accountability.[7]

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1. See Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

2. Section 1983 states in relevant part:

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

42 U.S.C. § 1983 (2012).

3. See, e.g., Truvia v. Connick, 577 F. App'x 317, 320 (5th Cir. 2014) (affirming dismissal of claims filed by exonerated former inmates for *Brady* violations); see also Connick v. Thompson, 131 S. Ct. 1350, 1366 (2011) (overturning judgment against city under similar circumstances).

4. *Thompson*, 131 S. Ct. at 1359 ("[L]ocal governments . . . are not vicariously liable under § 1983 for their employees' actions.").

5. See infra section I.C (discussing individual immunities for local government actors).

6. Infra section I.C.

7. Infra section I.C.

This Article argues that the local inoculation from legal accountability for federal constitutional violations is a consequential, de facto form of "local sovereign immunity."

The notion that local governments are "immune" from federal constitutional suits defies long-held conventional wisdom. As early as four years after the American Constitution was born, Chief Justice John Jay invoked the presumed absence of local sovereign immunity as a basis for questioning the wisdom of state sovereign immunity: "Will it be said, that the fifty odd thousand citizens in Delaware . . . stand in a rank so superior to the forty odd thousand of Philadelphia?"[8] In that case, *Chisholm v. Georgia*, Chief Justice Jay and the majority of the Court ultimately concluded that states were not immune from suit in federal court.[9] It has been said that *Chisholm* "shocked the Nation," inspiring a swift reaction in the form of the Eleventh Amendment.[10] Under that amendment, federal judicial power "shall not be construed" to permit suits against states initiated by private citizens of another state.[11] The text of the Eleventh Amendment, however, says nothing about local governments.

The doctrine that has emanated from the Eleventh Amendment purports to reaffirm the idea that local governments do not receive sovereign immunity.[12] Despite significant shifts in sovereign immunity

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8. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 472 (1793) (opinion of Jay, C.J.) (emphasis omitted).

9. See id. at 479 (opinion of Jay, C.J.) ("[A] State is suable by citizens of another State.").

10. Edelman v. Jordan, 415 U.S. 651, 662 (1974); see also 1 Charles Warren, The Supreme Court in United States History 96 (1922) ("[*Chisholm*] fell upon the country with a profound shock."). But see John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1926 (1983) ("Congress's initial reaction to the Chisholm decision hardly demonstrates the sort of outrage so central to the profound shock thesis.").

11. U.S. Const. amend. XI.

12. N. Ins. Co. of N.Y. v. Chatham County, 547 U.S. 189, 193 (2006) (holding state sovereign immunity does not extend to county); Jinks v. Richland County, 538 U.S. 456, 466 (2003) (same); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280–81 (1977) (holding state sovereign immunity does not extend to school boards); Moor v. County of Alameda, 411 U.S. 693, 717–22 (1973) (holding California counties are citizens of state for diversity purposes); Workman v. New York, 179 U.S. 552, 570 (1900) ("[A]s [a] municipal corporation[,] . . . the city of New York, unlike a sovereign, was subject to the jurisdiction of the court . . . ."); see also William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033, 1044 (1983) [hereinafter Fletcher, Historical Interpretation] (observing "while the eleventh amendment," before Court's refinement of policy and custom requirement, "protects the states from direct suits and from certain damage suits against their officers, it provides no comparable protection for their subdivisions"); Denise Gilman, Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System, 95 Geo. L.J. 591, 610 (2006) ("Local government entities, such as counties, municipalities, and districts, do not enjoy the same blanket sovereign immunity applicable to states."); cf. Jesse H. Choper & John C. Yoo, Who's

doctrine,[13] courts have continued to assert that local governments are not immune from federal suits. As the Supreme Court reasoned in 1980, by making cities amenable to suit under § 1983, Congress abrogated or dissolved any claim a municipality could have to the principle of sovereign immunity.[14] Or as the Court explained more recently in 2006, when rejecting a county's claim of sovereign immunity, "only States and arms of the State possess immunity from suits authorized by federal law."[15]

It is difficult to reconcile these pronouncements with the broad protections local governmental defendants receive from constitutional suit. These protections are, after all, expressly rooted in background principles of sovereignty and generally untethered from the language of any particular constitutional or statutory provision. This immunity comes primarily by way of a causation requirement that sounds deceptively simple to establish. Plaintiffs suing cities for violations of federal constitutional rights must prove that a city's policy or custom caused a constitutional violation. The Court made clear in *Monell v. Department of Social*

Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings, 106 Colum. L. Rev. 213, 231 (2005) ("[L]ocal governments are not subject to unqualified § 1983 liability, even though they are not constitutional beneficiaries of state immunity.").

13. The Supreme Court ruled that states could "constructively consent" to federal lawsuits before it ruled that they could not. Compare *Edelman*, 415 U.S. at 673 (finding "no place" for "[c]onstructive consent"), with Parden v. Terminal Ry., 377 U.S. 184, 196–97 (1964) (finding state had consented to liability by "enter[ing] into activities subject to congressional regulation"). The Court ruled that Congress could abrogate sovereign immunity when enacting legislation under the Commerce Clause before ruling it could not. Compare Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58–59 (1996) ("The Eleventh Amendment immunity may not be lifted by Congress unilaterally deciding that it will be replaced by grant of some other authority."), with Pennsylvania v. Union Gas Co., 491 U.S. 1, 13–14 (1989) (finding Congress has power under Commerce Clause to permit suits against states). Other works have thoroughly documented these changes. See Andrew B. Coan, Text as Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment, 74 Fordham L. Rev. 2511, 2511–12 (2006) (outlining "inconclusive" debate between two competing interpretations of Eleventh Amendment); Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. Chi. L. Rev. 429, 459 (2002) [hereinafter Fallon, "Conservative" Paths] (noting "relative boldness of the sovereign immunity decisions, as signified by the Court's brash willingness to overrule prior cases and reformulate doctrinal tests"); Fred O. Smith, Jr., Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment, 80 Fordham L. Rev. 1941, 1961–64 (2012) [hereinafter Smith, Awakening] (tracing development of state sovereign immunity in United States); cf. John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 Yale L.J. 1663, 1666 (2004) ("In recognizing such broad classes of immunity, the Court has dealt with the Eleventh Amendment's text in two (arguably inconsistent) ways . . . ."). See generally Carlos Manuel Vázquez, Eleventh Amendment Schizophrenia, 75 Notre Dame L. Rev. 859 (2000) (describing conflict between "supremacy" and "state sovereignty" strains of Eleventh Amendment analysis).

14. Owen v. City of Independence, 445 U.S. 622, 647–48 (1980).

15. *N. Ins. Co. of N.Y.*, 547 U.S. at 193.

Services and its progeny that unlike in the case of most torts,[16] it is insufficient to establish municipal causation on the predominant theory that the principal is responsible for the torts of her agent.[17] The Court has not only repeatedly affirmed this rejection, but has emboldened it by narrowly interpreting the term "policy." "[A] lesser standard of fault would," the Court has explained, "implicate serious questions of federalism."[18]

It has been roughly three decades since the Court has ruled that a municipal policy caused a constitutional violation.[19] And in the post-*Monell* era, the Court has never found that a municipal custom caused a constitutional violation.[20] While the outcome in lower courts is more mixed,[21] the municipal causation requirement nonetheless often inoculates local governments from accountability,[22] including for conduct that would render them liable for violations of state law. When this causation requirement interacts with other immunities that govern-

16. Restatement (Third) of Agency § 7.03(2)(b) (Am. Law Inst. 2006) ("A principal is subject to vicarious liability to a third party harmed by an agent's conduct when . . . the agent commits a tort when acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal."); 2 Dan B. Dobbs et al., The Law of Torts § 425, at 780 (2d ed. 2011) ("[P]rivate employers (and some public employers) are generally jointly and severally liable along with the tortfeasor employee for the torts of employees committed within the scope of employment."); 10 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Corporations § 4877, at 307–08 (perm. ed., rev. vol. 2010) ("Corporations can commit almost any kind of a tort that individuals can commit, and they are liable for the acts of their agents and servants in the same degree as natural persons are liable for the acts of their servants and agents.").

17. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

18. City of Canton v. Harris, 489 U.S. 378, 392 (1989).

19. The last time the Court found a municipal policy unconstitutional was Pembaur v. City of Cincinnati, 475 U.S. 469, 485 (1986) (holding county liable for § 1983 violation by prosecutor).

20. See, e.g., Adickes v. S. H. Kress & Co., 398 U.S. 144, 173–74 (1970) (remanding pre-*Monell* case with instruction that district court evaluate custom but not finding constitutional violation).

21. Compare Estate of Sinthasomphone v. City of Milwaukee, 878 F. Supp. 147, 148, 151 (E.D. Wis. 1995) (allowing civil rights case challenging city police "customs and practices" to proceed to jury), with Calhoun v. Ramsey, 408 F.3d 375, 381 (7th Cir. 2005) (affirming jury instructions in case challenging county jail's medical policy under § 1983 where jury found policy did not violate constitution).

22. See Richard H. Fallon, Jr., Asking the Right Questions About Officer Immunity, 80 Fordham L. Rev. 479, 482 n.11 (2011) [hereinafter Fallon, Asking the Right Questions] ("Under cases decided subsequent to *Monell*, the standards for establishing the liability of local governmental entities for constitutional violations committed by their officials are exceedingly difficult to satisfy."); Pamela S. Karlan, The Paradoxical Structure of Constitutional Litigation, 75 Fordham L. Rev. 1913, 1920 (2007) (noting "there are many areas where it is exceptionally difficult to show that the challenged action involves an unwritten policy" in part because while "governments are repeat players, plaintiffs are not"); David Rittgers, *Connick v. Thompson*: An Immunity That Admits of (Almost) No Liabilities, 2011 Cato Sup. Ct. Rev. 203, 235 (describing *Connick* as "practically foreclos[ing] the prospect of any route of recovery for intentional *Brady* violations").

mental officials receive,[23] survivors of governmental abuse are often left with no defendant to sue at all.

Determined in a case retired Justice John Paul Stevens recently called a "manifest injustice," the fate of John Thompson exemplifies the consequences of local immunity.[24] Thompson is a New Orleanian who was wrongly convicted of armed robbery and murder.[25] During his initial trial, prosecutors refused to turn over exculpatory physical evidence that would have saved him from eighteen years in prison, fourteen of which were spent languishing on death row.[26] The District Attorney's office never trained these prosecutors about the unconstitutionality of withholding exonerating evidence.[27]

When Thompson was finally released, he sued New Orleans under § 1983.[28] He could not maintain a suit against the local prosecutors, however, because they were protected by the doctrine of prosecutorial immunity.[29] Further, the Supreme Court ruled that Thompson could not receive a judgment against New Orleans for these unconstitutional acts despite the absence of local training. According to the Court, Thompson failed to show that the District Attorney's failure to train prosecutors constituted a *policy* of deliberate indifference.[30] Negligence, even gross negligence, is not enough to constitute an actionable municipal "policy" or "custom."[31] A standard less than deliberate indifference, Justice Antonin

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23. These other immunities include legislative, prosecutorial, judicial, and qualified immunities.

24. John Paul Stevens, Letter to the Editor, Prosecutors' Misconduct, N.Y. Times (Feb. 18, 2015), http://www.nytimes.com/2015/02/18/opinion/prosecutors-misconduct.html (on file with the *Columbia Law Review*). Thompson's case has received additional attention and scrutiny in recent months, in part because the Fifth Circuit recently relied on it to dismiss claims against New Orleans for failure to turn over exonerating evidence. See Truvia v. Connick, 577 F. App'x 317, 320 (5th Cir. 2014) (affirming dismissal of claims filed by exonerated former inmates for *Brady* violations), cert. denied, 135 S. Ct. 1550 (2015); see also Editorial, How to Force Prosecutors to Play Fair, N.Y. Times (Feb. 16, 2015), http://www.nytimes.com/2015/02/16/opinion/how-to-force-prosecutors-to-play-fair.html (on file with the *Columbia Law Review*) ("[I]n a bizarre 2011 ruling, five justices of the Supreme Court . . . essentially clos[ed] off one of the only ways to hold prosecutors and their offices liable for wrongdoing.").

25. Connick v. Thompson, 131 S. Ct. 1350, 1356 (2011).

26. Id.

27. Id. at 1357 (noting "no prosecutor [in Orleans Parish District Attorney's Office] remembered any specific training session regarding *Brady* prior to" Thompson's prosecution).

28. Id.

29. Thompson v. Connick, 553 F.3d 836, 846 (5th Cir. 2008) ("Thompson brought state law claims for malicious prosecution . . . as well as a claim under [§ 1983] . . . . The district court granted summary judgment for Defendants on the state law claims on the basis of absolute prosecutorial immunity . . . ."), aff'd 578 F.3d 293 (5th Cir. 2009) (en banc), rev'd 131 S. Ct. 1350.

30. *Connick*, 131 S. Ct. at 1366.

31. See City of Canton v. Harris, 489 U.S. 378, 391–92 (1989) (requiring higher standard of fault than negligence for municipal liability).

Scalia reasoned, "would 'engage the federal courts in an endless exercise of second-guessing municipal employee-training programs,' thereby diminishing the autonomy of state and local governments."[32] Constitutional accountability thus yielded to the abstract idea of local autonomy.

Together, the stringent causation requirement and the individualized immunities of the type that protected Thompson's prosecutors are best understood as constituent parts of local sovereign immunity. This does *not* mean that the form of sovereign immunity possessed by local governments is the same as state sovereign immunity. Instead "local sovereign immunity," as used here, means two things. First, as a descriptive matter, the municipal causation requirement shares core ideological and methodological features with state sovereignty doctrines. To be sure, "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities."[33] Still, cities have often been seen both as instrumentalities for sovereign states to carry out functions and as instruments for another sovereign, the people, to express their will.[34] The Court has often drawn on a hybrid of these views—which I call "republican sovereignty"—in crafting the contours and content of the municipal causation requirement.

Second, as a functional matter, the municipal causation requirement and the individual immunities that local officers receive render specific classes of governmental defendants insusceptible to suit, even when there is a determination that a government's agent has violated constitutional rights.[35] That is what immunity *is*.[36]

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32. *Connick*, 131 S. Ct. at 1367 (Scalia, J., concurring) (quoting *Canton*, 489 U.S. at 392).

33. Reynolds v. Sims, 377 U.S. 533, 575 (1964).

34. Richard Briffault, Who Rules at Home?: One Person/One Vote and Local Governments, 60 U. Chi. L. Rev. 339, 396–401 (1993) [hereinafter Briffault, Who Rules at Home?] (discussing cases in which local franchise unconstitutionally extended to people less "comparably affected" by local government).

35. See generally Larry Kramer & Alan O. Sykes, Municipal Liability Under § 1983: A Legal and Economic Analysis, 1987 Sup. Ct. Rev. 249, 249 ("Corporations are a legal fiction representing a network of legal, usually contractual, arrangements. 'Corporations' thus do not act, do not make contracts, sell property, or commit torts: their agents do.").

36. Cf. James E. Pfander, Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages, 111 Colum. L. Rev. 1601, 1611 (2011) [hereinafter Pfander, Immunity Dilemma] (proposing "immunity-free constitutional tort action for nominal damages"). But see John C. Jeffries, Jr., The Right–Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 87 (1999) [hereinafter Jeffries, Right–Remedy Gap] (observing "right-remedy gap is probably inevitable in constitutional law and is in any event deeply embedded in current doctrine"). See generally Gary S. Gildin, The Supreme Court's Legislative Agenda to Free Government From Accountability for Constitutional Deprivations, 114 Penn St. L. Rev. 1333, 1384 (2010) ("[T]he current Supreme Court is not likely to be a hospitable audience to arguments seeking to liberalize federal court remedies to victims of governmental wrongdoing . . . ."); Karlan, supra note 22, at 1913–14 ("The United States Supreme Court has pieced together a crazy quilt of constitutional doctrines that undercut its central goal of intelligently and efficiently refining broad constitutional commands.").

State sovereign immunity is an important topic in federal courts scholarship. Scholars have interrogated the meaning of the Eleventh Amendment,[37] investigated whether sovereign immunity bars suits beyond the text of that amendment,[38] and canvassed the policy goals sovereign immunity does and should serve.[39] *Monell*, a case that has been called an "'accidental landmark,'" is also an important topic in federal courts.[40] Scholars have (with remarkable unity) criticized the *Monell*

37. William A. Fletcher and John Gibbons advanced the diversity explanation, under which the Eleventh Amendment explains the contours of Article III's grant of jurisdiction to federal courts in cases between a state and a citizen of another state. See William A. Fletcher, The Diversity Explanation of the Eleventh Amendment: A Reply to Critics, 56 U. Chi. L. Rev. 1261, 1274 (1989) (arguing Eleventh Amendment can be understood "as failing to authorize jurisdiction, by requiring a narrow construction of the affirmative grant of party-based jurisdiction; that is, after the amendment, the state-citizen diversity clause authorizes jurisdiction when a state is a plaintiff but not when it is a defendant"); Fletcher, Historical Interpretation, supra note 12, at 1033–34 ("The Court apparently views the amendment as a form of jurisdictional bar that specifically limits the power of federal courts to hear private citizens' suits against unconsenting states. This article contends that as a historical matter this view of the amendment is mistaken."); see also U.S. Const. art. III § 2 ("The judicial Power shall extend . . . to Controversies between two or more States . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); Gibbons, supra note 10, at 2004 (arguing Eleventh Amendment "applies only to cases in which the jurisdiction of the federal court depends solely upon party status"); James E. Pfander, History and State Suability: An "Explanatory" Account of the Eleventh Amendment, 83 Cornell L. Rev. 1269, 1323–52 (1998) (contending amendment was "explanatory," designed to shield states from liability for debts accrued under Articles of Confederation). Others have advanced the plain meaning explanation, in which the Eleventh Amendment only applies to bar suits against a state by citizens of another state, regardless of what head of jurisdiction the plaintiff invokes. See generally Lawrence C. Marshall, Fighting the Words of the Eleventh Amendment, 102 Harv. L. Rev. 1342 (1989) (justifying distinction between ability of out-of-state and in-state citizens to sue state in federal court based on plain text of Eleventh Amendment).

38. See generally Bradford Clark, The Eleventh Amendment and the Nature of the Union, 123 Harv. L. Rev. 1817, 1825 (2010) ("The leading theories of the Eleventh Amendment go beyond the words of the Amendment without a fully convincing theoretical basis."); Manning, supra note 13, at 1666, 1750 ("[I]t is a familiar reality that almost none of the Court's important cases involving the Amendment deal with matters that fall within its terms . . . . [T]he Court . . . must not readjust the Amendment's precise terms to capture their apparent background purpose.").

39. See Choper & Yoo, supra note 12, at 261 (arguing Rehnquist Court's sovereign immunity decisions reflect Court is less "interested in protecting states as it is (a) in centralizing the enforcement of federal law in the executive branch and (b) in pressing Congress to make clear cost-benefit decisions on the use of lawsuits to enforce federal policy"); John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 51 (1998) ("The real role of the Eleventh Amendment is not to bar redress for constitutional violations by states but to force plaintiffs to resort to Section 1983.").

40. Charles R. Epp, Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State 70 (2009) (quoting Oscar G. Chase & Arlo Monell Chase, *Monell*: The Story Behind the Landmark, 31 Urb. Law. 491, 491 (1999)).

Court's misuse of legislative history[41] and scrutinized the policy concerns at issue in municipal suits.[42]

An important topic, however, has generally escaped scholarly and jurisprudential attention: Is this doctrinal shield from municipal liability a form of sovereign immunity? And if so, what can this teach us?

This Article's focus on local governments is not intended to trivialize the importance of studying other forms of sovereign immunity, including federal and state immunity. And it may well be that some of the lessons potentially learned from studying local accountability have force in the contexts of state and local governments as well. But attention to local accountability is important in its own right as well. Local government provides the sphere of regulation that is often closest to us in our daily lives, from law enforcement to education.[43] In the area of law enforcement alone, as Professor Charles Epp has observed, "local police forces exercise awesome powers, among them surveillance, arrest, incarceration, and the use of force up to and including the authority to

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41. See Vodak v. City of Chicago, 639 F.3d 738, 747 (7th Cir. 2011) (Posner, J.) (noting "scholars agree" heightened causation requirement is based upon "historical misreadings (which are not uncommon when judges play historian)"); see also 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, 2196 (2005) [hereinafter Achtenberg, Taking History Seriously] ("The Court's conclusions rest on historically inaccurate assumptions about the nineteenth-century justifications for respondeat superior."). A more exhaustive list of citations can be found infra note 378.

42. See Susan A. Bandes, The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on *Connick v. Thompson*, 80 Fordham L. Rev. 715, 730–31 (2011) (suggesting prosecutorial "tunnel vision" and other cognitive biases that lead to unintentional *Brady* violations could be deterred but are not because of *Monell* and related cases); Rosalie Berger Levinson, Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-*Iqbal*/*Connick* World, 47 Harv. C.R.-C.L. L. Rev. 273, 304 (2012) (arguing there "is no reason" to apply Eighth Amendment's stringent culpability test to § 1983 objective deliberate indifference cases because "subordinate's constitutional violation has already been adjudicated" and "only remaining question is statutory"); see also Michael J. Gerhardt, The *Monell* Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983, 62 S. Cal. L. Rev. 539, 614 (1989) (noting shifts away from Court's "controversial" application of *Monell* rule will only occur "because of changes in the political makeup of the Supreme Court"); Kramer & Sykes, supra note 35, at 250 ("The policy rule has been extremely difficult to apply coherently, and there is no reason to continue the exercise."); Sheldon H. Nahmod, Constitutional Accountability in Section 1983 Litigation, 68 Iowa L. Rev. 1, 24–25 (1982) (describing *Monell* as having "proper approach to local government accountability under section 1983" and describing fault-based interpretation of § 1983); Terrence S. Welch & Kent S. Hofmeister, *Praprotnik*, Municipal Policy and Policymakers: The Supreme Court's Constriction of Municipal Liability, 13 S. Ill. U. L.J. 857, 883 n.176 (1989) (discussing disadvantages of "expansive view of municipal liability," including lack of insurance coverage).

43. Most police officers, teachers, and firefighters, for example, work for municipal governments. See generally Epp, supra note 40, at 5 ("[L]ocal government[] . . . practices affect people almost every day . . . .").

kill."[44] Consequentially, there are copious occasions for local governments to commit constitutional torts that cause direct harm.[45] Indeed, there are more local governmental officials than any other type.[46]

As local governments have taken on traditional state sovereign functions in areas like public safety and education, a doctrine of local sovereign immunity is not entirely illogical. But the doctrine, as currently constituted, raises serious questions about accountability, representative government, and the rule of law. With some regularity, federal courts are powerless to hold local abusers of the public trust liable for violations of the Constitution—despite the contrary promise of a duly enacted legislative statute.

In the aftermath of the Civil War, Congress made clear its intention to eradicate instances in which remedies for constitutional violations were available in theory, but not available in practice.[47] In the shadow of that history, the version of federalism that the Court cites in support of local sovereign immunity is, as Professor Norman Spaulding once said of the Court's federalism jurisprudence, "chillingly amnesic."[48] Ironically, it is also chillingly shortsighted, as the scope of local government power continues to expand.[49] Police gear and weaponry are increasingly militaristic,[50] a topic that has especially captured America's attention in the

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44. Id. at 33.

45. See generally Marshall S. Shapo, Constitutional Tort: *Monroe v. Pape*, and the Frontiers Beyond, 60 Nw. U. L. Rev. 277, 322–23 (1965) (coining phrase "constitutional tort").

46. There are roughly 11,000,000 local employees in the United States, compared to about 4,000,000 state employees, and 3,000,000 federal employees. U.S. Census Bureau, 2011 Annual Survey of Public Employment and Payroll, 2011 Public Employment and Payroll Data, Local Governments (rev. May 2013), http://www2.census.gov/govs/apes/11locus.txt [http://perma.cc/YA3K-YSPK] (providing local data); U.S. Census Bureau, 2011 Annual Survey of Public Employment and Payroll, 2011 Public Employment and Payroll Data, State Governments (rev. May 2013), http://www2.census.gov/govs/apes/11stus.txt [http://perma.cc/8XTG-A7ZX] (providing state data); U.S. Census Bureau, 2010 Public Employment and Payroll Census, Federal Government Civilian Employment by Function: March 2010, http://www2.census.gov/govs/apes/10fedfun.pdf [http://perma.cc/AVB7-DM6Z] (last visited Oct. 27, 2015) (providing federal data).

47. See infra note 420 and accompanying text (noting Court's discussion of original purposes of § 1983 in Monroe v. Pape, 365 U.S. 167 (1961)).

48. Norman W. Spaulding, Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory, 103 Colum. L. Rev. 1992, 2015 (2003).

49. See generally Michelle Wilde Anderson, Mapped Out of Local Democracy, 62 Stan. L. Rev. 931, 959–66 (2010) [hereinafter Anderson, Mapped Out] (discussing how ascension of local control has rendered it more difficult to check abuses of government power in areas such as voting rights and antidiscrimination).

50. See generally Radley Balko, Rise of the Warrior Cop: The Militarization of America's Police Forces (2013) (describing increasing militarism of American police forces); Militarizing the American Criminal Justice System: The Changing Roles of the Armed Forces and the Police (Peter B. Kraska ed., 2001) (analyzing militarization of American criminal justice system and police forces); Al Baker, When the Police Go

post-Ferguson era. Some local school districts are exploring ways to equip teachers with guns.[51] Local officers and prosecutors are on the front lines of a criminal justice system that incarcerates more people than at any point in history and any place in the world.[52] Major American cities are experimenting with unmanned drone technology to surveil Americans from the skies,[53] a development that recently drew a note of concern about privacy from a sitting United States Supreme Court Justice.[54]

Military, N.Y. Times (Dec. 3, 2011), http://www.nytimes.com/2011/12/04/sunday-review/have-american-police-become-militarized.html (on file with the *Columbia Law Review*) ("[L]ately images from Occupy protests streamed on the Internet . . . show just how readily police officers can adopt military-style tactics and equipment, and come off more like soldiers as they face down citizens.").

51. See, e.g., James C. McKinley Jr., In Texas School, Teachers Carry Books and Guns, N.Y. Times (Aug. 28, 2008), http://www.nytimes.com/2008/08/29/us/29texas.html (on file with the *Columbia Law Review*) ("The school board . . . has drawn national attention with its decision to let some teachers carry concealed weapons . . . ."); James Rainey, More or Fewer Guns? The Experts Are Divided, L.A. Times (Dec. 20, 2012), http://articles.latimes.com/2012/dec/20/nation/la-na-more-guns-20121221 [http://perma.cc/KLL2-7NJX] (describing debate on whether gun control is effective deterrent and noting districts in some states have discussed allowing school employees to be armed); Motoko Rich, School Officials Look Again at Security Measures Once Dismissed, N.Y. Times (Dec. 18, 2012), http://www.nytimes.com/2012/12/19/education/after-newtown-shootings-schools-consider-armed-security-officers.html (on file with the *Columbia Law Review*) ("In the wake of the Newtown, Conn., shootings last week, [the Charlotte-Mecklenburg school superintendent] finds himself contemplating . . . increasing the number of security officers in schools who carry their own guns.").

52. Barbara A. Bardes et al., American Government and Politics Today 488 (2012) ("The United States has more people in jail or prison than any other country in the world."); Pew Ctr. on the States, One in 31: The Long Reach of American Corrections 4–10 (2009), http://www.convictcriminology.org/pdf/pew/onein31.pdf [http://perma.cc/DE93-TW58] (describing rise in prison population).

53. See, e.g., Courtney E. Walsh, Surveillance Technology and the Loss of Something a Lot Like Privacy: An Examination of the "Mosaic Theory" and the Limits of the Fourth Amendment, 24 St. Thomas L. Rev. 169, 208 (2012) (noting Los Angeles Sheriff's Department, Miami-Dade Metro Police, and Houston and Sacramento Police Departments have active drone acquisition and testing programs); Brian Bennett, Police Employ Predator Drone Spy Planes on Home Front, L.A. Times (Dec. 10, 2011), http://articles.latimes.com/2011/dec/10/nation/la-na-drone-arrest-20111211 [http://perma.cc/3WsZ-K6TN] (reporting use of unmanned Predator drones for surveillance by local law enforcement in North Dakota); Katie Orr, Local Governments Setting California Policy Agenda, Jefferson Pub. Radio (Feb. 26, 2015), http://ijpr.org/post/local-governments-setting-california-policy-agenda [http://perma.cc/7KSR-8VML] (describing ACLU of Northern California's attempt to regulate local law enforcement use of drones for surveillance); see also Joseph J. Vacek, Big Brother Will Soon Be Watching—Or Will He? Constitutional, Regulatory, and Operational Issues Surrounding the Use of Unmanned Aerial Vehicles in Law Enforcement, 85 N.D. L. Rev. 673, 674 (2009) (calling widespread use of drones "imminent").

54. Jacob Gershman, Sotomayor: Americans Should Be Alarmed by Spread of Drones, Wall St. J.: L. Blog (Sept. 12, 2014, 12:07 PM), http://blogs.wsj.com/law/2014/09/12/justice-sotomayor-americans-should-be-alarmed-by-spread-of-drones/ [http://perma.cc/T5JD-8T32] (quoting Justice Sonia Sotomayor in speech warning law students and faculty about "frightening" privacy invasions associated with drone surveillance).

This power carries risks of abuse—abuse that the current doctrine is ill-equipped to correct. Is it possible to have a doctrine that increases accountability for local constitutional violations, while taking seriously the view that federal lawsuits represent a threat to federalism, autonomy, and representative government?

Part I briefly outlines the reason for the consensus that local governments do not receive sovereign immunity—and then shows why this view is unfounded. As an initial matter, local governments were traditionally protected from suits at common law, in part because of their status as creatures of the sovereign states. Part I then describes the municipal causation requirement and local actors' individual immunities from suit. These doctrines collectively stand as a sequel to the common law background of state sovereignty, often relying on arguments sounding in federalism, autonomy, and representative government.

Part II unpacks the concept of "republican sovereignty" by documenting its prominence in historical and doctrinal affirmations of state sovereignty in the United States. This concept is not simply an update of the ancient principle that "the [sovereign] king can do no wrong."[55] Rather, the Court's state sovereignty jurisprudence heavily relies on the very principles that purportedly drive the municipal causation requirement: federalism, autonomy, and representative government.

Part III then examines how salient these principles are in the context of local governments. Local governments serve a number of traditional state sovereign functions in areas such as education and public safety. This leads to two important normative concerns. On the one hand, it is plausible that many of the concerns that drive state sovereign immunity—crippling money damages, invasive executions of judgments—have real force in the context of local governments as well. On the other hand, the significant role local governments play in Americans' everyday lives means that a mechanism for accountability for constitutional violations is an acute and pressing concern.

Part IV argues that the municipal causation requirement is "immunity." Like state sovereign immunity, qualified immunity, and absolute immunity, the requirement protects a special class of defendants from liability, even when a violation has occurred. Indeed, when the

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55. Opponents of sovereign immunity, in particular, have often charged that the doctrine arises from this ancient principle. Will v. Mich. Dep't of State Police, 491 U.S. 58, 87–88 (1989) (Stevens, J., dissenting) (asserting "doctrine of sovereign immunity rests on the fictional premise that the 'King can do no wrong'"); Erwin Chemerinsky, Against Sovereign Immunity, 53 Stan. L. Rev. 1201, 1201 (2001) [hereinafter Chemerinsky, Against Sovereign Immunity] ("The principle of sovereign immunity is derived from English law, which assumed that 'the King can do no wrong.'"); see also Owen v. City of Independence, 445 U.S. 622, 645 n.28 (1980) ("Although it has never been understood how the doctrine of sovereign immunity came to be adopted in the American democracy, it apparently stems from the personal immunity of the English Monarch as expressed in the maxim, 'The King can do no wrong.'").

causation requirement operates synergistically with other known immunities, it often leaves victims of lawless conduct with no defendant to sue at all. Under these circumstances, ostensibly hallowed constitutional rights become hollow.[56]

Part V catalogues some of the consequences and normative benefits of conceptualizing the municipal causation requirement and related local individual immunities as local sovereign immunity. First, some benefits flow from simply having a cohesive framework for thinking about the ways that individual immunities and the municipal causation requirement work together to create an accountability gap for constitutional torts. In the life of a constitutional tort case, the municipal causation requirement and individual immunities often operate together to render a victim without a remedy. It would be helpful then to adopt a synergistic approach to local constitutional torts that takes that into account. For example, a significant improvement over the doctrine would be the adoption of a rule that respondeat superior liability against local governments is available when (and only when) there is no other federal constitutional remedy available by virtue of individual immunities.

Second, Part V contends that it is useful to think of the municipal causation requirement as sovereign immunity because it brings the requirement in dialogue with debates about how to reform (or some would argue, abolish) sovereign immunity. Third, the values of republican sovereignty provide a set of normative benchmarks that can be used both to assess sovereign immunity and craft reforms that balance the complex and competing values that attend the world of constitutional accountability. With these aims in mind, this Article offers potential ways to take seriously both the local accountability gap and the potential harm to republican sovereignty that attends lawsuits against cities. In particular, this is an area where federal courts can learn from the states, where state courts and legislatures have confronted many of the same concerns that exist at the federal level. To that end, caps on damages and executions of judgment should be considered as an alternative to preventing victims of constitutional torts from having access to federal courts in the first instance.

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56. See generally Richard H. Fallon, Jr., The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights, 92 Va. L. Rev. 633, 651, 687–89 (2006) (discussing limits sovereign and official immunity impose on availability of civil remedies); Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 889–99 (1999) (discussing application of "various types of right-remedy interaction" to different constitutional contexts).

I. THE GENEALOGY OF LOCAL SOVEREIGN IMMUNITY

Under the conventional account, "municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."[57] The Supreme Court has identified at least two reasons for this delineation. The first is the language of the Eleventh Amendment. That amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[58] By its terms, then, "the protection afforded by that Amendment is only available to 'one of the United States.'"[59] Thus, the "Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'"[60]

The second reason is sovereign immunity's historical roots. In *Alden v. Maine*, the Court explained that it "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments."[61] For that reason, "'Eleventh Amendment immunity' . . . is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."[62] Because states, not local governments, have this historical status as sovereigns, the Court has found that only states are entitled to sovereign immunity.[63]

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57. Jinks v. Richland County, 538 U.S. 456, 466 (2003); see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280–81 (1977) ("[T]he record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.").

58. U.S. Const. amend. XI.

59. Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 400 (1979).

60. Id. at 401.

61. Alden v. Maine, 527 U.S. 706, 713 (1999); see also Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55–56 (1996) (requiring "obvious" and "unequivocally expresse[d] intent to abrogate" sovereign immunity in order for case to proceed (internal quotation marks omitted) (first quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1992); and then quoting Green v. Mansour, 474 U.S. 64, 68 (1985) (alteration in original))); Principality of Monaco v. Mississippi, 292 U.S. 313, 322–23 (1934) ("States of the Union, still possessing attributes of sovereignty, shall be immune from suits . . . save where there has been 'a surrender of this immunity in the plan of the convention.'" (internal quotation marks omitted)(citation omitted) (quoting The Federalist No. 81, at 399 (Alexander Hamilton) (Lawrence Goldman ed., 2008))).

62. *Alden*, 527 U.S. at 713.

63. See N. Ins. Co. of N.Y. v. Chatham County, 547 U.S. 189, 193 (2006) ("A consequence of this Court's recognition of preratification sovereignty as the source of

This Part outlines the common law tradition of municipal immunity for certain torts. The doctrine of state sovereign immunity deeply informs this common law tradition. This Part then discusses various ways that federal doctrine inoculates local governments and their agents from constitutional accountability, even when a constitutional violation has taken place. First, plaintiffs suing local governments for constitutional violations must meet a unique causation requirement that applies only to state and local governments. Under this requirement, a plaintiff must demonstrate, at a minimum, that a "final policymaker" exhibited deliberate indifference to constitutional rights. Negligence is not sufficient. Nor is deliberate indifference by a high-level supervisor who lacks policymaking authority. What is more, local governmental officials are protected by qualified immunity or absolute immunities, just like employees of American sovereigns (i.e., state and local governments). To sustain these limitations, the Court has often relied on broad precepts such as federalism, autonomy, and representative government. As Part II demonstrates, these are principles the Court has similarly relied upon when defining the scope of state sovereignty doctrines.

A. *Development of Common Law Municipal Immunity*

For over two centuries, the common law protected municipalities from certain suits sounding in tort.[64] This tradition is older than § 1983, the statutory vehicle for bringing claims against state and local actors who violate federal rights.[65] The 42nd Congress brought that statute into law during the Reconstruction Era as a part of the Ku Klux Klan Act of 1871.[66] Notions of state sovereignty have driven the development of both the common law immunity and limitations on § 1983.[67]

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immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law."); see also Ann Woolhandler & Michael G. Collins, Judicial Federalism and the Administrative States, 87 Calif. L. Rev. 613, 645 n.133 (1999) ("Local agencies are not considered to be arms of the state . . . and relief against them on the basis of federal law for their unconstitutional laws, customs and policies is therefore unproblematic.").

64. Mower v. Inhabitants of Leicester, 9 Mass. (8 Tyng) 247, 250 (1812) (introducing doctrine into American common law). By the mid-twentieth century, state courts and legislatures began to drastically limit or abolish sovereign immunity in common law actions. Lauren K. Robel, Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law, 78 Ind. L.J. 543, 553–55 (2003) (discussing state decisions rejecting sovereign immunity on grounds it interfered with democratic values).

65. 42 U.S.C. § 1983 (2012).

66. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2012)).

67. Common law immunity has nonetheless evolved quite differently than the doctrine emanating from § 1983. See David Achtenberg, Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will, 86 Nw. U. L. Rev. 497, 524–28 (1992) [hereinafter Achtenberg, Immunity] (discussing gap between common law development and static immunities under § 1983).

It is generally understood that this municipal immunity is traceable to the English case of *Russell v. Men of Devon*, where plaintiffs sued a town[68] for injuries sustained after a bridge failed.[69] That case, decided in 1788, held that local governments are not amenable to suit absent express legislation rendering them liable. Writing in seriatim, the court relied on the novelty of the claim, the potential high volume of litigation a contrary holding would spark, and the importance of unimpeded public functions. "If this experiment had succeeded, it would have been productive of an infinity of actions," Lord Chief Justice Lloyd Kenyon hypothesized.[70]

Judge William Ashurst agreed that "[i]t is a strong presumption that that which never has been done cannot by law be done at all."[71] But he also focused on a lawsuit's ability to harm the public at large: "[I]t is better that an individual should sustain an injury than that the public should suffer an inconvenience. Now if this action could be sustained, the public would suffer a great inconvenience . . . ."[72]

During the first half of the nineteenth century, state courts rendered a mixed verdict on *Men of Devon*. Some relied on the case, and its rationale, to protect municipalities from suits sounding in common law torts.[73] The Massachusetts Supreme Judicial Court led this trend, relying almost exclusively on that case when rejecting municipal liability in 1812.[74] Courts in New York,[75] South Carolina,[76] New Jersey,[77] and

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68. More accurately, the plaintiff sued the population of a town. The town itself lacked a treasury. (1788) 100 Eng. Rep. 359, 359; 2 T.R. 667, 667 (K.B.).

69. Id. at 359–60; see also Robert Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57, 72–73 (1999) (noting "[c]ounties, townships, school districts, and similar organizations were . . . generally immune from suit in tort," and noting *Men of Devon* is "[t]he English case to which this doctrine is traceable").

70. *Men of Devon*, 100 Eng. Rep. at 362.

71. Id.

72. Id.

73. See, e.g., Lynn v. Adams, 2 Ind. 143, 145–46 (1850) (citing *Men of Devon* in dismissing action "against an overseer of roads, for damages resulting from the neglect of his duties"); Mower v. Inhabitants of Leicester, 9 Mass. 247 (8 Tyng) (1812).

74. See *Mower*, 9 Mass. at 250 ("This question is fully discussed in the case of *Russell & al.* vs. *The men of Devon,* cited at the bar, and the reasoning there is conclusive against the action.").

75. See Bartlett v. Crozier, 15 Johns. 250, 254–55 (N.Y. Sup. Ct. 1818) ("[W]herever an individual has sustained an injury, by . . . an officer, . . . the law affords redress by an action on the case adapted to the injury. Lord *Kenyon,* in . . . *The Men of Devon* . . . did not think the action lay at common law against the county.").

76. See Young v. Comm'rs of Rds., 11 S.C.L. (2 Nott & McC.) 537, 537–38 (S.C. Const. Ct. App. 1820) ("In . . . *men of Devon* . . . it was ruled, that such an action would not lie against an overseer of the roads for an error of judgment in the execution of his trust. No case has been found, in which such an action has been sustained."). Two justices dissented. Id. at 538.

Mississippi[78] also relied in significant part on *Men of Devon* in helping form the contours of their states' versions of municipal immunity. In contrast, courts in New Hampshire and New Jersey charted a different course. One New Hampshire case, decided within a decade of the Massachusetts opinion, emphasized that the reasoning of *Men of Devon* was of limited utility when deciding whether municipalities were liable for *statutory* violations, as opposed to violations of common law torts.[79] And indeed, by 1849, New Hampshire abandoned any reliance on *Men of Devon*.[80]

By the end of the nineteenth century, American courts continued to explore the contours of municipal liability. Rather than relying primarily on the British tradition (and a common law American tradition heavily informed by the British tradition), these cases also relied heavily on American notions of state sovereignty. Two approaches were particularly common. The first granted counties more robust immunity than cities or towns.[81] The second granted immunity to municipalities only for government functions, denying immunity for corporate functions.[82] This latter approach underscored the "'dual nature' of local governments—part public or governmental, and part 'corporate' or 'proprietary.'"[83] Both distinctions were sometimes informed by notions of state sovereignty.

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77. See Bd. of Chosen Freeholders of Sussex Cty. v. Strader, 18 N.J.L. 108, 116–18 (N.J. 1840) (relying on *Men of Devon* to reject notion of common law liability for municipalities and to inform limitations on municipal liability for violations of statutes).

78. See Yalabusha Cty. v. Carbry, 11 Miss. (3 S. & M.) 529, 552 (Miss. 1844) (concluding, with reference to *Men of Devon*, municipalities were liable only for violations of statutes—not common law), overruled on other grounds by Dismukes v. Stokes, 41 Miss. 430 (Miss. 1867).

79. Farnum v. Town of Concord, 2 N.H. 392, 393 (1821).

80. See Wheeler v. Town of Troy, 20 N.H. 77, 79–80 (1849) ("*Men of Devon* . . . proceeded upon the ground that no action lies against a town unless given by a statute. We are inclined . . . to the opinion that . . . remedy by action[] is properly applicable to the case of one who has received an injury through the neglect of a town . . . .").

81. See, e.g., Barnett v. County of Contra Costa, 7 P. 177, 177–78 (Cal. 1885) (prohibiting suit against county); Bd. of Comm'rs of Marion Cty. v. Riggs, 24 Kan. 255, 257 (1880) (same); Reardon v. St. Louis County, 36 Mo. 555, 562 (1865) (same); White v. Comm'rs of Chowan, 90 N.C. 437, 440–41 (1884) (same); cf. Michelle Wilde Anderson, Dissolving Cities, 121 Yale L.J. 1364, 1426 (2012) [hereinafter Anderson, Dissolving Cities] ("Law . . . treats municipalities as voluntary democracies with rights to include and exclude territory, and counties as a primordial state with weak . . . rights to shape . . . territory . . . closer to state governments, with relatively immovable borders and a role more akin to an 'arm[] of the state[]' than a locally 'representative bod[y].'" (alteration in original) (quoting Briffault, Who Rules at Home?, supra note 34, at 339, 346–48)). But see House v. Bd. of Comm'rs of Montgomery Cty., 60 Ind. 580, 584 (1878) (permitting suit against county); Wilson v. Jefferson County, 13 Iowa 181, 184–85 (1862) (same); Rigony v. Schuylkill County, 103 Pa. 382, 386–87 (1883) (same).

82. 18 Eugene McQuillin, The Law of Municipal Corporations § 53:6 (3d ed. rev. vol. 2013).

83. Id. (citing Maryland ex rel. Pryor v. Miller, 194 F. 775 (4th Cir. 1911)).

In *Madden v. Lancaster County*, for example, the Eighth Circuit cited concerns about state sovereignty as a basis for its conclusion that a county was not amenable to common law suit[84]:

> All the powers with which they are intrusted [sic] are the powers of the state, and the duties imposed upon them are the duties of the state; and inasmuch as the sovereign power is not amenable to individuals for neglect in the discharge of public duty, and cannot be sued for such neglect without express permission from the state itself, so these [counties] . . . are not liable for such negligence . . . .[85]

By contrast, cities did not have the same quasi-sovereign status. "[C]ities and municipal bodies, that voluntarily accept charters from the state to govern themselves, and to manage their own local affairs, are municipal corporations proper, and are liable for negligence . . . ."[86] Courts in states such as Texas offered similar state sovereignty based rationales for the distinction between suits against counties and suits against cities.[87]

Courts that permitted suits against local governments in their "corporate" capacity, but not their "governmental" capacity also cited rationales rooted in notions of state sovereignty. A New York high court opinion explained, for example, that, in contrast to a local government's "corporate" acts, governments also engage in activities that "arise[], or [are] implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign . . . . The former is not held by the municipality as one of the political divisions of the State; the latter is."[88] A roughly contemporaneous federal district court concurred:

> Public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised either by the state or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population.[89]

A Kansas case put it more succinctly:

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84. 65 F. 188, 190–92 (8th Cir. 1894).

85. Id. at 191.

86. Id. The court did rely in part on the British tradition for this proposition, noting that such was "[t]he general rule of law in this country and in England." Id. Still, state sovereignty served as the principal rational in this line of cases.

87. See Heigel v. Wichita County, 19 S.W. 562, 562–63 (Tex. 1892) ("Counties are . . . commonly called '*quasi* corporations.' They are created by the state for the purposes of government . . . . Cities . . . are deemed voluntary corporations, and . . . their charters are granted not so much with a view to the interests of the public as for the private advantage of their citizens.").

88. Maxmilian v. Mayor of New York, 62 N.Y. 160, 164 (1875).

89. Hart v. Bridgeport, 11 F. Cas. 681, 682 (C.C.D. Conn. 1876). That court went on to supply common examples of a city's governmental duties, including "the duty of preserving the peace, and the protection of property from wrong-doers, the construction of highways, the protection of health and the prevention of nuisances." Id.

> The broad reason upon which exemption from liability exists is that the township or county, as the case may be, in building roads, is acting in the capacity of an agent of the state—the sovereignty—and is no more liable than the state itself would be should it employ some other agency in doing the work.[90]

Yet, by the middle of the twentieth century, state jurists began to question and reject municipal immunity for common law torts. These repudiations illustrate that courts viewed the question of municipal immunity as unavoidably linked with the question of sovereign immunity generally. In *Hargrove v. Town of Cocoa Beach*, decided in 1957, the Florida Supreme Court refused to render a city immune for injuries arising from a jail fire.[91] That maintaining a jail constituted a "governmental function" was no barrier to liability.[92] "Immunization in the exercise of governmental functions has been traditionally put on the theory that 'the king can do no wrong but his ministers may.'"[93] Citing the Declaration of Independence and the centrality of representative democracy in the United States, the court continued, "[T]he time has arrived to declare this doctrine anachronistic not only to our system of justice but to our traditional concepts of democratic government."[94] Municipal and sovereign immunities, the court suggested, were simultaneously unified and unsound.

Although much of the reasoning in *Hargrove* echoed sentiments expressed in earlier dissenting opinions,[95] as a majority opinion, *Hargrove* is credited with inducing "'a minor avalanche of decisions repudiating municipal immunity.'"[96] Two years after it was decided, the Illinois Supreme Court denied immunity to a city for its involvement in a school bus accident.[97] Then, in 1961, the California Supreme Court declined to

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90. Fisher v. Delaware Township, 125 P. 94, 96 (Kan. 1912); cf. Gunther v. Bd. of Rd. Comm'rs of Cheboygan Cty., 196 N.W. 386, 387 (Mich. 1923) (collecting cases adopting government–corporate distinction).

91. 96 So. 2d 130, 134 (Fla. 1957), superseded by statute, Fla. Stat. § 768.28 (2012), as recognized in Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981).

92. Id. at 132.

93. Id.

94. Id.

95. Justice James Wolfe's dissent in *Bingham v. Board of Education* criticized the majority's rejection of a suit against a city, reasoning that the "state . . . should not shield itself behind the immoral and indefensible doctrine that 'the king [sovereign] can do no wrong.'" 223 P.2d 432, 438–39 (Utah 1950) (Wolfe, J., dissenting) (alteration in original); see also Boorse v. Springfield Twp., 103 A.2d 708, 715 (Pa. 1954) (Musmanno, J., dissenting) ("In a government founded on the proposition that all men are created equal, it would be an anomaly that one can obtain redress from every one but the entity supposed and intended to be answerable to all its citizens.").

96. Owen v. City of Independence, 445 U.S. 622, 646 n.28 (1980) (quoting William L. Prosser, Law of Torts § 131, at 985 (4th ed. 1971)); see also Michael Tardif & Rob McKenna, Washington State's 45-Year Experiment in Governmental Liability, 29 Seattle U. L. Rev. 1, 8 (2005) (documenting this small trend).

97. Molitor v. Kaneland Cmty. Unit Dist. No. 302, 163 N.E.2d 89, 95–96 (Ill. 1959).

grant immunity to a city for an injury occurring at a public hospital.[98] By 1971, fifteen courts had done away with municipal immunity under most circumstances.[99] Because of decisions like those, along with state legislation rendering cities liable for suit under some circumstances,[100] a majority of jurisdictions significantly curtailed municipal immunity by the early 1980s.[101]

Around the same time, federal courts began to wrestle with whether or how these common law traditions applied to suits under § 1983.[102] In *Owen v. City of Independence*, the Court addressed whether cities were entitled to common law municipal immunities in § 1983 cases.[103] The Court declined to recognize any such immunity. The Court acknowledged that these common law municipal immunities were grounded in the principle of state sovereignty. But § 1983 abrogated this immunity: "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress . . . abolished whatever vestige of the State's sovereign immunity the

98. Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 463 (Cal. 1961).

99. See Jones v. Kearns, 462 S.E.2d 245, 251 (N.C. Ct. App. 1995) ("When *Steelman* was decided [in 1971], fifteen jurisdictions, in addition to Florida, had already overruled or greatly modified the doctrine of sovereign immunity in tort actions.").

100. See Smith, Awakening, supra note 13, at 1985 n.306 (citing Georgia, Mississippi, and Texas tort claims acts).

101. See Catone v. Medberry, 555 A.2d 328, 330 (R.I. 1989) ("[T]he overwhelming majority of jurisdictions have either limited or repudiated the doctrine of sovereign immunity by court decision or legislative fiat."). See generally Restatement (Second) of Torts §§ 895B, 895C app. (Am. Law Inst. 1982) (compiling each state's position on state and local immunity); Philip A. Harley & Bruce E. Wasinger, Governmental Immunity: Despotic Mantle or Creature of Necessity, 16 Washburn L.J. 12, 33–53 (1976) (categorizing and describing positions of states on state sovereign immunity and local government immunity). Today, judicially constructed immunities have given way to narrowly tailored legislation that among other things (1) limits the amount that municipalities are required to pay and (2) renders certain of types of torts ineligible for damages from municipalities. See Lawrence Rosenthal, A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings, 9 U. Pa. J. Const. L. 797, 806–10 (2007) (describing various legislative regimes).

102. See, e.g., Paxman v. Campbell, 612 F.2d 848, 856 (4th Cir. 1980) (finding municipality entitled to "good faith immunity defense"); Owen v. City of Independence, 589 F.2d 335, 337–38 (8th Cir. 1978) ("We imply from the Court's discussion of immunity [in *Monell*] that local governing bodies may assert a limited immunity defense to actions brought against them under section 1983."), rev'd, 445 U.S. 622 (1980); Ohland v. City of Montpelier, 467 F. Supp. 324, 340 (D. Vt. 1979) (finding municipality entitled to "good faith immunity" defense); Gross v. Pomerleau, 465 F. Supp. 1167, 1175–76 (D. Md. 1979) (same). But see Bertot v. Sch. Dist. No. 1, 613 F.2d 245, 250–51 (10th Cir. 1979) (en banc) (rejecting good-faith defense for school district in teacher's equitable claim for backpay).

103. 445 U.S. 622 (1980); see also David Jacks Achtenberg, Symposium on Enforcing Constitutional Rights in the Twenty-First Century—Section 1983 Thirty Years After *Owen*, 78 UMKC L. Rev. 869, 869 (2010) ("In a sense, *Owen* was the high water mark for those who hoped that § 1983 would provide a comprehensive civil remedy for constitutional wrongs.").

municipality possessed."[104] This reasoning had strong precedential support. In *Fitzpatrick v. Bitzer*, the Supreme Court unanimously concluded that Congress may abrogate sovereign immunity when exercising its powers under Section 5 of the Fourteenth Amendment.[105] And this principle remains one of the few undisputed tenets of state sovereign immunity doctrine.[106]

Yet, despite *Owen*'s rejection of municipal immunity, cities are nonetheless generally protected from federal constitutional suits due to subsequent cases interpreting and applying *Monell v. Department of Social Services*.[107] Local sovereign immunity found its way into § 1983 doctrine, albeit by a different name.[108]

B. *Constitutional Liability: The "Policy and Custom" Requirement*

In *Monell*, a class of female employees of New York City challenged a city policy that compelled them to begin unpaid leaves when they became pregnant, well before medically necessary.[109] The plaintiffs sued the city, charging that this policy constituted an unconstitutional deprivation of property without due process. Because suing the department was the functional equivalent of suing the city itself, the case was placed on a collision course with a case decided in the early 1960s, *Monroe v. Pape*.[110] That opinion held that cities could not be held liable under

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104. *Owen*, 445 U.S. at 647–48.

105. 427 U.S. 445, 456 (1976); cf. Lia Epperson, Legislating Inclusion, 6 Harv. L. & Pol'y Rev. 91, 98 (2012) ("On its face, [Section 5 doctrine] suggests Congress may have expansive authority to enact remedial legislation to reduce racial isolation in schools. The Court, however, tempered such language by requiring 'congruence and proportionality' between the prevention or remedying of an injury and the means adopted." (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997))); Rebecca E. Zietlow, The Judicial Restraint of the Warren Court (and Why it Matters), 69 Ohio St. L.J. 255, 291–92 (2008) (identifying Rehnquist Court's invocation of sovereign immunity to limit ability of civil rights plaintiffs to sue in contrast to Warren Court's restraint).

106. See Fallon, "Conservative" Paths, supra note 13, at 454–55 (noting in federalism cases such as *Morrison*, Court reiterated Congress may abrogate sovereign immunity pursuant to Fourteenth Amendment power).

107. See 436 U.S. 658, 691 (1978) ("[T]he language of § 1983 . . . compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.").

108. Some scholars have observed that, relying on principles of federalism and self-governance, the federal courts have also bestowed immunity on state and local governments in the area of antitrust through its "state action" exception. See, e.g., David McGowan & Mark A. Lemley, Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment, 17 Harv. J.L. & Pub. Pol'y 293, 298–99 (1994) (arguing explanation for state action exception must derive from federalism and attendant respect for states). While this Article's focus is federal constitutional rights, the parallels in the antitrust context are worthy of mention.

109. 436 U.S. at 660–62.

110. 365 U.S. 167 (1961).

§ 1983 because cities were not "persons" within the meaning of that statute.[111]

The Court overturned *Monroe*, concluding that municipalities were amenable to suit under § 1983. The Court relied, in part, on the Dictionary Act, passed just months before the Ku Klux Klan Act of 1871 that became § 1983.[112] There, Congress proclaimed that "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense."[113] The Court also relied on a review of § 1983's legislative history, which included views about the importance of interpreting the statute broadly.[114]

Accordingly, the *Monell* Court held that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[115] This holding did not specify when a city could be held liable in the absence of an officially promulgated, unconstitutional policy.

Importantly, however, *Monell* contemporaneously rejected the imposition of respondeat superior liability on cities. The Court concluded "that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."[116]

The Court reasoned in part that the Congress that enacted § 1983 doubted its constitutional ability to impose affirmative obligations on cities, an imposition that necessarily accompanies respondeat superior liability. The "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional."[117] Indeed,

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111. Id. at 191.

112. The Dictionary Act was passed February 25, 1871, Dictionary Act of 1871, ch. 71, 16 Stat. 431, and the Ku Klux Klan Act of 1871 passed the House on April 20, Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13.

113. The Dictionary Act was passed February 25, 1871. Dictionary Act of 1871, ch. 71, 16 Stat. 431. The Ku Klux Klan Act of 1871 passed the House on April 20, 1871. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13.

114. See *Monell*, 436 U.S. at 684 (quoting Representative Shellabarger saying § 1983 "is remedial, and in aid of the preservation of human liberty and human rights" and "[a]ll statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed" (quoting Cong. Globe, 42d Cong., 1st Sess. 68 app. (1871) [hereinafter Globe App.])).

115. Id. at 690.

116. Id. at 691.

117. Id. at 693.

Congress rejected the Sherman Amendment, which would have imposed liability on local governments for damage caused by private mobs.[118]

At bottom, then, alongside the textual arguments for the Court's rejection of respondeat superior liability was an "[e]qually important" concern that the Congress that enacted § 1983 would have believed that respondeat superior liability unconstitutionally obstructed state sovereignty.[119] The Court explained that when Congress rejected the Sherman Amendment, for example, a number of representatives cited the nineteenth century case *Collector v. Day*.[120] *Day* prohibited the taxation of state officers' income. In the words of the *Monell* majority, "*Collector* v. *Day* . . . was the clearest and, at the time of the debates, the most recent pronouncement of a doctrine of coordinate sovereignty."[121] Another case that reaffirmed this view was *Prigg v. Pennsylvania*, an 1842 case that upheld federal legislation that gave slave "owners" the ability to cross state lines to apprehend escaped former slaves.[122] While the thrust of the opinion is quite nationalist (because it upheld the federal Fugitive Slave Act) the case relied on notions of state sovereignty when it stopped short of requiring state officers to find the former slaves.[123]

One difficulty with this reasoning is that the nineteenth-century notions of state sovereignty reflected in *Day* and *Prigg* are rather dated. State employees may be taxed.[124] And Congress could presumably enact legislation pursuant to its powers under the Thirteenth Amendment prohibiting individuals from entering a state with the purposes of apprehending fellow human beings they purported to "own."[125]

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118. Id. at 694.

119. Id. at 693.

120. Monell, 436 U.S. at 675 ("'[O]nly the other day, the Supreme Court . . . decided [in Collector v. Day]. . . that there is no power in the Government of the United States . . . to tax the salary of a State officer . . . . Simply because the power to tax involves the power to destroy . . . .'" (quoting Cong. Globe, 42d Cong., 1st Sess. 795 (1871)); see also Collector v. Day, 78 U.S. 113, 128 (1870) ("[T]he reserved rights of the States . . . are not proper subjects of the taxing power of Congress." (internal quotation marks omitted) (quoting Veazie v. Fenno, 57 U.S. 533, 547 (1869)).

121. *Monell*, 436 U.S. at 676.

122. See 41 U.S. 539, 625–26 (1842) (striking Pennsylvania law for violation of constitutional protection, but stating "we are by no means to be understood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty").

123. *Monell*, 436 U.S. at 672 (describing role of *Prigg*).

124. Helvering v. Gerhardt, 304 U.S. 405, 419–20 (1938) (upholding federal income tax on state employees).

125. In passing the Trafficking Victims Protection Act of 2000, for example, Congress relied on the Thirteenth Amendment to pass a bill aimed at punishing human trafficking. Pub. L. No. 106-386, div. A, § 1, 114 Stat. 1466, 1466–67 (codified as amended at 22 U.S.C. §§ 7101–7112 (2012)); see also Rebecca E. Zietlow, James Ashley's Thirteenth Amendment, 112 Colum. L. Rev. 1697, 1712 (2012) (noting reliance on Thirteenth Amendment to prevent "exploitation of women in the sex trafficking industry").

A second difficulty is that the Court does not offer a full account of why cases about state sovereignty have any particular bearing on what the scope of municipal liability should look like. The subtext of *Monell* is that because the federal government could not tax *state* officials, and because the federal government could not force *states* to apprehend fugitive slaves, § 1983 could not impose respondeat superior liability on *local* governments. A fully satisfactory account of municipal liability, at least one that purports to be informed by notions of state sovereignty, would explore the relationship between state sovereignty and locales.

Two more recent refinements on the doctrine governing local constitutional accountability—both described in the subsections below—have rendered constitutional accountability against municipalities as entities particularly illusive. First, the Court has made clear that negligence is insufficient to hold a local government accountable for a federal constitutional violation. That is, liability against municipalities does not exist even if a high-level official or governing body fails to act with the degree of care that a reasonable person would have under the same or similar circumstances. Instead, officials must exhibit deliberate indifference before liability attaches. Second, the Court has carefully circumscribed what higher-ups count when determining whether a local government is responsible for a constitutional violation. Serving in a supervisory role, even a high-level supervisory role, is not sufficient. Instead, a plaintiff must demonstrate that the person who exhibited deliberate indifference, or who violated the Constitution, was a person with final policymaking authority. This is the case even though the word policy appears nowhere in the text of § 1983.

1. *Deliberate Indifference.* — The *Monell* Court's indeterminate language left open the possibility, for example, that a city could be held liable any time a city employee implemented a constitutional policy in an unconstitutional manner. Such a rule might, as a functional matter, result in almost as many instances of municipal liability as respondeat superior liability. Any time city employees act within the scope of their city-vested authority, it could reasonably be said that they are implementing a city's policy.[126] At another extreme, the Court left open the possibility that a city could only be held liable when its policy was itself unconstitutional. And there is a range of other possibilities between those two poles. For example, would negligence or recklessness suffice?[127] Cases over the next

126. Cf. Kramer & Sykes, supra note 35, at 249 ("Corporations are a legal fiction representing a network of legal, usually contractual, arrangements. 'Corporations' thus do not act, do not make contracts, sell property, or commit torts; their agents do.").

127. Indeed, ten years after *Monell* was decided, Justice Brennan noted that the Court had yet to decide whether a city could only be held liable if it boasted an unconstitutional policy, or whether something shy of that could trigger municipal liability. See City of St. Louis v. Praprotnik, 485 U.S. 112, 147 (1988) (Brennan, J., concurring) ("[T]he Court today need not and therefore does not decide that a city can only be held liable under § 1983 where the plaintiff prove[s] the existence of an unconstitutional municipal

several decades answered these questions,[128] and sometimes relied on notions of state sovereignty while narrowing the scope of municipal liability.

One such case was *City of Canton v. Harris*.[129] The Sixth Circuit Court of Appeals held that "a municipality is liable for failure to train its police force, [where] the plaintiff . . . prove[s] that the municipality acted recklessly, intentionally, or with gross negligence."[130] The Supreme Court vacated the judgment of the Court of Appeals. It concluded that the negligence-based standard adopted by the lower court would result in "unprecedented liability under § 1983" because there would undoubtedly be many cases when a city could have done more to prevent a city employee's lawless, unconstitutional act.[131] A negligence standard, the Court found, represented "de facto respondeat superior liability on municipalities—a result . . . rejected in *Monell*."[132] The Court instead embraced a deliberate indifference standard. That is, short of an unconstitutional policy, a city's conduct or omission "can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants."[133]

As support, the *Harris* Court cited legislative history and policy considerations that sound in sovereignty. Most notably—referencing *Monell*—Justice Sandra Day O'Connor's concurring opinion cited the 42nd Congress's rejection of the Sherman Amendment, the provision that would have made cities liable for the riotous conduct of mobs such as the Ku Klux Klan.[134] The Court also cited federalism, concluding that the "endless exercise of second-guessing municipal employee-training programs" would challenge the judicial system's institutional competence and "implicate serious questions of federalism."[135]

The Court reaffirmed and more carefully defined the deliberate indifference standard in the 1997 case of *Board of County Commissioners of*

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policy . . . . That question is certainly not presented by this case, and nothing we say today forecloses its future consideration." (internal quotation marks omitted) (quoting majority opinion).).

128. See Susanah M. Mead, 42 U.S.C. § 1983 Municipal Liability: The *Monell* Sketch Becomes a Distorted Picture, 65 N.C. L. Rev. 517, 535–37 (1987) (examining rationales for and against attaching respondeat superior liability to states).

129. 489 U.S. 378 (1989).

130. Harris v. Cmich, No. 85-3314, 1986 WL 17268, at *3 (6th Cir. July 2, 1986), vacated sub nom. City of Canton v. Harris, 489 U.S. 378.

131. *Harris*, 489 U.S. at 391–92.

132. Id. at 392.

133. Id.

134. Id. at 394 (O'Connor, J., concurring in part and dissenting in part) ("The [*Monell*] Court found that the language of § 1983, and rejection of the 'Sherman Amendment' by the 42d Congress, were both strong indicators that the framers . . . did not intend that municipal governments be held vicariously liable for the constitutional torts of their employees.").

135. Id. at 392 (majority opinion).

Bryan County v. Brown (*Bryan County*).[136] That case involved a routine traffic stop gone awry. During the stop, a deputy dragged a woman out of her car and slammed her to the ground with enough force to cause severe knee injuries.[137] The deputy, it turns out, had a history of run-ins with the law prior to being hired, including convictions both for assault and battery, and resisting arrest.[138] Nonetheless, the Sheriff of Bryan County, the deputy's great-uncle, had hired him.

The victim of the deputy's excessive force sued Bryan County. She alleged that the Sheriff—an undisputed policymaker for the county[139]—engaged in a deliberately indifferent hiring decision that caused her constitutional injury.[140] And while a jury and a Fifth Circuit panel agreed with her, the Supreme Court did not.

Five Justices concluded that in order to constitute deliberate indifference, a one-time hiring decision or omission must have an especially close causal and predictive link with the constitutional injury.[141] That link, the Court concluded, did not exist in that case. The Court found that "unless [Sheriff Moore] would necessarily" have concluded that the deputy was "an extremely poor candidate . . . *because* [the deputy's] use of excessive force would have been a plainly obvious consequence of the hiring decision, Sheriff Moore's inadequate scrutiny of Burns' record cannot constitute 'deliberate indifference.'"[142] *Bryan County*, then, simultaneously affirmed the deliberate indifference standard to contexts beyond "failure to train," and made the standard more difficult for plaintiffs to establish.

As in *Canton*, the Court in *Bryan County* relied in part on concerns of federalism and representative government: "A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose."[143] Dissenters in *Bryan County* acknowledged these policy concerns, but countered with their own concerns. Most notably, Justices Ruth Bader Ginsburg, Stephen Breyer, and Stevens expressed their view that the rejection of vicarious liability had resulted in complex distinctions that "may not deserve . . .

136. 520 U.S. 397 (1997).

137. Id. at 400–01.

138. Id. at 428.

139. Id. at 408 ("Before trial, counsel for Bryan County stipulated that Sheriff Moore 'was the policy maker for Bryan County regarding the Sheriff's Department.'").

140. Id. at 401.

141. See id. at 412 ("[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff.").

142. Id. at 414.

143. Id at 415.

longevity."[144] They continued, "[T]he case for reexamination [of vicarious liability] is a strong one."[145]

The Court has recently reaffirmed the rejection of vicarious liability. The most recent escalation of the deliberate indifference standard came in *Connick v. Thompson*,[146] discussed in the Introduction,[147] where the Court again cited principles of federalism, autonomy, and representative government to explain its choices. The case contains tragic facts. At the same time the Orleans Parish District Attorney's Office tried John Thompson for armed robbery, prosecutors violated the Fourteenth Amendment by failing to turn over evidence that would have exonerated him.[148] Thompson was convicted.[149] And because of his conviction, he elected not to testify when the government charged him with murder shortly thereafter.[150] He spent eighteen years in prison, fourteen of which were spent on death row.[151] Weeks before the state planned to kill Thompson, his investigator detected the grave error.[152]

When the prosecutors' actions came to light, the state courts of Louisiana reversed Thompson's murder conviction, finding that his trial was unduly tainted by the state's failure to turn over exculpatory evidence.[153] The state again tried Thompson for the murder. He testified at that trial and a jury exonerated him.[154] After the jury's verdict of "not guilty," Thompson was technically free. Still, he had spent almost half of his life in a prison for a crime he did not commit. And for fourteen of those years, he lived in anticipation of his pending state-sanctioned death.[155]

Thompson sought compensation for his years of confinement and, as is often the case for plaintiffs seeking redress for constitutional injuries, a number of barriers immediately presented themselves. Most importantly, no matter how egregious the prosecutor's conduct, Thompson could not rely on § 1983 to sue because the prosecutor was

144. Id. at 435 (Breyer, J., dissenting).

145. Id. at 437 (Breyer, J., dissenting).

146. 131 S. Ct. 1350 (2011); see also Bandes, supra note 42, at 719 ("[The *Thomas* majority] held that no amount of independent proof of deliberate indifference to the need to train prosecutors about their *Brady* violations can suffice [to establish municipal liability].").

147. Supra notes 24–32 and accompanying text.

148. *Connick*, 131 S. Ct. at 1357; see also Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

149. *Connick*, 131 S. Ct. at 1355.

150. Id.

151. Id.

152. Id.

153. Id.

154. Id. at 1357.

155. Id. at 1370 (Ginsburg, J., dissenting).

entitled to absolute prosecutorial immunity. To be sure, the text of § 1983 says nothing about prosecutorial immunity, or any types of legal immunity actually. Yet, the Supreme Court has interpreted this silence to confirm the common law principle that prosecutors are immune from suit for conduct related to criminal prosecutions.[156] Nor could Thompson sue the State of Louisiana, for states are entitled to sovereign immunity due to presuppositions affirmed in the Constitution's structure.[157]

The unavailability of a suit against the prosecutors or the state meant that Thompson's best chance at legal success was a suit against the District Attorney's office itself, a local government entity. Municipalities, we are told, are not immune from suit.

Yet, as noted, plaintiffs seeking to sue a municipality must either prove that a policymaker authorized the unconstitutional misconduct, or exhibited deliberate indifference to known or probable violations. There was no apparent evidence that the District Attorney, or any other policymaker, *directed* the prosecutors in Thompson's case to withhold the evidence that would have demonstrated his innocence. There was evidence, however, that on at least four separate occasions in the decade leading up to Thompson's prosecution, the state courts of Louisiana had ruled that prosecutors in New Orleans had unconstitutionally failed to turn over exculpatory evidence.[158]

Thompson argued that the New Orleans District Attorneys should have known to train prosecutors about their duty to turn over exculpatory evidence in light of the "obvious" high risk of such violations in criminal prosecutions.[159] Failure to train prosecutors, Thompson alleged in his complaint, reflected deliberate indifference to the constitutional rights of himself and others.[160] A federal jury in New Orleans agreed, finding the office liable for Thompson's eighteen-year ordeal, awarding Thompson fourteen million dollars.[161]

A Fifth Circuit panel affirmed, concluding that "there was evidence that [the District Attorney] was aware that the attorneys in the [District Attorney's] Office would be required to confront *Brady* issues on a regular basis and that failure to properly handle those issues would result in constitutional violations for criminal defendants."[162] The Fifth Circuit

156. See Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (concluding prosecutor entitled to "same absolute immunity under § 1983 that the prosecutor enjoys at common law").

157. Alden v. Maine, 527 U.S. 706, 748–49 (1999).

158. *Connick*, 131 S. Ct. at 1360 ("[D]uring the ten years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office.").

159. Id. at 1361.

160. Complaint at 24, Thompson v. Connick, No. 03-2045, 2007 WL 1200826 (E.D. La. Apr. 23, 2007), 2003 WL 23859567.

161. *Connick*, 2007 WL 1200826, at *1.

162. Thompson v. Connick, 553 F.3d 836, 853 (5th Cir. 2008), vacated en banc, 578 F.3d 293 (5th Cir. 2009), rev'd, 131 S. Ct. 1350.

vacated the panel's decision and heard the matter en banc. The active judges on the circuit were evenly divided, and the jury's verdict stood.[163]

In an opinion by Justice Clarence Thomas, the Supreme Court reversed the jury's verdict, concluding 5–4 that Thompson had failed to prove deliberate indifference. First, the Court determined that Thompson could not rely on the four previous occasions courts had overturned New Orleans convictions based on *Brady* violations in the decade before his conviction. None of those cases involved blood evidence or related scientific evidence, and therefore, those cases could not have placed the District Attorney on notice of the need to train prosecutors to turn over lab reports showing that the assailant's blood type did not match the defendant's.[164]

Second, the Court rejected the view that it is plainly obvious that District Attorneys should train prosecutors of the need to turn over exculpatory evidence. This is the type of legal principle that prosecutors would learn in other settings. "Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both," Justice Thomas explained.[165] He added, "Most jurisdictions require attorneys to satisfy continuing-education requirements."[166]

The Court made clear that "deliberate indifference" was a standard significantly higher than negligence. "[W]e must adhere to a 'stringent standard of fault,' lest municipal liability under § 1983 collapse into *respondeat superior*."[167] Abandoning or diluting the deliberate indifference standard "would 'engage the federal courts in an endless exercise of second-guessing municipal employee-training programs,' thereby diminishing the autonomy of state and local governments."[168] Local autonomy overrode the constitutional guarantees Thompson sought to vindicate.

2. *Policymakers.* — The above cases answered the following question: When may a city be held liable for the actions committed by employees who are not final policymakers, like police officers and prosecutors? A related question, however, is how one should define "final policymaker." To be sure, one could certainly make a plausible case for a definition of policymaker that includes officers and prosecutors. Both exercise a tremendous amount of discretion when deciding what constitutes a legal violation, what classes of violations are worth pursuing, and to what

163. Thompson v. Connick, 578 F.3d 293, 293 (5th Cir. 2009) (en banc), rev'd 131 S. Ct. 1350.

164. *Connick*, 131 S. Ct. at 1360 ("Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.").

165. Id. at 1361.

166. Id. at 1362.

167. Id. at 1365 (quoting Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 410 (1997)).

168. Id. at 1367 (quoting City of Canton v. Harris, 489 U.S. 378, 391 (1989)).

end.[169] Still, the Court has adopted a much narrower definition, limiting the term to those who state law vests with *final* authority to issue rules of general applicability. And concerns about federalism and autonomy influenced the Court's reasoning on that front as well.

Most notably, the Court curtailed the scope of municipal liability in *City of St. Louis v. Praprotnik* by narrowly defining what it means for someone to be a final policy maker.[170] A mid-level employee of the city's Community Development Agency—James Praprotnik—argued that the City of St. Louis violated his First Amendment rights by firing him in retaliation for his successful appeal of an earlier personnel decision.[171] The director of the Community Development Agency initiated the termination.[172]

The Court held that even if Praprotnik's termination violated the First Amendment, he could not receive relief from the city. To be sure, the person who fired him was the director of an agency and was authorized by law to hire and fire employees within that agency.[173] However, the director was not the final *policymaker* regarding personnel decisions for the City of St. Louis. That distinction belonged to the city's Civil Service Commission, which promulgated personnel matters.[174] There was no evidence that the Commission itself initiated or ratified Praprotnik's dismissal, let alone shared the director's purportedly unconstitutional retaliatory motive.[175]

Thus, a plaintiff suing a city must do more than show that a final *decisionmaker* caused a constitutional violation. The proper inquiry is whether the person (or persons) who caused or directed the constitutional violation had the final authority to annunciate governing rules of general applicability.

Federalism animates this inquiry as well, albeit subtly. The *Praprotnik* Court made clear that whether a person is a "policymaker" is a question of state and local law, rather than federal common law. In announcing this approach, the controlling plurality expressed its view "that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of local government's business."[176] Thus while federalism and autonomy played a less explicit

169. See Epp, supra note 40, at 33 ("[T]he police represent an extreme case of vesting powerful authority in a deeply decentralized system.").

170. 485 U.S. 112 (1988).

171. Id. at 115–17.

172. Id. at 115–16.

173. Id. at 129.

174. Id. at 117–18.

175. See id. at 130 ("Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy.").

176. Id. at 124–25.

role in *Praprotnik* than in some of the earlier cases discussed, they nonetheless guided the Court.

The Court's decision to look to state law to identify policymakers is notable for another reason: The Court defines "state law" in a manner that explicitly includes *local* ordinances and regulation.[177] This inclusion reflects two assumptions. The first is a common assumption, one that is central to § 1983 cases and Fourteenth Amendment doctrine. That is, employees of the local governments are state actors, operating under the color of state law. This is an important assumption because only state actors may violate the Fourteenth Amendment. And only individuals acting under the color of state law fall within the ambit of § 1983's cause of action.[178] The second assumption is more surprising. Not only does state law play a role in defining local action; local action plays a role in defining the law of sovereign states.

C. *Individual Immunities as Sovereign Immunity*

A discussion of sovereign immunity for local actors that omits discussion of immunities for individual local actors would be incomplete. Like federal[179] and state employees[180]—but unlike private employees such as private prison guards[181]—individual employees of local government are entitled to limited immunity from damages.[182] These immunities include absolute immunity for acts performed by prosecutors in an adversarial role,[183] absolute immunity for judicial (rather than administrative) acts,[184] absolute immunity for acts performed in one's legislative capacity,[185] and qualified immunity for other acts so long as an official does not violate clearly established law that a reasonable person would

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177. Id.

178. 42 U.S.C. § 1983 (2012).

179. See, e.g., Wood v. Moss, 134 S. Ct. 2056, 2061 (2014) (holding Secret Service agents entitled to qualified immunity); Butz v. Economou, 438 U.S. 478, 507 (1978) (holding federal executive officials entitled to qualified immunity).

180. See infra notes 187–192 and accompanying text (discussing Scheuer v. Rhodes, 416 U.S. 232 (1974)).

181. See infra notes 193–197 and accompanying text (discussing Richardson v. McKnight, 521 U.S. 399 (1997)).

182. See, e.g., Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (holding local school officials were entitled to qualified immunity for strip searching a middle-school-aged girl thought to have unauthorized ibuprofen on campus).

183. See supra note 156 and accompanying text (discussing prosecutorial immunity under common law and § 1983).

184. See Stump v. Sparkman, 435 U.S. 349, 356 (1978) (holding judge entitled to absolute immunity for authorizing sterilization of high school student without her knowledge or consent); infra note 198 and accompanying text (discussing Pierson v. Ray, 386 U.S. 547 (1967)).

185. See infra notes 202–206 and accompanying text (discussing Bogan v. Scott-Harris, 523 U.S. 44 (1998)).

have known at the time of the violation.[186] These individual immunities, like the municipal causation requirement, have been fundamentally shaped by sovereignty and related principles such as federalism, autonomy, and representative government.

The case of *Scheuer v. Rhodes* makes the connection between individual immunities and principles of sovereign immunity quite plain.[187] At issue in that case was whether the Governor of Ohio and other state officials were entitled to absolute immunity or some form of qualified immunity for allegations that they were responsible for deadly and potentially unconstitutional uses of force against antiwar protestors at Kent State University.[188] The Court rejected the argument that governors were entitled to absolute immunity, but concluded that state officials are entitled to, as it was then called, "good faith" immunity.[189]

What is important for the purposes of this Article is that in reaching this conclusion, state sovereignty and autonomous decisionmaking both played a central role in the Court's reasoning. "The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity," the Court observed.[190] As the doctrine evolved, the Court noted, among the key rationales for common law individual immunities is averting "the danger that the threat of such liability would deter [an officer's] willingness to execute his office with the decisiveness and the judgment required by the public good."[191] Legislative immunity, for example, "was intended to secure for the Legislative Branch of the Government the freedom from executive and judicial encroachment."[192]

The link between sovereignty and individual immunities is made equally apparent in *Richardson v. McKnight*.[193] The Court held in a 5–4 opinion that employees of a private for-profit prison are not entitled to qualified immunity.[194] Notably, both the majority and the dissent appealed to traditions of state sovereignty. The majority noted that at common law, immunity from suit applied only to those (including private

186. *Safford Unified Sch. Dist.*, 557 U.S. at 377.

187. 416 U.S. 232, 239–42 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982).

188. Id. at 234.

189. Id. at 246–48.

190. Id. at 239.

191. Id. at 240.

192. Id. at 240–44. While the Court later moved from the subjective good faith standard suggested in *Scheuer v. Rhodes* to a more objective reasonableness standard for qualified immunity, this autonomy rationale remained. See *Harlow*, 457 U.S. at 806 ("[P]ublic officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.").

193. 521 U.S. 399, 407 (1997).

194. Id. at 412.

actors) who "performed services at the behest of the sovereign"—not to "private individuals working for profit."[195] The dissent countered:

> The duty of punishing criminals is inherent in the Sovereign power. It may be committed to agencies selected for that purpose, but such agencies, while engaged in that duty, stand so far in the place of the State and exercise its political authority, and do not act in any private capacity.[196]

What should matter is that private prison guards are performing a "governmental function," the dissent contended.[197]

While the above cases illustrate that individual immunities have roots in *sovereign* immunity, the Court has extended these immunities to *local* actors. In *Pierson v. Ray*, the Court held that local judges are entitled to absolute immunity and local police are entitled to qualified immunity.[198] In the 1975 case of *Wood v. Strickland*, the Court applied the doctrine of qualified immunity to local school board members.[199] Indeed, the only dissent called for a more protective form of qualified immunity than that advanced by the majority—one in which good faith could excuse unreasonable mistakes of law. "Most of the school board members are popularly elected," the dissent offered, "drawn from the citizenry at large, and possess no unique competency in divining the law."[200] And today the application of immunity doctrines to local actors is routine. For example, in 2009, the Supreme Court held that local school officials were entitled to qualified immunity for unlawfully strip searching a middle-school student suspected of harboring unauthorized ibuprofen.[201]

Very little on the face of the relevant case law explains the Court's choice to extend a doctrine rooted in sovereign immunity to local actors. The most substantial discussion of why local officials are entitled to absolute immunity for legislative acts came in the 1998 case of *Bogan v. Scott-Harris*,[202] a decision rendered during an era in which the Rehnquist Court's state sovereignty jurisprudence was at full steam.[203] The Court held that local legislators (and mayors under some circumstances) are entitled to absolute legislative immunity.[204] And in reaching this view, the Court relied in part on respect for representative government and local autonomy. The electoral process is the best mechanism to hold legis-

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195. Id. at 407.

196. Id. at 417 (Scalia, J., dissenting) (quoting Alamango v. Bd. of Supervisors, 32 N.Y. Sup. Ct. 551, 552 (N.Y. Gen. Term. 1881) (internal quotation marks omitted)).

197. Id. (Scalia, J., dissenting).

198. 386 U.S. 547, 553, 557 (1967).

199. 420 U.S. 308, 321–22 (1975).

200. Id. at 331 (Powell, J., concurring in part and dissenting in part).

201. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 378–79 (2009).

202. 523 U.S. 44 (1998).

203. See generally infra Part II (discussing state sovereignty jurisprudence).

204. *Bogan*, 523 U.S. at 44.

lators accountable, especially at the local level, the Court explained.[205] "Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace."[206]

* * *

Individual immunities have roots in and are informed by historical sovereignty doctrines, as well as related principles of autonomy, representative government, and federalism. And these immunities apply to local officials. Qualified and absolute immunity are central components of a de facto form of local sovereign immunity.

II. STATE "REPUBLICAN SOVEREIGNTY"

The cases in Part I illustrate the ways that autonomy, federalism, and representative government have influenced the Court's heightened causation requirement and individualized immunities from suit. What may be less obvious is the salience of these concepts to a conversation about sovereignty.

On the one hand, autonomy is deeply embedded in historical notions of sovereignty. Consider the sixteenth-century writings of Jean Bodin, who engaged in one of the earliest and most influential attempts to define the contours and content of sovereignty.[207] Among other insights, he enunciated the powers of sovereignty, including: the power to initiate and end war, appoint judges, pardon those convicted of crimes, remove high officers, and impose taxes, among others.[208] "Sovereignty is the absolute and perpetual power of the commonwealth," he contended.[209] These powers speak to an autonomous state, free to carry on core affairs without interference from those within or beyond the state's borders.

On the other hand, American states and local governments seem to defy these theorizations of sovereignty, even while confirming others. They do not possess or command their own armies or navies, but they do have police forces and judges. They do not coin money, but they do levy

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205. See id. at 53 ("[T]he ultimate check on legislative abuse—the electoral process—applies with equal force at the local level, where legislators are often more closely responsible to the electorate.").

206. Id. at 52.

207. Jean Bodin, On Sovereignty (Julian H. Franklin ed., trans., 1992) (1576); see also Donald L. Doernberg, Sovereign Immunity or the Rule of Law: The New Federalism's Choice 13 (2005) ("It would be difficult to overstate Bodin's influence on political philosophy . . . ."); Julian H. Franklin, Introduction to Bodin, supra, at xii–xiii ("[Bodin's] precise definition of supreme authority, his determination of its scope, and his analysis of the functions that it logically entailed, helped turn public law into a scientific discipline.").

208. Doernberg, supra note 207, at 20.

209. Bodin, supra note 207, at 1.

taxes. Their laws must yield to "supreme" federal law,[210] yet they have control over residual affairs the Constitution does not expressly provide to the federal government.

American federalism helps resolve this autonomy quandary, at least with respect to states. As Justice Anthony Kennedy put it in *United States Term Limits v. Thornton*, "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[211] Similarly, the Court has famously defined "Our Federalism" as "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government . . . always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[212] Federalism, then, endeavors to recharacterize sovereignty in a way that (1) renders state and federal governments supreme over different spheres and (2) protects each from undue intrusion.

This reasoning could lead one to conclude that states should receive immunity from suit. Representative government, however, adds complexity to the sovereignty puzzle. Leading thinkers have long argued that state sovereign immunity is antithetical to the axiomatic principle that the United States is a government (or system of governments) of the people, for the people, and by the people.

Justice James Wilson expressed this view in stark terms in the famous case of *Chisholm v. Georgia*, in which the State of Georgia claimed to be immune from suit:

> [T]he citizens of Georgia, when they acted upon the large scale of the Union, as a part of the 'People of the United States,' did not surrender the Supreme or sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.[213]

Under Wilson's view, in a system of representative government, people are sovereign, not states. It is of course true that the Eleventh Amendment clarified shortly thereafter that federal courts lack jurisdiction over diversity suits initiated by a citizen of one state who sues

210. U.S. Const. art. VI, cl. 2.

211. 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

212. Younger v. Harris, 401 U.S. 37, 44 (1971).

213. 2 U.S. (2 Dall.) 419, 457 (1793) (opinion of Wilson, J.) (emphasis omitted).

another state.[214] But nothing in the text of that amendment expressly declared that states are sovereign or declared that the people are not.[215]

More recently, Professor Akhil Amar added force to this view, calling sovereign immunity "wholly antithetical to the Constitution's organizing principle of popular sovereignty."[216] He argued that in the American system, sovereignty is vested in one people: the People of the United States, not "thirteen [or fifty] distinct Peoples" or governments.[217] Likewise, in his piece *Against Sovereign Immunity*, Professor Erwin Chemerinsky argued that "[s]overeign immunity is inconsistent with a central maxim of American government: no one, not even the government, is above the law."[218] Further, "[a] doctrine derived from the premise that 'the King can do no wrong' deserves no place in American law."[219]

To their point, the Supreme Court's occasional invocation of the king maxim to sustain sovereign immunity does seem arcane in a system of representative democracy. Citing Bodin, Justice Oliver Wendell Holmes once stated, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[220] If one believes that no one is above the law—not even those we entrust with the power to govern—

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214. See Hans v. Louisiana, 134 U.S. 1, 11 (1890) ("[*Chisholm*] created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States.").

215. See U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

216. Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1466 (1987) (citing U.S. Const. pmbl.).

217. Id. at 1450.

218. Chemerinsky, Against Sovereign Immunity, supra note 55, at 1202.

219. Id.; see also Donahue v. United States, 660 F.3d 523, 526–27 (1st Cir. 2011) (Torruella, J., concurring) (questioning whether sovereign immunity is consistent with "republican form of government" and noting "[m]any jurisdictions have recognized the incompatibility of sovereign immunity with democratic principles . . . [,] only a handful of States still cling to . . . [sovereign] immunity[, and] there is a trend among major democratic nations towards [its] abolition" (internal quotation marks and citations omitted) (quoting Owens v. City of Independence, 445 U.S. 622, 645 n.28 (1980))); James E. Pfander, Government Accountability in Europe: A Comparative Assessment, 35 Geo. Wash. Int'l L. Rev. 611, 616 (2003) (noting sovereign immunity was abrogated in England in 1947); cf. Bertrall L. Ross II, The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard, 81 Fordham L. Rev. 175, 237 (2012) (arguing courts in minority vote-dilution cases reach decisions in light of "judicial role in structuring representative government"). See generally Smith, Awakening, supra note 13, at 1978–90 (arguing courts should "weigh[] the principles animating the Guarantee Clause more heavily in applying sovereign immunity").

220. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

even this version of the lawmaking maxim looks a lot like overgrown weeds stifling the ability of representative democracy to flourish.

If state sovereignty, then, were principally a reaffirmation of the despotic and antirepublican claim that "the king can do no wrong," it would face grave challenges of democratic legitimacy. But it is not. Representative government is not only consistent with sovereignty as reconceived in the American system, but is a central feature of sovereignty's origins and operation. The Constitution's commitment to republicanism was often cited in Ratification Debates as evidence that the states, in fact, were sovereign.[221] And today, the Court regularly cites representative government as a justification for its sovereignty jurisprudence generally, and sovereign immunity in particular.[222] The trilogy of autonomy, federalism, and representative government, then, are important to a comprehensive understanding of how sovereignty operates in the American system.

As demonstrated below, history and doctrine both animate the symbiotic nature of these three precepts.[223] This Part traces the relationship among these three concepts, showing that the concepts have been related since the Founding. Further, these concepts have helped to profoundly structure the most recent state sovereignty revolution of the 1990s and 2000s as well. In the American system, state sovereignty is republican sovereignty.

A. *History*

A number of Founders cited representative government as a means of protecting state autonomy, power, and sovereignty.[224] In James Madison's famous essay on the ineluctability and danger of factions, he defended representative government by distinguishing what he called a "pure democracy" and a "republic."[225] "A republic, by which I mean a

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221. See infra notes 235–241 and accompanying text (discussing invocation of republicanism in Ratification Debates).

222. See infra notes 268–270 (discussing Court's invocation of republicanism in Alden v. Maine, 527 U.S. 706 (1999)).

223. Heather Gerken has pushed for a different vision, in which federalism and sovereignty were not linked. Heather K. Gerken, Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 8 (2010) ("[R]ecasting federalism as minority rule *without* sovereignty would push federalism all the way down, turning our attention to the institutions neglected by federalists and their localist counterpart.").

224. A more comprehensive account of the narrative described in section II.A can be found in Part I of Smith, Awakening, supra note 13, at 1949–61. Deborah Merritt has offered a very helpful account of the Guarantee Clause's connection with state autonomy, engaging many of the sources contained in this Part. Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism For a Third Century, 88 Colum. L. Rev. 1, 25–26 (1988).

225. The Federalist No. 10, supra note 61, at 52–53 (James Madison).

government in which the scheme of representation takes place . . . promises the cure for which we are seeking."[226] He continued:

> The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.[227]

He expounded this view in Federalist No. 37, explaining:

> The genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept . . . by a short duration of their appointments; and that even during this short period the trust should be placed not in a few, but a number of hands.[228]

Absent this type of republican liberty, Madison feared that states would collapse into tyranny and weaken other states. For example, elsewhere he voiced concerns about monarchies and other "experiments" initiated by "the ambition of enterprising leaders."[229] "[A]mbitious or vindictive enterprises" by powerful states could render "the weaker members of the Union" even weaker.[230] In this sense, representative government served to protect states' stability. Irregular or easily malleable legislation, according to Madison, was "odious to the people."[231] Representative government provided a form of government that allowed the ultimate sovereign, the people, to express their will.

Another view, expressed during the Constitutional Convention and Ratification Debates, was that representative government would not only protect against despotism, but anarchy. Edmund Randolph, for example, defended the clause in the Constitution that guarantees a republican form of government in every state.[232] Randolph explained that representative government could help prevent and eradicate commotion that

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226. Id. at 52.

227. Id.

228. The Federalist No. 37, supra note 61, at 176 (James Madison).

229. The Federalist No. 43, supra note 61, at 217 (James Madison); see also The Federalist No. 21, supra note 225, at 103 (Alexander Hamilton) ("A guaranty by the national authority would be as much leveled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community.").

230. The Federalist No. 43, supra note 61, at 217 (James Madison).

231. The Federalist No. 37, supra note 61, at 176 (James Madison).

232. An implicit assumption is that "republican form of government" includes representative government as one of its tenets. This is a debatable point. Amar has argued, for example, that the central tenet of republicanism is majoritarianism, not representative government. Akhil Reed Amar, The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and The Denominator Problem, 65 U. Colo. L. Rev. 749 (1994). I challenge these ideas in Smith, Awakening, supra note 13, at 1955 n.78 ("In reaching the conclusion that [republican government encompasses representative government], I rely on . . . the text of the constitution, dictionaries, treatises, multiple Federalist Papers, and the broader purpose behind the Clause.").

threatened to undermine a state's existence: "[T]he republican principle" would help reduce "the prospect of anarchy from the laxity of government everywhere . . . ."[233]

During the Ratification Debates, some delegates similarly invoked republicanism to rebut fears that the Constitution would "annihilate[]"[234] or cause the "dissolution"[235] of state sovereignty. During the Pennsylvania Ratification Debates, for example, Jasper Yeates argued:

> [T]o assure us of the intention of the framers of this [C]onstitution[,] to preserve the individual sovereignty and independence of the States inviolate, we find it expressly declared by the 4th section of the 4th [A]rticle, that the United States shall guarantee to every [s]tate in this [u]nion, a republican form of government.[236]

Political economist Tench Coxe echoed this link between representative government and state sovereignty, writing in defense of the new Constitution under the pen name "A Freeman."[237] Despite others' concerns that "state sovereignties . . . would indeed be finally annihilated,"[238] Coxe argued that state sovereignty could not "be dispensed with" under the new constitution.[239] "The states have, in the federal constitution, a guarantee of a *separate republican form of government*," he reasoned.[240] Republican principles stood as "*a never failing antidote* to aristocracy, oligarchy and monarchy."[241]

This American brand of sovereignty is not monarchial or tyrannical. Representative democracy is an indispensable, defining feature of American "representative sovereignty."

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233. The Anti-Federalist Papers and the Constitutional Convention Debates 36 (Ralph Ketcham ed., 2003) (statement of Gov. Edmund Randolph, May 29, 1787).

234. Tench Coxe, A Freeman I, Penn. Gazette, Jan. 23, 1788 [hereinafter Coxe, Freeman I], reprinted in 15 The Documentary History of the Ratification of the Constitution 453, 455 (John P. Kaminski et al. eds., Digital Edition 2009) [hereinafter Documentary History].

235. Merritt, supra note 224, at 32 (quoting Ratification of the Constitution by the States: Massachusetts, No. 3 1339 (Kaminski et al. eds., 2000) (statement of Del. John Brooks, Jan. 24, 1788), reprinted in 6 Documentary History, supra note 234, at 1, 1339) (internal quotation marks omitted) (noting Massachusetts delegate sought to allay fears "Constitution would produce a dissolution of the state governments" by referencing Guarantee Clause).

236. Id. at 31 (quoting Ratification of the Constitution by the States: Pennsylvania 437 (Merrill Jensen ed. 1976) (statement of Del. Jasper Yeates, Nov. 30, 1787), reprinted in 2 Documentary History, supra note 234, at 1, 437) (internal quotation marks omitted).

237. 15 Documentary History, supra note 234, at 453.

238. Coxe, Freeman I, supra note 234, at 455.

239. Tench Coxe, A Freeman II, Penn. Gazzette, Jan. 30, 1788, reprinted in 15 Documentary History, supra note 234, at 508, 508 (emphasis omitted).

240. Id. at 511.

241. Id. at 508.

B. *Doctrine*

This history helps explain why federalism, autonomy, and representative government feature prominently in the Court's state sovereignty jurisprudence. The doctrines of state sovereign immunity and anticommandeering are both illustrative.[242] Sovereign immunity jurisprudence generally prohibits damages suits against unconsenting states. Anticommandeering jurisprudence prohibits the federal government from requiring state and local governments to enact federal policies.

1. *State Sovereign Immunity.* — Under the doctrine of state sovereign immunity, a private actor may not bring a federal damages suit against an unconsenting state. Nor may a plaintiff bring a federal lawsuit in state court that the doctrine of sovereign immunity would prohibit the plaintiff from bringing in federal court. This latter principle was articulated in *Alden v. Maine*, in which the Supreme Court provided one of its clearest articulations of the rationale for state sovereign immunity.[243] While the Eleventh Amendment of the Constitution provides a textual bar against extending federal jurisdiction to certain cases against states, the *Alden* case reaffirmed that broader extra-textual principles drive much of the doctrine.[244]

The case involved a group of probation officers in the State of Maine who alleged that the state illegally withheld their overtime pay in violation of the Fair Labor Standard Act.[245] That provision expressly authorized suits against non-complying states.[246] The Court had ruled in *Seminole Tribe of Florida v. Florida*, however, that Congress could not abrogate sovereign immunity when enacting legislation under its Commerce Clause powers.[247] (Importantly, Congress can abrogate sovereign immunity when enforcing the Fourteenth Amendment.[248])

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242. See Robert A. Schapiro, Not Old or Borrowed: The Truly New Blue Federalism, 3 Harv. L. & Pol'y Rev. 33, 39–47 (2009) ("[T]he Court has resuscitated limits on federal power through new interpretations of the Interstate Commerce Clause, state sovereign immunity, and the prohibition of 'commandeering' the state governmental apparatus." (footnotes omitted)).

243. 527 U.S. 706 (1999).

244. See James E. Pfander, Once More unto the Breach: Eleventh Amendment Scholarship and the Court, 75 Notre Dame L. Rev. 817, 821 (2000) ("The Court has long since abandoned any arguments based upon the text of the Eleventh Amendment, admitting in *Seminole Tribe* that the text alone would support what has come to be known . . . as the 'diversity' theory.").

245. 29 U.S.C. § 203(m) (2012).

246. Id. § 203(d), (x) (including state employers); Id. § 216(b) (providing private cause of action). The Act was amended to expressly include state employers after the Court ruled that Congress may only override sovereign immunity through a clear statement. Emps. v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973).

247. 517 U.S. 44, 59–63 (1996).

248. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.").

Because Congress passed the FLSA pursuant to its Commerce Clause Powers, then, Congress's attempt to abrogate sovereign immunity was invalid in federal court.

The probation officers brought their claims in state court, rather than federal court, with the hope that the Eleventh Amendment did not apply to that forum. After all, the language of that amendment begins: "'The Judicial power of the United States shall not be construed to extend to any suit . . . .'"[249] Because the text of the amendment expressly addresses only the "Judicial power of the United States," Alden argued that it did not apply to suits brought in state courts.[250] The Maine Supreme Court rejected Alden's bid: "If Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims."[251]

The Supreme Court affirmed,[252] relying on a variety of arguments. First, the Court canvassed leaders' assurances during Ratification Debates that the Constitution maintained state sovereign immunity.[253] Second, the Court narrated the swiftness with which the states ratified the Eleventh Amendment after the Supreme Court ruled in *Chisholm v. Georgia* that a South Carolina citizen could sue the state of Georgia.[254]

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249. Alden v. State, 715 A.2d 172, 174 (Me. 1998) (quoting U.S. Const. amend. XI).

250. See Reply Brief for Appellants at 13–16, *Alden*, 715 A.2d 172 (No. CUM-97-446), 1997 WL 34476915, at *7–10 ("[T]he Eleventh Amendment simply has no application to state court proceedings.").

251. *Alden*, 715 A.2d at 174.

252. Alden v. Maine, 527 U.S. 706, 712 (1999).

253. Id. at 715–19. For example, Alexander Hamilton expressed in Federalist No. 81 that private suits against states in federal court, at least for debts that states owed, would amount to an "unwarrantable" "war against the contracting State[s]. " The Federalist No. 81, supra note 61, at 399 (Alexander Hamilton); see also Clark, supra note 38, at 1862 (describing these objections).

254. *Alden*, 527 U.S. at 715. This is consistent with the traditional narrative, which holds that the Supreme Court's decision in *Chisholm* "literally shocked the Nation." Edelman v. Jordan, 415 U.S. 651, 662 (1974); see also 1 Warren, supra note 10, at 96 ("[*Chisholm*] fell upon the country with a profound shock."); cf. Akhil Reed Amar, America's Constitution: A Biography 332 (2005) ("To appreciate the impulse animating this (the Eleventh) Amendment, we need to understand the first constitutionally significant case ever decided by the Supreme Court, *Chisholm v. Georgia*."); Martha A. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 515 (1978) ("The one interpretation of the eleventh amendment to which everyone subscribes is that it was intended to overturn *Chisholm v. Georgia*."); Fletcher, Historical Interpretation, supra note 12, at 1034 ("The eleventh amendment was passed in the 1790's in order to overrule a particular case—*Chisholm v. Georgia*."); Manning, supra note 13, at 1680 ("No one questions that the nation adopted the Eleventh Amendment in response to *Chisholm*."). But see Gibbons, supra note 10, at 1926 ("Congress's initial reaction to the *Chisholm* decision hardly demonstrates the sort of outrage so central to the profound shock thesis.").

Third, the Court cited precedent, noting that sovereign immunity was now firmly embedded in a "settled doctrinal understanding."[255]

Finally, and relatedly, the Court relied on the structure of the Constitution: "Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms."[256] "'Behind the words of the constitutional provisions are postulates which limit and control.'"[257]

The Court marshaled the background principles[258] and presuppositions that, in its view, supported state sovereign immunity. Among these principles was federalism: "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[259] Private suits against nonconsenting states are unbecoming in that they fail to treat states as full "'members of the federation.'"[260]

These principles also included state autonomy. Suits against states could force levies on government dollars or buildings by "federal fiat."[261] The Court noted that concerns about autonomy might have been especially acute in *Alden*, where the plaintiffs filed in state rather than federal court. The federal government requiring federal courts to entertain suits against states is one thing, but forcing state courts to hear such suits is even more intrusive of state sovereignty, the Court noted: "Although the immunity of one sovereign in the courts of another has often depended in part on comity or agreement, the immunity of a sovereign in its own courts has always been understood to be within the

255. *Alden*, 527 U.S. at 728.

256. Id. at 729 (internal quotation marks omitted) (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996)).

257. Id. (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).

258. See Janet Cooper Alexander, Jurisdiction-Stripping in a Time of Terror, 95 Calif. L. Rev. 1193, 1220–21 (2007) (noting somewhat like habeas corpus, doctrine of sovereign immunity emanates from "historically-based understanding" of "foundational principle . . . implicit in the structure of the Constitution"); Ernest A. Young, *Alden v. Maine* and the Jurisprudence of Structure, 41 Wm. & Mary L. Rev. 1601, 1641 (2000) (analyzing Court's use of structural reasoning in that case).

259. *Alden*, 527 U.S. at 748.

260. Id. at 748–49 (quoting P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)) ("The founding generation thought it 'neither becoming nor convenient that the several States . . . should be summoned as defendants to answer the complaints of private persons.' The principle of sovereign immunity preserved by constitutional design 'thus accords the States the respect owed them as members of the federation.'" (citations omitted) (first quoting In re Ayers, 123 U.S. 443, 505 (1887); then quoting *P.R. Aqueduct*, 506 U.S. at 146)).

261. Id. at 749.

sole control of the sovereign itself."[262] Accordingly, a "power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals."[263] The Court rejected this "'coercive process.'"[264]

The threat to states' treasuries would also undermine state autonomy by endangering states' "financial integrity."[265] If Congress could authorize suits against states under its Commerce Clause power, this would give Congress the "power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages [that] could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design."[266] The power to strip States of sovereign immunity "carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States."[267]

Completing the trilogy of American sovereignty, the Court also cited representative government as a background constitutional presupposition that suits against states would threaten. Such suits could result in "'unanticipated intervention in the processes of government.'"[268] Specifically, the private suits for money damages could "place unwarranted strain on the States' ability to govern in accordance with the will of their citizens."[269] Deciding how to allocate limited resources in light of contested needs "lies at the heart of the political process."[270] Like the federal government, states have a direct relationship with and obligation to the governed.

2. *Anticommandeering*. — The principles of federalism, autonomy, and representative government are equally prominent in a doctrine that sounds not in the Eleventh Amendment, but the Tenth. That amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the

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262. Id.

263. Id.

264. Id. (quoting *Ayers*, 123 U.S. at 505).

265. Id. at 750; see also Robert A. Schapiro, Intersystemic Remedies for Governmental Wrongs, 41 U. Tol. L. Rev. 153, 157 (2009) ("The doctrine of sovereign immunity may limit all kinds of remedies, but it is especially hostile to damages. The potential risk to the public fisc has been a special concern of immunity doctrines." (footnote omitted)).

266. *Alden*, 527 U.S. at 750.

267. Id.

268. Id. (quoting Great N. Life Ins. Co. v. Read, 322 U.S. 47, 53 (1944)).

269. Id. at 750.

270. Id.; cf. id. at 713 ("Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance.").

States respectively, or to the people."[271] This amendment prohibits the federal government from commanding local and state officers to adopt or enforce federal policies.

In *New York v. United States*, the Court considered the constitutionality of a federal law that required the States to adopt a legislative or administrative scheme.[272] The case centered on the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required states to either (a) enact legislation on the disposal of radioactive waste or (b) "take title" to the waste.[273] Relying on principles of sovereignty, the Court concluded that the Constitution forbade this type of commandeering.[274] "Whatever the outer limits of that sovereignty may be," the Court held, "one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."[275]

In reaching the conclusion that the "take title" provision offended state sovereignty, the Court cited concerns about federalism. The Constitution provides for a federal structure that vests the federal government with some powers and states with all others. "The benefits of this federal structure," the majority observed, "have been extensively cataloged."[276] Still, these benefits were not the central concern, for the Court's task would remain the same even if "federalism secured no advantages to anyone."[277] At issue was "not what power the Federal Government ought to have but what powers in fact have been given by the people."[278] When Congress and states have overlapping jurisdiction, the Court found that it undermined this federal structure when one sovereign purports to tell another what laws to enact.[279]

State autonomy is also a central concern. The Court highlighted this precept in *Printz v. United States*,[280] while invalidating a provision of the Brady Handgun Violence Prevention Act. The challenged provision commanded "state and local law enforcement officers to conduct background checks on prospective handgun purchasers."[281] The Court

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271. U.S. Const. amend. X.

272. 505 U.S. 144 (1992).

273. Id. at 152–53.

274. Id. at 176.

275. Id. at 188.

276. Id. at 157 (citing Gregory v. Ashcroft, 501 U.S. 452, 457–60 (1991)); Merritt, supra note 224, at 3–10; Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1491–511 (1987) (book review)).

277. *New York*, 505 U.S. at 157.

278. Id. (citing United States v. Butler, 297 U.S. 1, 63 (1936)).

279. Id. at 159 ("The actual scope of the Federal Government's authority with respect to the States has changed over the years, therefore, but the constitutional structure underlying and limiting that authority has not.").

280. 521 U.S. 898 (1997).

281. Id. at 902.

held that just as "Congress cannot compel the States to enact or enforce a federal regulatory program," nor can Congress "circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[282]

The compulsion of state officers frustrated state sovereignty by undermining state autonomy. In the words of the Court, the Brady Act represented an "intrusion upon state sovereignty" in that it was incompatible with the "[p]reservation of the States as independent and autonomous political entities."[283] Because the Act "'reduc[ed] [states] to puppets of a ventriloquist Congress,'"[284] it violated an "essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."[285]

Both *New York* and *Printz* further advanced representative government as a tenet of American state sovereignty. When "States . . . retain the ability to set their legislative agendas," the Court reasoned in *New York*, "state government officials remain accountable to the local electorate."[286] When Congress compels a state to act, however, "the accountability of both state and federal officials is diminished."[287] To commandeer states is to dilute voters' ability to hold either federal officials or state officials electorally accountable for "unpopular" or "detrimental" decisions. The Court seconded this accountability thesis in *Printz*: "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."[288]

Federalism, autonomy, and representative government, then, serve as symbiotic pillars of sovereignty as conceived and lived in the American system.

III. LOCAL "REPUBLICAN SOVEREIGNTY"

As illustrated in Parts I and II, overlapping principles animate the limitations on suits against cities described in the Court's state sovereignty jurisprudence. Indeed, in *Printz*, the Court alluded to these shared principles, observing that "'local or municipal authorities form distinct and independent portions of the supremacy'" and are "'no more subject, within their respective spheres, to the general authority than the general

282. Id. at 935.

283. Id. at 928.

284. Id. (quoting Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975), vacated, 431 U.S. 99 (1977)).

285. Id. (citing Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868)).

286. 505 U.S. 144, 185 (1992).

287. Id. at 168.

288. *Printz*, 521 U.S. at 920–21.

authority is subject to them, within its own sphere.'"[289] The continued limitations on municipal liability under § 1983—refined over the last thirty years—suggest that state sovereignty and local immunity share more than a nineteenth-century past. They share a common sphere in the Court's current jurisprudence.

This is unsurprising. Local governments serve as republican dispensaries of core sovereign functions.[290] Across the country, citizens elect a range of representatives to exact taxes and allocate limited resources in service of the public good. Whether they are called city councilpersons or aldermen, county commissioners or supervisors, local elected representatives often play this crucial role.[291] This Part documents the role local governments play in dispensing core sovereign functions. This focus exposes two competing lessons. On the one hand, if it is true that damages suits and intrusive judgments can cripple the ability of states to carry out core sovereign functions, the same is presumably true of local governments as well. On the other hand, the expansive role local governments play in Americans' everyday lives means that a lack of constitutional accountability for constitutional violations is of both pressing and profound concern. A doctrine of local sovereign immunity should, indeed must, take both of these dueling normative concerns into account.

A. *Local Sovereign Interests*

1. *Police Power.* — A guiding principle of federalism, and concomitant state sovereignty, is that states retain a "general police power" that the national government lacks.[292] In *Gonzales v. Oregon*, the

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289. Id. (quoting The Federalist No. 39, supra note 61, at 192 (James Madison)). The Court added that "the distinction in our Eleventh Amendment jurisprudence between States and municipalities is of no relevance here." Id. at 931 n.15; see also Fallon, "Conservative" Paths, supra note 13, at 454–55 ("Interestingly, the noncommandeering principle as specified in *Printz* reaches local as well as state governments, even though the former do not possess sovereign immunity.").

290. Indeed, scholars have observed how even outside the context of sovereign immunity, the Court in the 1970s and 1980s began exhibiting considerable deference to local decisionmaking and sovereignty. See M. David Gelfand, The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's, 21 B.C. L. Rev. 763, 789 (1980) (noting Burger Court's "consistent pattern of judicial deference to local government political decisions"); Joan C. Williams, The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law, 1986 Wis. L. Rev. 83, 84 ("[T]he Burger Court majority has exalted the power of localities through the principle of local government sovereignty.").

291. See Anderson, Mapped Out, supra note 49, at 935, 979–95 (asserting "potential of county governments to alleviate problems of metropolitan polarization" and "represent regional interests and logic in intergovernmental negotiations").

292. See, e.g., United States v. Comstock, 560 U.S. 126, 153 (2010) ("Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone."); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (expressing

Court posited that "the structure and limitations of federalism . . . allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'"[293] This general police power permits states to legislate, and sometimes litigate, on behalf of the safety and health of those within its borders.[294] In *United States v. Morrison*, a case often hailed and lamented as a quintessential example of federalism jurisprudence,[295] the majority noted that it could "think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[296]

These cases have sometimes acknowledged the role that local governments play in carrying out these powers.[297] Even a cursory observation of local governments confirms this role. Cities and counties across the nation have police forces that respond to disturbances;[298] initiate arrests for major and minor crimes;[299] enforce court orders;[300]

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reluctance to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

293. 546 U.S. 243, 270 (2006) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)).

294. Massachusetts v. EPA, 549 U.S. 497, 519–20 (2007) (finding Massachusetts has standing based on importance of its "stake in protecting its quasi-sovereign interests").

295. E.g., David S. Rubenstein, Delegating Supremacy?, 65 Vand. L. Rev. 1125, 1133 n.39 (2012) ("The Rehnquist Court's (in)famous 'New Federalism' decisions in *Lopez* and *Morrison* portended an invigorated judicial effort to police the bounds of federal power."). See generally Fallon, "Conservative" Paths, supra note 13, at 446 (identifying trend of "commitments to federalism and sovereign immunity" in Rehnquist Court); H. Geoffrey Moulton, Jr., The Quixotic Search for a Judicially Enforceable Federalism, 83 Minn. L. Rev. 849, 891–95 (1999) (concluding Rehnquist Court's "doctrinal innovations" emerged in response to expansion in federal government's exercise of unenumerated powers).

296. United States v. Morrison, 529 U.S. 598, 618 (2000); see also Kelley v. Johnson, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power . . . .").

297. Cf. UAW v. Wis. Emp't Relations Bd., 351 U.S. 266, 274–75 (1956) ("It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction.").

298. Brian A. Reaves, Bureau of Justice Statistics, Local Police Departments, 2007, at 8 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd07.pdf [http://perma.cc/DQH6-5DFA] ("Local police departments perform a wide range of functions . . . includ[ing] first response to criminal incidents, response to calls for service, patrol, crime investigation, [and] arrest of criminal suspects . . . .").

299. See, e.g., 3 John Martinez, Local Government Law § 18:3 (2011) ("The police department and force shall have the power . . . to . . . enforce and prevent the violation of all laws and ordinances in force in the city . . . and . . . to arrest all persons guilty of violating any law or ordinance . . . ." (quoting N.Y.C., N.Y., Charter § 435(a) (2004))).

300. Cf. Town of Castle Rock v. Gonzales, 545 U.S. 748, 752, 760–61 (2005) (discussing discretion afforded to officers in determining whether to enforce state court restraining order and noting restraining order included preprinted notice that peace officer "shall use every reasonable means to enforce [a] restraining order"); Crawford v. Countrywide Home Loans, Inc., 647 F.3d 642, 643–44 (7th Cir. 2011) (addressing challenge to county

and even enforce locally crafted ordinances.[301] When a person dials 911 and reports an emergency, the first responder is likely not an employee of a state government in a distant state capital, but a local policeperson or firefighter.[302] Local governments are critical players in carrying out states' residual police power.

2. *Education.* — In *United States v. Lopez*, the United States Supreme Court famously invalidated the Gun Free School Zones Act on the grounds that it exceeded constitutionally authorized federal power.[303] Concurring, Justice Kennedy opined that "[w]hile the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant."[304] The federal act invaded this sovereignty in part because of the traditional role states have played in educating children. "An interference of these [state functions] occurs here, for it is well established that education is a traditional concern of the States."[305] Because schools are "owned and operated by the States or their subdivisions," Justice Kennedy reasoned that the Court had "a particular duty to ensure that the federal–state balance is not destroyed."[306]

Among the state's subdivisions that own and operate schools are local governments.[307] Local governments largely fund public schools and

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sheriff's enforcement of court-ordered eviction); 16A McQuillin, supra note 82, § 45:52 ("[A] law enforcement officer enforcing a court order enjoys absolute immunity.").

301. See, e.g., City of Chicago v. Morales, 527 U.S. 41, 49 (1999) (discussing Chicago Police Department's enforcement of Chicago's Gang Congregation Ordinance); Christensen v. Park City Mun. Corp., 554 F.3d 1271, 1274 (10th Cir. 2009) (addressing city police officers' enforcement of municipal ordinance prohibiting sale of merchandise on city parks and streets).

302. See Reaves, supra note 298, at 15 ("An estimated 97% of local police officers worked for a department with some type of 9-1-1 system during 2007, and 90% were employed by a department with an enhanced 9-1-1 system.").

303. 514 U.S. 549, 567–68 (1995). See generally Daniel A. Farber, Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism, 75 Notre Dame L. Rev. 1133, 1138 (2000) ("Arguably, the most startling of the recent federalism rulings was *United States v. Lopez* . . . .").

304. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

305. Id. at 580 (Kennedy, J., concurring) (citing Milliken v. Bradley, 418 U.S. 717, 741–42 (1974); Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

306. Id. at 581 (Kennedy, J., concurring) ("'[W]e start with the assumption that the historic police powers of the States' are not displaced by a federal statute 'unless that was the clear and manifest purpose of Congress.'" (alteration in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))). Some have questioned the normative desirability, and logic, of inquiries into whether an area properly belongs to the state or federal government. States and federal governments, after all, often work cooperatively. See Robert A. Schapiro, Toward a Theory of Interactive Federalism, 91 Iowa L. Rev. 243, 257 (2005) ("The dualist emphasis on dividing state and federal power has produced legal doctrine that while formally consistent embodies substantively contradictory impulses.").

307. See Aaron J. Saiger, The School District Boundary Problem, 42 Urb. Law. 495, 519–20 (2010) (arguing local control allows for parental involvement and makes public schools and school districts "more likely to be genuine 'functional communities' than

public schools constitute a significant portion of state budgets.[308] And often, it is local city councils and school boards that make decisions about policies and resources in those schools.[309] Local governments, then, play a critical role in carrying out this traditional state function.

* * *

Leading scholars have astutely identified the tension inherent in treating local governments as arms of the state for some purposes, and as laboratories of democracy for other purposes.[310] But there are ways in which these conceptions are reconcilable. In ways we have come to accept, states vest local government with historically sovereign powers to protect, educate, and allocate taxes. And like state officials, locally elected representatives often make decisions about how to wield this formidable sovereign power.

B. *Lawsuits as a Threat to Sovereign Functions*

State sovereignty jurisprudence often also adduces states' collective role as exactors and stewards of tax dollars. In *Alden*, the Court explained this concern as follows: "Private suits against nonconsenting States may threaten their financial integrity, and . . . strain States' ability to govern in accordance with their citizens' will, for judgment creditors compete with other important needs and worthwhile ends for access to the public fisc . . . ."[311]

Accordingly, a state has the important role of tending to its own treasury in ways that comport with the public will and public good. And when that treasury is depleted, the state's survival is imperiled. "Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process."[312] For example, as previous commentators have documented, "states faced staggering debts . . . in the aftermath of the Revolutionary and Civil Wars."[313] Allowing judicial enforcement of those debts would have presented severe challenges to states' survival.[314]

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other local polities"). But see Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 Colum. L. Rev. 346, 385 (1990) (arguing while "[l]ocal tax revenues are devoted primarily to schools, . . . parents' interests would be better served by greater state fiscal responsibility for local schools").

308. See Saiger, supra note 307, at 519–20 (referring to "sustained time and substantial resources associated with schooling").

309. Id. at 533–34.

310. See generally Anderson, Mapped Out, supra note 49, at 964–65 (discussing these competing visions); Briffault, Who Rules at Home?, supra note 34, at 396–400 (same).

311. Alden v. Maine, 527 U.S. 706, 709 (1999).

312. Id. at 751.

313. See Smith, Awakening, supra note 13, at 1973–75 (discussing state debts after Revolutionary and Civil Wars); Michael G. Collins, The Conspiracy of the Eleventh Amendment, 88 Colum. L. Rev. 212, 213 (1988) (book review) ("[T]he Supreme Court

The Court's observation in *Alden* about "financial integrity" resembles an insight found in cases protecting local government's role in managing the public fisc. In *City of Newport v. Fact Concerts, Inc.*, when the Court rejected punitive damages against cities, it reasoned, "To add the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities."[315] Local governments, after all, often exact sales and property taxes and allocate them for the public good.[316]

This concern even looms in cases that involve prospective, rather than retrospective, relief. Prevailing plaintiffs in § 1983 cases are entitled to attorneys' fees, including suits for injunctions and declaratory relief. At oral argument in *Los Angeles County v. Humphries*,[317] the case that expanded the heightened causation requirement to suits for prospective relief, several justices identified a potential injustice to taxpayers. The issue of attorneys' fees arose at least twenty-six times during oral argument.[318] As Justice Scalia put it, "I suspect . . . the case is mostly about attorneys' fees."[319]

Lawsuits and execution of legal judgments threaten local treasuries and, therefore, their ability to engage their sovereign functions.[320] Just as executing judgments against states could "[endanger] government buildings or property which the State administers on the public's behalf,"[321] the same could be said of cities. Courts, after all, sometimes award property to a prevailing party in execution of a judgment.[322] And

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helped the South out of its staggering, multi-million dollar post-Civil War debt crisis."); see also Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 406 (1821) ("It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument."); Ernest A. Young, Its Hour Come Round at Last? State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First Century, 35 Harv. J.L. & Pub. Pol'y 593, 593–96 (2012) (describing state sovereign immunity as means of protecting states during times of economic crisis including, presciently and presently, the Great Recession).

314. Smith, Awakening, supra note 13, at 1974.

315. 453 U.S. 247, 270 (1981).

316. See generally Columbus-Muscogee Cty. Consol. Gov't v. CM Tax Equalization, Inc., 579 S.E.2d 200 (Ga. 2003) (recognizing local neighborhood preservation as legitimate taxing purpose); Bd. of Dirs. of Tuckahoe Ass'n v. City of Richmond, 510 S.E.2d 238 (Va. 1999) (reviewing tax treating commercial and residential entities differently).

317. 562 U.S. 29 (2010).

318. Transcript of Oral Argument, *Humphries*, 562 U.S. 29 (No. 09-350), 2010 WL 3907895.

319. Id. at 4.

320. See Williams, supra note 290, at 84 (discussing ways suits can threaten cities' ability to carry out responsibilities and serve as custodians of resources).

321. Alden v. Maine, 527 U.S. 706, 749 (1999).

322. See Dan Dobbs, Law of Remedies § 1.4, at 15–16 (2d abr. ed. 1993) (detailing procedure for execution of judgment for real property); see also Aebig v. Cox, No. 258505,

as Professor Michael McConnell has observed, courts have on rare occasions awarded government property to litigants in execution of judgments against cities.[323] For example, the case of *Estate of DeBow v. City of East St. Louis*[324] involved a decision by a court to award a park and city hall building in execution of a judgment. The Illinois Appellate Court found that awarding city hall to a litigant violated public policy.[325] Still, the court simultaneously upheld the portion of the same execution order that awarded a litigant 220 acres of city-owned vacant ground.[326]

What is more, as Professor Michelle Anderson has demonstrated, when a city's dollars or property disappear, sometimes cities themselves fall as well.[327] Legal judgments against Mesa, Washington, and Half Moon Bay, California, mark recent examples of legal judgments bringing cities to the brink of collapse.[328]

C. *Accountability*

In government, the power to help citizens is inevitably bundled with the power to harm them. One does not need to travel into the realm of the hypothetical to consider what types of injustices can thrive when powerful local governments are immune from suit.

1. *Municipal Immunity Pre-*Monell. — Prior to 1978, local governments were immune from suit under § 1983. And during that

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2006 WL 1360504, at *1 (Mich. Ct. App. May 18, 2006) (affirming award of real property in execution of judgment).

323. Cf. Michael W. McConnell & Randal C. Picker, When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy, 60 U. Chi. L. Rev. 425, 429–30 (1993) ("The most basic remedy available to creditors in the private sphere is seizure of the debtor's property. If this remedy were available to municipal creditors, they could seize the assets of the city . . . in satisfaction of the debt."). But see Murphree v. City of Mobile, 18 So. 740 (Ala. 1895) (awarding land belonging to city in execution of judgment).

324. 592 N.E.2d 1137 (Ill. App. Ct. 1992).

325. See id. at 1144 (holding City Hall's "cognizable municipal function" precluded execution of property on grounds of public policy); see also Brazil v. City of Chicago, 43 N.E.2d 212, 214 (Ill. App. Ct. 1942) ("However strong the obligation of a town or city to pay its debts, . . . to allow payment to be enforced by execution would so far impair the usefulness and power of the corporation . . . that the public good required the denial of such a right.").

326. *Estate of DeBow*, 592 N.E.2d at 1144–45 (finding 220-acre tract of vacant ground did not serve "cognizable municipal function" and appeal from execution thereof moot).

327. Anderson, Dissolving Cities, supra note 81, at 1401 ("[D]issolution is precipitated by acute fiscal crisis caused by . . . a steep fall in housing values; a downward spike in . . . bond rating; . . . closure of an industrial cornerstone of local employment or tax revenue; and/or a sizable legal judgment . . . .").

328. Id. at 1402–03; Julia Scott, The End of Half Moon Bay?, San Jose Mercury News (Aug. 27, 2010), http://www.mercurynews.com/bay-area-news/ci_15920803 [http://perma.cc/VW9Y-FNGM] (discussing $15 million lawsuit settlement).

time, a number of local governments abused their sovereign role as custodians of education.[329]

In 1954, the Supreme Court issued its landmark decision in *Brown v. Board of Education*, unanimously using its equitable power to overturn de jure segregation in American schools as a violation of the Fourteenth Amendment's Equal Protection Clause. "Today, education is perhaps the most important function of state and local governments," the Court observed.[330] "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . . It is the very foundation of good citizenship."[331]

Nonetheless, neither *Brown* nor its sequel a year later[332] proved sufficient to overcome many local governments' recalcitrant and ominous commitment to "segregation now, segregation tomorrow, and segregation forever."[333] The overwhelming majority of school districts throughout the South did not integrate until the late 1960s and early 1970s.[334] Indeed, when they finally did, local school districts were primarily motivated by something that was not at stake in *Brown* and its progeny: money.[335] That is, a substantial number of school districts desegregated following the passage of a federal law that tied conditional grants to school districts in exchange for "[d]ismantling the dual system of education in the South."[336] To encourage meaningful integration, economists recently demonstrated, a district needed to be paid roughly $1,200 per pupil.[337]

This necessarily means that the threat of private suits for prospective relief, pursuant to the court's equitable authority, was insufficient to convince school districts to desegregate schools. We will never know whether schools would have integrated earlier if monetary damages for

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329. Indeed, local governments have at times engaged in mass abuse of their role in the arena of public safety as well. Kermit L. Hall, Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–1872, 33 Emory L.J. 921, 925 (1984) (exploring ways local law enforcement inhibited enforcement of federal law in years leading up to § 1983's passage).

330. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

331. Id.

332. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

333. George C. Wallace, Governor, The Inaugural Address of Governor George C. Wallace (Jan. 14, 1963), http://digital.archives.alabama.gov/cdm/ref/collection/voices/id/2952 (on file with the *Columbia Law Review*).

334. Elizabeth Cascio et al., Paying for Progress: Conditional Grants and the Desegregation of Southern Schools, 125 Q.J. Econ. 445, 446 fig.I (2010).

335. See id. at 451 ("[D]istricts with larger grants would have been more likely to cross the [desegregation] threshold to receive their federal funds.").

336. Id. at 446.

337. Id. at 448.

psychic and emotional harms had been among the remedies available to school children throughout the South.[338]

2. *Municipal Immunity Post-*Monell. — Today, it is not uncommon for a plaintiff to lack any remedy for a constitutional violation committed by a local agent. The following case typifies this phenomenon.

Jesse Buckley is a resident of Florida whom a police deputy stopped for speeding in March 2004.[339] At the time of the traffic stop, Buckley was homeless and asked the deputy to take him to jail. He allowed himself to be handcuffed, but then, after exiting the car, fell to the ground and sobbed uncontrollably. "My life would be better if I was dead," he told police.[340] The officer threatened to tase Buckley if he refused to stand, but Buckley refused to stand. "I don't care anymore-tase me."[341] The officer then tased the handcuffed, sobbing man three times into different areas of his back and chest. The shocks lasted roughly five seconds per round.[342]

Buckley sued the officer and Washington County, Florida,[343] for excessive force under the Fourth Amendment's prohibition against

338. Smith, Awakening, supra note 13, at 1973 ("Local school districts . . . present a useful analogy to explore the ways monetary factors can incentivize constitutional conduct. Before *Monell* . . . plaintiffs generally could not sue municipal governments for violations of federal rights . . . ."). But see John C. Jeffries, Jr., The Liability Rule for Constitutional Torts, 99 Va. L. Rev. 207, 247 (2013) [hereinafter Jeffries, Liability Rule] ("Limitations on money damages facilitate constitutional evolution and growth by reducing the cost of innovation. Judges contemplating an affirmation of constitutional rights need not worry about the financial fallout. The curtailment of such consequences is in a sense liberating.").

339. Buckley v. Haddock, 292 F. App'x 791, 792 (11th Cir. 2008). The opinion is unpublished, perhaps suggesting that the court thought it was breaking no new ground. See David R. Cleveland, Clear As Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations, 65 U. Miami L. Rev. 45, 59 n.91 (2010) (canvassing evidence that decision not to publish generally means opinion articulates no new legal principles).

340. *Buckley*, 292 F. App'x at 792 (internal quotation marks omitted).

341. Id.

342. Id. at 792–93. See generally Adam Liptak, Supreme Court Enters the YouTube Era, N.Y. Times (Mar. 2, 2009), http://www.nytimes.com/2009/03/03/us/03bar.html (on file with the *Columbia Law Review*) (discussing use of video in Buckley's certiorari petition to Supreme Court).

343. Buckley named the Sheriff of Washington County as a defendant, suing him in his official capacity. *Buckley*, 292 F. App'x at 793 n.5. Suing a person in his or her official capacity is the functional equivalent of suing the entity for whom that person works. See Kentucky v. Graham, 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."); see also Hutton v. Strickland, 919 F.2d 1531, 1542 (11th Cir. 1990) (finding sheriffs are county officials under Florida law). But see McMillian v. Monroe County, 520 U.S. 781, 782 (1997) (finding sheriffs are state officials under Alabama law).

unreasonable seizures.[344] A federal district court dismissed the claim against the County on a motion for summary judgment. That court, which viewed a video of the incident, noted that "[t]he only apparent purpose for using the taser was to cause the restrained Buckley, who had not been violent or dangerous, to get into [the deputy's] car."[345] The district court also acknowledged that an official investigation conducted by Washington County, Florida exonerated the officer of any wrongdoing and failed to discipline him. Further, the city lacked a written policy on the proper use of a taser when used without darts.[346] Still, the court found that even if the deputy violated the Constitution, the County could not be held liable under the stringent "policy or custom" requirement.[347]

The following year, in a routine unpublished opinion, the Eleventh Circuit dismissed the claim against the deputy as well on qualified immunity grounds. To be sure, a majority on an Eleventh Circuit panel apparently agreed that, at a minimum, the third instance of tasering was unconstitutional. As Judge Beverly Martin wrote, "[T]he Fourth Amendment forbids an officer from discharging repeated bursts of electricity into an already handcuffed misdemeanant—who is sitting still beside a rural road and unwilling to move—simply to goad him into standing up."[348] But the two-judge majority concluded that the officer was entitled to qualified immunity, reasoning that previous case law could not have given him "fair and clear notice" that his conduct violated the Constitution.[349] This meant that despite the constitutional violation, the plaintiff was left with no constitutional remedy.

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344. See Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (noting "hazy border between excessive and acceptable force" (internal quotation marks omitted) (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001))); Graham v. Connor, 490 U.S. 386, 394 (1989) (invoking citizens' Fourth Amendment rights in context of excessive force during arrest); see also Jonathan Remy Nash, The Supreme Court and the Regulation of Risk in Criminal Enforcement, 92 B.U. L. Rev. 171, 178–82 (2012) (outlining Court's excessive force jurisprudence).

345. Buckley v. Haddock, No. 05:060cv53-RS, 2007 WL 710169, at *1 (N.D. Fl. Mar. 6, 2007), rev'd, 292 F. Appx. 791.

346. Order Granting Summary Judgment at 6, *Buckley*, No. 5:060cv53-RS (N.D. Fl. Mar. 21, 2007), 2007 WL 891662, at *3 ("There is no specific instruction in the policy on how and when an officer should use an air taser without the darts.").

347. Id. at *4.

348. Buckley v. Haddock, 292 F. App'x 791, 799 (11th Cir. 2008) (Martin, J., dissenting). While Judge Martin wrote for herself, Judge Fredrick Dubina similarly wrote that "Deputy Rackard's conduct of applying the taser on the third occasion violated the Constitution." Id. (Dubina, J., concurring specially). At the time of the decision, Judge Martin was a district court judge on the Northern District of Georgia sitting by designation. Her courageous dissent was cited in the Atlanta press when President Barack Obama nominated her to the Eleventh Circuit Court of Appeals, where she now sits. Bill Rankin, Spotlight on Taser Dissent, Atl. J. Const., Dec. 30, 2009, at A15 ("Before her nomination, Beverly Martin caused a stir on the federal appeals court by penning a blistering dissent as a visiting judge in an excessive-use-of-force case.").

349. See *Buckley*, 292 F. App'x at 796–97 (majority opinion) (discussing qualified immunity). See generally Hope v. Pelzer, 536 U.S. 730, 741–42 (2002) (denying qualified

Scholars such as Professor Pamela Karlan have shown that federal dockets are replete with cases like Buckley's—where immunities and the municipal causation requirement conspire to immunize local governments and their officials for conduct that violates the Constitution.[350]

Regularly leaving plaintiffs without this remedy undermines representative government. Apposite are the words of Representative Samuel Shellabarger, the author of § 1983, who shepherded the provision through the House of Representatives: "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation."[351] The frequency with which plaintiffs are left without remedy for constitutional violations raises questions about whether this legislative promise is adequately fulfilled today.

The rights–remedies gap also presents substantial challenges to federalism and the reimagined zone of autonomy anticipated by the framers of the Fourteenth Amendment. As the Court recognized in 1880 in *Ex parte Virginia*, "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power."[352] Thus, when Congress enacts legislation pursuant to that amendment, "not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."[353]

It diminishes these insights when courts refuse to correct constitutional violations on grounds of federalism and autonomy. Indeed, Professor Spaulding has observed that odes to federalism that ignore this monumental history are not just incomplete, but dangerous, because they "turn[] on a chillingly amnesic reproduction of antebellum conceptions of state sovereignty."[354] They relegate the promise of the

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immunity to those who reasonably have "fair warning" their conduct violates federal rights at time of violation).

350. See Karlan, supra note 22, at 1920 ("[T]he Supreme Court has placed a substantial limitation on when [local] governments will be liable for constitutional violations committed by their employees."); see also Gilman, supra note 12, at 610 (discussing "significant difficulties" plaintiffs suing local governments for constitutional violations face "in obtaining compensation").

351. Globe App., supra note 114, at 68 app.

352. 100 U.S. 339, 346 (1879).

353. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

354. Spaulding, supra note 48, at 2015; cf. Denise C. Morgan & Rebecca E. Zietlow, The New Parity Debate: Congress and Rights of Belonging, 73 U. Cin. L. Rev. 1347, 1349 (2005) ("Congress plays an irreplaceable role in the protection of individual rights, such that the inevitable result of a reduction in that institution's power will be a rollback in the protection of rights of belonging."); Edward L. Rubin & Malcolm Feeley, Federalism:

42nd Congress to, as Justice Robert Jackson said in another context, "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."[355]

* * *

While there are ways that suits against cities challenge representative government and federalism, cases as epic as *Brown* and as commonplace as *Buckley* dramatize a competing concern: Failure to enforce constitutional guarantees also challenges both representative government and the federal structure as reborn during Reconstruction. Any judicially crafted municipal immunity should aim to calibrate these competing demands on foundational ideals.

IV. IMMUNITY

The special restrictions on § 1983 municipal suits are steeped in the same ideological commitments that shape the Court's state sovereignty jurisprudence. The inoculation local governments and their agents receive has roots in republican-inflected notions of "sovereignty." What remains unaccounted for, however, is the claim that a heightened causation requirement constitutes an "immunity." This Part focuses on the "immunity" premise.

In *Swint v. Chambers County Commission*, the Supreme Court held that *Monell*'s heightened causation requirement is not an immunity.[356] A municipality's "assertion that [an officer] is not its policymaker does not rank . . . as an immunity from suit. Instead, the plea ranks as a 'mere defense to liability.'"[357] The Court did not provide any reasons for this characterization, or describe why the two are mutually exclusive.[358] Immunities *are* defenses.[359] And indeed, lower courts nonetheless some-

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Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 931 (1994) (critiquing version of federalism conflating decentralization with state sovereignty).

355. Edwards v. California, 314 U.S. 160, 186 (1941) (Jackson, J., concurring) (opining law banning nonresident indigents from California violated Privileges and Immunities Clause).

356. 514 U.S. 35, 43 (1995).

357. Id. (quoting Mitchel v. Forsyth, 472 U.S. 511, 526 (1985)).

358. At issue was the collateral order doctrine, an exception to the general rule that appeals to the federal courts of appeals may only be made from final judgments, known as the final judgment rule. 18 U.S.C. § 1291 (2012). The collateral order doctrine provides an exception to the final judgment rule where important interests cannot be vindicated if a nondispositive order cannot be appealed. See *Swint*, 514 U.S. 35, 41–42, 51 (defining doctrine and holding district court's "preliminary ruling regarding the county did not qualify as a 'collateral order'").

359. See Camreta v. Greene, 131 S. Ct. 2020, 2032 (2011) (referring to "immunity defense"); Sossamon v. Texas, 131 S. Ct. 1651, 1659 (2011) (same); Ortiz v. Jordan, 131 S. Ct. 884, 888 (2011) (same); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 369 (2009) (referring to "defense of qualified immunity"); see also Linda S. Mullenix, Beyond

times refer to the concept of "municipal immunity"[360] in § 1983 cases—often providing as little reasoning as the Court did in *Swint*. Who is right?

The municipal causation requirement's status as an immunity can be shown in part by reflecting on what it is not. Unlike the anticommandeering principle, for example, it is not a basis for a cause of action. It is not a pleading requirement. It is not an element that a plaintiff must prove to establish a constitutional violation. Further, it is not an inexorable outcome compelled by § 1983's text or history. Rather, the heightened causation requirement is a protection that applies to only two entities: state and local governments.

The methodology the Court used to create this protection tracks the approach found in cases that recognized other immunities in § 1983 suits, including judicial and legislative immunities. Indeed, as described in Part III, as a functional matter, the municipal causation requirement and other immunities often interact in ways that insulate local governments *and* their officers from suit.[361]

A. *Absence of Alternatives*

1. *Element of a Violation.* — The municipal causation requirement is not an element of a constitutional violation. Rather, the requirement protects cities from suit even when there is no question that the underlying conduct violates constitutional guarantees.

In *Bryan County v. Brown*, for example, the Supreme Court accepted that a deputy violated the Fourth Amendment when he slammed Jill Brown to the ground without provocation during a routine traffic stop, with enough force to break her knees.[362] The question was whether the county that hired that deputy (despite his violent criminal record) could be held liable. "That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation."[363] The Court added, "A failure to apply stringent culpability and causation requirements raises serious federalism concerns."[364] The heightened municipal causation requirement is not a prerequisite to establishing a consti-

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Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation, 32 Wm. & Mary L. Rev. 475, 483 (1991) (referring to "sovereign immunity defenses").

360. Bennett v. City of Grand Prairie, 883 F.2d 400, 410 (5th Cir. 1989) (referring to heightened causation requirement as "Municipal Immunity"); Eberhart v. Gettys, 215 F. Supp. 2d 666, 680 (M.D.N.C. 2002) (same); Moore v. Wyo. Med. Ctr., 825 F. Supp. 1531, 1542 (D. Wyo. 1993) (same).

361. This question is largely an empirical one that I intend to explore in later work. See Fallon, Asking the Right Questions, supra note 22, at 487 ("[I]mmunity doctrines and limitations on causes of action frequently can serve as functional equivalents . . . .").

362. 520 U.S. 397, 400–01 (1997). The officer stopped her because she turned her car around when she saw a police roadblock. Id. at 400.

363. Id. at 406.

364. Id. at 415.

tutional violation. It is federalism-based insulation from liability for the employer of the tortfeasor.

2. *Pleading Prerequisite.* — Nor is the municipal causation requirement in the tradition of heightened pleading standards.[365] Courts sometimes overturn judgments on *Monell* grounds even after a trial verdict.[366] What is more, the Court has expressly rejected attempts by lower courts to impose heightened pleading standards in § 1983 suits.

The case of *Crawford-El v. Britton*[367] overturned a heightened pleading standard the D.C. Circuit imposed for certain constitutional violations that required a showing of unconstitutional motive. "To the extent that the [D.C. Circuit] was concerned with this procedural issue," the Court held, "our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process."[368]

The Court similarly ruled in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* that a federal court may not "apply a 'heightened pleading standard'—more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure—in civil rights cases alleging municipal liability."[369] The heightened causation requirement, then, must be something else.

3. *Legislative Command.* — Nor is the causation requirement an inevitable consequence of § 1983's language or history. The text renders liable:

> *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.[370]

The Court ruled in *Monell* that the language "causes to be subjected" suggests that a city must *cause* a constitutional violation in order to be

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365. Cf. Edward A. Hartnett, Taming *Twombly*, Even After *Iqbal*, 158 U. Pa. L. Rev. 473, 474–75 (2010) (suggesting "*Twombly* can be understood as equivalent to the traditional insistence that a factual inference be reasonable," can invite litigants "to dislodge a judge's baseline assumptions about what is natural," and arguing "discovery can proceed during the pendency of a *Twombly* motion"); A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. Rev. 431, 490 (2008) (discussing "filtering function" of pleadings); Adam N. Steinman, The Pleading Problem, 62 Stan. L. Rev. 1293, 1305 (2010) (noting theories attempting to limit reach of *Twombly*). See generally Ashcroft v. Iqbal, 556 U.S. 662, 677–80 (2009) (outlining pleading standards).

366. See, e.g., Connick v. Thompson, 131 S. Ct. 1350, 1359, 1366 (2011) (concluding case failed to meet *Monell*'s requirements); *Brown*, 520 U.S. at 415–16 (same).

367. 523 U.S. 574 (1998).

368. Id. at 595.

369. 507 U.S. 163, 164 (1993).

370. 42 U.S.C. 1983 (2012) (emphasis added).

liable for it.[371] While this makes sound textual sense, there are a range of entirely plausible interpretations of the word "cause," including some that do not require a showing of the deliberate indifference standard adopted by the Court.

Indeed, not only is respondeat superior the leading theory of causation today,[372] local governments are regularly held liable under a theory of respondeat superior liability for common law torts,[373] and even for violations of federal statutes.[374] And leading authorities around the time of § 1983's passage stated that the prevailing view was that municipalities and corporations should be treated similarly on questions of causation.[375] For example, in the highly cited case of *Thayer v. City of Boston*, the Massachusetts Supreme Judicial Court noted:

> [Even] if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done.[376]

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371. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691–92 (1978).

372. See 2 Dobbs et al., supra note 16, § 425 (recognizing respondeat superior is "most common kind of vicarious liability").

373. Cf. Rosenthal, supra note 101, at 804–13 (providing comprehensive list of state statutes limiting various tort liabilities).

374. See Bd. of Cty. Com'rs v. Brown (Bryan County) 520 U.S. 397, 432–33 (1997) (Breyer, J., dissenting) (identifying instances in which courts have used other federal statutes to impose respondeat superior liability on local governments); see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998) ("Congress has directed federal courts to interpret Title VII based on agency principles.").

375. See 2 John Dillon, The Law of Municipal Corporations § 764, at 875 (2d ed. 1873) ("[A]s respects *municipal corporations* proper, . . . even in the absence of statute giving the action, . . . they are liable for acts of *misfeasance* positively injurious to individuals[] done by their authorized agents or officers . . . ."); Thomas G. Shearman & Amasa A. Redfield, A Treatise on the Law of Negligence § 120, at 139 (1869) ("There is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action."); see also 18 McQuillin, supra note 82, § 53:3 ("The majority rule is that in the absence of a statute granting immunity, a municipality is liable for its negligence in the same manner as a private person or corporation.").

376. 36 Mass. (19 Pick.) 511, 515–16 (1837). This principle was adopted widely. See, e.g., Hawks v. Charlemont, 107 Mass. 414, 417–18 (1871) (applying theory of respondeat superior to municipality through statute); Billings v. City of Worcester, 102 Mass. 329, 332–33 (1869) (discussing liability of town for negligently maintained street); Horton v. Inhabitants of Ipswich, 66 Mass. 488, 492 (1853) (asserting town might be liable for "breach of public duty" in failing to maintain roads); Elliot v. Concord, 27 N.H. 204, 208 (1853) ("[T]he general policy of the law . . . is to subject the town to the action of the party who suffers damage from . . . want of repair of a highway . . . ." (internal quotation

Nothing about the word "cause," historically or today, inherently leads to a rejection of respondeat superior.

As Justice Breyer has noted, "[T]he history on which *Monell* relied consists almost exclusively of the fact that the Congress that enacted § 1983 rejected an amendment (called the Sherman amendment) that would have made municipalities vicariously liable for the marauding acts of *private* citizens."[377] This reliance on the rejection of the Sherman Amendment has been criticized early, often, and in sharp terms.[378]

Even the *Monell* Court noted the very limited range of deductions one could reasonably draw from Congress's rejection of the Sherman Amendment. "[O]f course," the Court acknowledged, "the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees."[379] Yet this rejection, "combined with the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability," means "the inference that Congress did not intend to impose such liability is quite strong."[380]

Thus, as even defenders of the "policy and custom" requirement have acknowledged, the Supreme Court rejected respondeat superior not because of textual or historical evidence that compelled that result,

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marks omitted) (quoting statute at issue in case)); Lee v. Village of Sandy Hill, 40 N.Y. 442, 448–51 (1869) ("I do not mean to assert the rule as against municipal corporations broad than it is laid down . . . in [*Thayer*] . . . ."); Town Council of Akron v. McComb, 18 Ohio 229, 230–31 (1849) ("[A] municipal corporation is liable for an injury resulting to the property of another, by an act strictly within its corporate powers, and without negligence or malice."); Squiers v. Village of Neenah, 24 Wis. 588, 593 (1869) ("The case presented . . . is one falling fully within the principle stated in *Thayer* . . . ."); Hurley v. Town of Texas, 20 Wis. 634, 637–38 (1866) ("We have no hesitation in applying the principle of [*Thayer*] to this case.").

377. *Bryan Cty.*, 520 U.S. at 431–32.

378. See, e.g., Achtenberg, Taking History Seriously, supra note 41, at 2204–12 (arguing *Monell* ignored other rationales for Congress's rejection of Sherman Amendment); Jack M. Beermann, Municipal Responsibility for Constitutional Torts, 48 DePaul L. Rev. 627, 635 (1999) ("[E]fforts to discern the meaning of § 1983 from debates surrounding the rejection of the Sherman Amendment yield, at best, weak arguments."); Kramer & Sykes, supra note 35, at 259–60 (noting disparate treatment court gives to city's agents "has nothing to do with the constitutional principles that made the Sherman amendment objectionable"); Peter H. Schuck, Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory, 77 Geo. L.J. 1753, 1755 n.13 (1989) ("At its birth, the doctrine bore the unmistakable imprint of bastardy; its supporting rationale suggests nothing so much as a split-the-difference judicial compromise, a quid pro quo . . . ."); Russell Glazer, Comment, The Sherman Amendment: Congressional Rejection of Communal Liability for Civil Rights Violations, 39 UCLA L. Rev. 1371, 1406–21 (1992) (arguing Congress rejected Sherman Amendment because of concerns about imposing liability on all because of acts of some private mobs—not because of concerns about municipal liability itself).

379. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 693 n.57 (1978).

380. Id.

but rather, because there was "an absence" of textual or historical evidence that compelled the *opposite* result.[381] This approach mirrored the methodology generally found in immunity jurisprudence.

B. *Methodology*

A kindred method structures the Supreme Court's immunity jurisprudence under § 1983. Under this method, the Court looks to how deeply established a common law immunity was at the time of § 1983's passage in 1871. The existence of such an immunity creates a presumption that Congress did not intend to overcome that background absent strong, affirmative evidence to the contrary.

In *Pierson v. Ray*, the Court ruled that local judges are absolutely immune from suits for judicial functions.[382] "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."[383] The Court reasoned that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities."[384] The Court reaffirmed this principle in *Stump v. Sparkman*, blocking a suit that a young woman filed against a judge who ordered her sterilization as a child because she was "somewhat retarded."[385]

Similar reasoning informed the Court's recognition of legislative immunity in cases against local legislators. In *Bogan v. Scott-Harris*, the Court noted that "[t]he principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law."[386] This principle even took on a quasi-constitutional status, as "[t]he Federal Constitution, the Constitutions of many of the newly independent States, and the common law thus protected legislators from liability for their legislative activities."[387] "Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace."[388] The Court found that "Congress did

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381. In his defense of the "policy and custom" requirement, Michael Gerhardt called the *Monell* Court's apparent reliance on legislative history to reach their result "misleading." Gerhardt, supra note 42, at 541 ("[T]he Court treated section 1983 as . . . an open-textured delegation of authority . . . to establish the terms of federal court supervision of conduct by states . . . . [T]he policy or custom requirement was an exercise by the . . . Court of its perceived jurisdiction to decide the contours of federal common law . . . .").

382. 386 U.S. 547, 553–54 (1967).

383. Id. (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872)).

384. Id. at 554.

385. 435 U.S. 349, 351 (1978) (internal quotation marks omitted).

386. 523 U.S. 44, 48 (1998).

387. Id. at 49.

388. Id. at 52.

not intend for § 1983 to 'impinge on a tradition so well grounded in history and reason.'"[389]

A similar approach motivated the Court's heightened municipal causation requirement. In *Monell*, the Court observed the existence in the nineteenth century of "then-controlling constitutional and common-law principles" that would have raised serious doubts about Congress's ability to impose affirmative obligations on creatures of state law.[390] For example, while not binding today, the Court held in *Collector v. Day* that Congress could not tax the salary of a state officer.[391] Similarly, "a series of State Supreme Court cases in the mid-1860's . . . had invalidated a federal tax on the process of state courts on the ground that the tax threatened the independence of a vital state function."[392] In light of this background, the "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional."[393]

The Court cited the legislative statements that confirmed this background. In rejecting the Sherman Amendment, Representative Henry Blair noted that "[t]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be."[394] This rejection, "combined with the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability, [creates a strong inference] that Congress did not intend to impose such liability."[395]

As with other immunities, common law and constitutional traditions created a presumption (or inference) against imposing obligations on states and their instrumentalities.[396] The text and history of § 1983 did not create these traditions, but failed to explicitly rebut them.

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389. Id. (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)).

390. Monell v. Dep't of Soc. Services, 436 U.S. 658, 674 n.30 (1978).

391. 78 U.S. (11 Wall.) 113, 128 (1871).

392. *Monell*, 436 U.S. at 679.

393. Id. at 693.

394. Globe App., supra note 114, at 795.

395. *Monell*, 436 U.S. at 693 n.57.

396. This approach also informed the Court's recognition of prosecutorial immunity, see supra note 156 and accompanying text (discussing Imbler v. Pachtman, 424 U.S. 409 (1976)), and witness immunity, see Briscoe v. LaHue, 460 U.S. 325, 334 (1983) (concluding "common law's protection for witnesses is a tradition so well grounded in history and reason that we cannot believe that Congress impinged on it by covert inclusion in the general language before us" (internal quotation marks omitted) (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951))).

V. CONSEQUENCES

Beyond transparency and taxonomical accuracy, what consequences should or would flow from conceptualizing local governments and their agents' shields from suit as local sovereign immunity? This question is best understood as having three components. First, are there consequences that flow from simply thinking about individual immunities and the municipal causation requirement collectively, with attentiveness to the ways that the doctrines operate synergistically? Second, is it useful to think of these doctrines as a form of sovereign immunity? Third, are there benefits to conceptualizing local governmental immunities as a part of the court's broader republican sovereign jurisprudence? This Part considers each of these questions and uses the answers as a basis for potential doctrinal reform.

A. *Doctrines in Dialogue*

It is difficult to appreciate the scope, cause, or nature of the accountability gap in constitutional torts if the various doctrines of immunity and municipal causation are treated as disconnected or unrelated.[397] No case illustrates this better than *Bogan v. Scott-Harris*.[398] In that case, a jury found that the City of Falls River in Massachusetts and two of its officials unconstitutionally voted to eliminate a city position as retaliation for an employee's constitutionally protected speech.[399] One of those city officials was the mayor who signed the legislation eliminating the position.[400] The First Circuit affirmed the verdict against the city officials, concluding that the decision to eliminate the position was more of an administrative personnel choice than a legislative choice.[401] The court reversed the verdict against the city, however, finding that there was insufficient evidence that the retaliatory motive was widely shared by other council members.[402] By the time the case reached the Supreme Court, the question presented was whether and, if so, when the doctrine of legislative immunity should extend to the local governmental officials.[403]

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397. Erwin Chemerinsky made a similar point in a 2014 opinion piece. See Erwin Chemerinsky, Opinion, How the Supreme Court Protects Bad Cops, N.Y. Times (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html (on file with the *Columbia Law Review*) ("Taken together, these rulings have a powerful effect. They mean that the officer who shot Michael Brown and the City of Ferguson will most likely never be held accountable in court. How many more deaths and how many more riots will it take before the Supreme Court changes course?").

398. 523 U.S. 44, 45 (1998).

399. Id. at 47–48.

400. Id.

401. Scott-Harris v. City of Fall River, 134 F.3d 427, 441 (1st Cir. 1997).

402. Id. at 439–40.

403. *Bogan*, 523 U.S. at 46.

While the Court provided multiple reasons for its decision to extend the doctrine of absolute legislative immunity to this context,[404] one of those reasons is simultaneously striking, concerning, and revealing. The Court reasoned that suits are available against municipal officials: "[C]ertain deterrents to legislative abuse may be greater at the local level than at other levels of government."[405] "Municipalities themselves can be held liable for constitutional violations, whereas States and the Federal Government are often protected by sovereign immunity."[406]

This aspect of *Bogan*'s reasoning is notable on at least two levels. As an initial matter, as readers are now aware, while local governments are not formally recognized as beneficiaries of "sovereign immunity," they are regularly immunized from suit.[407] The Supreme Court's rigid and unyielding application of *Monell* means that, as a practical matter, local governments often are *not* subject to suit.[408] Therefore, it is questionable that a lack of formal local sovereign immunity should cause the Court to worry less about expanding local officials' absolute immunity.

On a more specific level, the plaintiff in *Bogan* could not sue the local government. By the time the case had reached the Supreme Court, the First Circuit had already overturned a jury's finding that the city was liable for retaliation in violation of the First Amendment.[409] Noting that the evidence only showed that fewer than half of the city-council members who voted for the ordinance acted with animus, the court stated, "We cannot rest municipal liability on so frail a foundation."[410]

When defining the scope of individual liability against constitutional tortfeasors, courts should not lose sight of the ever-narrowing scope of municipal liability. As *Bogan* demonstrates, it is sometimes conceptually difficult to appreciate the manner in which these doctrines interact to expand the rights–remedies gap. And if nothing else, thinking of these doctrines as one synergistic doctrine rather than isolated strands helps reduce the likelihood that we (or worse, courts) will commit this error. "Local sovereign immunity" provides a common doctrinal home for individual and entity liability, ensuring that each form of liability remains in dialogue with the other.

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404. For example, the Court noted it had extended the doctrine of absolute immunity to legislators of regional commissions several decades earlier. See id. at 49 ("Recognizing this venerable tradition, we have held that state and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities." (citing Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979))).

405. Id. at 53.

406. Id.

407. See generally Part I (discussing mechanisms protecting local governments and agents from liability).

408. See section I.B (discussing *Monell*).

409. Scott-Harris v. Fall River, 134 F.3d 427, 440 (1st Cir. 1997).

410. Id. at 440.

B. *The "Embarrassing Eleventh Amendment"*[411]

Sovereign immunity is not tethered to any particular constitutional or legislative provision. This is true of federal, state, and local sovereign immunity. Courts have treated federal sovereign immunity as an unquestionable, self-evident premise,[412] and have only occasionally relied on constitutional text.[413] And while state sovereign immunity is often called "Eleventh Amendment immunity,"[414] this is a misnomer. The Court has made clear that sovereign immunity is neither derived from nor limited by the text of that amendment. Rather, because states entered the union as sovereign, they remain sovereign, and are therefore immune from suit.[415]

The atextual nature of state sovereign immunity has led to sustained and varied critiques of the doctrine.[416] In prior work, I have joined the chorus of these criticisms in the context of suits sounding in federal question jurisdiction and suggested that there are ways to alter the doctrine that would help further its purported aims such as protecting representative democracy.[417] The doctrine of local sovereign immunity—which has a common genesis and common aims as the doctrine of state sovereign immunity—should be a part of those conversations.

This is especially true in light of the vast costs of the heightened causation requirement and related individual immunities. The requirement often dooms suits against local governments, even when it can be shown that a local agent committed a constitutional violation. This Article has pointed to two types of cases against local governments in which the heightened causation requirement presents an insur-

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411. Michael E. Solimine, Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment, 101 Mich. L. Rev. 1463, 1463 (2003) (book review). This section's title is a riff on Sanford Levinson's seminal piece, Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989).

412. See, e.g., United States v. Bormes, 133 S. Ct. 12, 16 (2012) ("Sovereign immunity shields the United States from suit absent a consent to be sued that is unequivocally expressed." (internal quotation marks omitted)).

413. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 33–34 (1989) (Scalia, J., concurring in part and dissenting in part) ("[S]ince the Constitution does not . . . require that private individuals be able to bring claims against the *Federal Government* for violation of the Constitution or laws . . . it is difficult to see why it must be interpreted to require that private individuals be able to bring such claims against the *States*." (citing U.S. Const., art. I, § 9, cl. 7; United States v. Testan, 424 U.S. 392, 399–402 (1976), overruled by Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996))); cf. Paul F. Figley & Jay Tidmarsh, The Appropriations Power and Sovereign Immunity, 107 Mich. L. Rev. 1207, 1209 (2009) (arguing Appropriations Clause provides textual basis for federal sovereign immunity).

414. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 *passim* (2000).

415. See supra section II.B (describing reliance of state sovereign immunity jurisprudence on republican sovereignty).

416. See supra note 37 (describing scholars' examination of whether sovereign immunity doctrine goes beyond text of Eleventh Amendment).

417. See Smith, Awakening, supra note 13, at 1973 (stating two textual theories Court could use to resolve tensions in existing sovereign immunity jurisprudence).

mountable barrier to suit against a city. First, the requirement often leaves victims of lawless conduct with *no* defendant to sue, despite a constitutional violation.[418] That is, the requirement conspires with absolute or qualified immunity, ensuring that the victim is left with no legal remedy whatsoever. Second, the requirement sometimes permits a plaintiff to sue a government wrongdoer, but not the municipality who employs that wrongdoer.[419]

Between these two outcomes, of particular concern are those cases in which *no* government actor may be held accountable for constitutional wrongdoing. One of the key goals of § 1983 was to provide a remedy for violations of federal law where such remedies "though adequate in theory, [were] not available in practice."[420] Leaving plaintiffs without a remedy against any defendant undermines this goal. Are there ways to achieve fewer instances in which victims are left with no legal remedy against any actor?

Closing the rights–remedies gap for local violations would require amending the heightened causation requirement, amending qualified and absolute immunities, or both. And conceptualizing the barriers to constitutional suits against local-government defendants provides a framework and set of principles for discussions about what such reforms might look like. As it stands today, the Court often eliminates avenues for government accountability while expressly (and sometimes wrongly) assuming that other avenues are available.

The precise nature of such reforms is beyond the scope of this project. But if nothing else, those skeptical of the sprawling and byzantine doctrine of state sovereign immunity's role in and obstruction of enforcement of federal rights should take care not to ignore that doctrine's consequential offspring: local sovereign immunity. In addition, understanding the genesis and development of municipal immunities for state *common law* torts can help us place in context how anomalous and anachronistic our approach to constitutional torts has become.[421]

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418. See supra notes 146–178 and accompanying text (discussing heightened deliberate indifference standard and resulting lack of remedy for plaintiff in *Connick v. Thompson*); supra notes 339–349 and accompanying text (explaining defendant's qualified immunity left plaintiff in *Buckley v. Haddock* without remedy).

419. See, e.g., Groh v. Ramirez, 540 U.S. 551, 563–66 (2004) (denying qualified immunity to local officials who violated clear constitutional text).

420. Monroe v. Pape, 365 U.S. 167, 174 (1961).

421. To the extent that state legislatures have implemented a more accountability-centric approach to enforcing rights against governmental defendants, might one approach be for federal courts to defer to those determinations in § 1983 suits? The idea is worthy of serious consideration and study. On the one hand, such an approach could potentially serve as a site of what Robert Schapiro has famously called "polyphonic federalism." After all, such an approach could serve to foster "interaction of state and federal power" in a manner that could potentially enhance individual liberty. Schapiro, supra note 306, at 252; see also Robert A. Schapiro, Polyphonic Federalism: Toward the Protection of Fundamental Rights 98 (2009) ("[T]he polyphonic conception of federalism

C. *Balancing Republican Principles: Toward Reforms*

The rhetoric of republicanism has inflected and buoyed state-sovereignty doctrines like anticommandeering and state sovereign immunity in recent decades. As state sovereignty jurisprudence has ascended, the Court has not relied on the monarchial, static, hierarchical version of sovereignty often associated with that word. The sovereignty of American jurisprudence rests on the idea that the "ultimate power" can reside wherever the people express their collective will through channels of representative government—in sites like state, federal, and, as documented here, local governments.

Under this vision, the Court does not defend governmental "autonomy" and "federalism" for their own sake. Rather, the Court tells us, "the federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'"[422] The Court justifies doctrines of federalism and state sovereignty by contending that the doctrines permit "[s]tates to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."[423] If we take these claims seriously, the Court's state sovereignty jurisprudence is accompanied by a set of republican-infused constitutional norms that we can use to help gauge the efficacy of state sovereignty doctrines and reform the doctrines when they fall short.[424]

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promotes the classic values of choice and competition, self-governance, and prevention of tyranny . . . ."). On the other hand, history has shown that vesting state governments with the power to decide when local governments are subject to federal suit can lead to mischief and obstruction of the enforcement of federal rights. See Howlett v. Rose, 496 U.S. 356, 375 (1990) ("If the District Court of Appeal meant to hold that governmental entities subject to § 1983 liability enjoy an immunity over and above those already provided in § 1983, that holding directly violates federal law.").

422. Bond v. United States, 131 S. Ct. 2355, 2364 (2011) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

423. Id.

424. This is not to say that other metrics are not important. Republican-inspired metrics can be used in tandem with, rather than to the exclusion of, metrics like compensation, deterrence, and accountability for their own sakes. See Erwin Chemerinsky, The Case Against the Supreme Court 197–98 (2014) (discussing intrinsic value of holding government accountable for unconstitutional or unlawful acts); Bernard P. Dauenhauer & Michael L. Wells, Corrective Justice and Constitutional Torts, 35 Ga. L. Rev. 903, 914–28 (2001) (discussing accountability using corrective-justice framework); Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. Chi. L. Rev. 345, 372 (2000) [hereinafter Levinson, Making Government Pay] (discussing deterrence); Michael L. Wells, Civil Recourse, Damages-As-Redress, and Constitutional Torts, 46 Ga. L. Rev. 1003, 1011 (2012) (discussing compensation and deterrence).

And yet, despite the purported aims of republican sovereignty, the doctrine of sovereign immunity in the American tradition often resembles its ancient counterpart. Indeed, Professor Peter Schuck has observed that there are ways that the American approach may even be worse, because historically there were mechanisms in place to successfully petition the Crown itself for money damages when the King's agents transgressed private rights.[425] By contrast, in the American system, one often cannot sue the State (or its officials) for damages, even when people have collectively agreed to make states liable for damages through acts of Congress.[426] And while individuals may sue state officials for declaratory and injunctive relief, this is ostensibly only because the Court has analogized the State to the Crown, and concluded that because the State (like the King) can do no wrong, it is logically impossible for the State to be responsible for ongoing illegal acts by its agents.[427] This, alongside sovereign immunity's atextual nature, makes the doctrine an easy target for criticism.

To that end, this Article has discussed an accountability gap in local constitutional litigation, documenting the doctrine from which it originates and the form the accountability gap takes. In addition, this Article has raised questions about whether in light of the unambiguous command of legislation passed pursuant to Section 5 of the Fourteenth Amendment, this gap is fully consistent with the very principles the Court's state sovereignty jurisprudence trumpets.

Again, this alone cannot possibly tell us what the precise contours of sovereign immunity generally—or local sovereign immunity in particular—should look like. Readers are invited to think about what a form of sovereign immunity that is more consistent with republican values could or should be. Because of the atextual, amorphous, and contested nature of state sovereign immunity, individuals will inevitably weigh various factors differently. Some may conclude that an accountability gap is justified in some contexts but not others. Others may conclude a rights–remedies gap is an unacceptable cost, notwithstanding the countervailing factors. Still others may well conclude that the kind of

425. See Peter H. Schuck, Suing Governments: Citizen Remedies for Official Wrongs 30–35 (1983) (discussing sovereign immunity in English common law tradition).

426. That is, at least, Congress may not abrogate sovereign immunity when legislation is passed pursuant to the Commerce Clause. See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) ("Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."). And as noted, in § 1983 suits, absolute and qualified immunities often stand in the way of suits. See supra section I.C (considering individual immunities for government agents).

427. See Ex parte Young, 209 U.S. 123, 159–60 (1908) (stating in "every case where an official claims to be acting under the authority of the State" and takes unconstitutional or illegal action, actor is proceeding without State's authority and is "stripped of his official or representative character").

express "balancing of principles"[428] that sometimes works its way into immunity doctrines looks more like legislation than judicial decision-making and is therefore better left to Congress to fix.

As we work toward a system of constitutional torts that better reflects our constitutional aspirations, regardless of whether Congress or courts lead the way, the following two related considerations warrant further study.

1. *A Synergistic Remedy?* — First, because immunities for governmental agents and immunities for local entities often work in tandem to block constitutional accountability, the optimal approach to adjudicating constitutional torts should take this synergy into account. The challenge to constitutional norms like representative government and federalism are starkest in cases like John Thompson's.[429] A flagrant, intentional, highly consequential constitutional violation almost cost Thompson his life. And yet, our legal system renders his constitutional (and incidentally, state law) claims unintelligible. Prosecutorial immunity and the municipal causation requirement operate together to erase Thompson's jury verdict, leaving him with no civil forum to adjudicate his federal rights. But it does not necessarily follow that a regime of absolute liability for government entities—the currently preferred approach of most writers in this area[430]—is the only solution.

What if our system of constitutional torts explicitly acknowledged the manner in which various federalism doctrines work together to prevent constitutional violations like Thompson's from even being adjudicated at trial? For example, what would be the relative costs and benefits of a regime that permitted liability against local governments under a theory of respondeat superior liability when there is no other adequate remedy available at law?

To be sure, to assess the efficacy of any particular proposal, including this one, we would want to know more. For example, does damages liability actually deter unconstitutional conduct? Relatedly, is the constitutional tortfeasor or the employer in a better position to avoid constitutional harms? In the language of traditional torts, is the principal or the agent the "cheapest cost avoider"?[431]

This Article's working assumption is that the employer is in the best position to avoid constitutional harm. Over the past few decades, Professors Schuck, Guido Calebresi, and Myriam Giles have all argued

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428. Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982) ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.").

429. See supra text accompanying notes 146–168 (discussing Thompson's case).

430. See Jeffries, Liability Rule, supra note 338, at 241 (noting "academic opinion favors" absolute liability and citing examples).

431. Guido Calabresi & Jon T. Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055, 1060 (1972).

that governmental employers are in the best position to engage in general deterrence.[432] Professor Charles Epp has lent compelling empirical support to this claim, identifying the systemic changes local governments have engaged in to avert liability by reducing the risk of unlawful harms.[433] For example, police forces across the country increased training of police officers when *Monell v. Department of Social Services* and its progeny converted a dormant § 1983 into a live possibility for constitutional liability.[434] What is more, as our nation today collectively focuses its attention on issues of police violence, it is becoming increasingly apparent that we should encourage governmental leaders to think deeply about systemic rather than episodic ways to reduce unlawful interactions between the police and the policed.[435]

One leading scholar in this area, Professor John Jeffries, Jr., recently advanced another proposal that, while quite different from my own tentative proposal above, nonetheless shares my goal of accounting for the ways that various immunities doctrines operate collectively. He notes that "[t]he proliferation of inconsistent policies and arbitrary distinctions renders constitutional-tort law functionally unintelligible."[436] And he observes that despite the "impressive" articles governing various immunities and the municipal causation requirement, "there are relatively few sustained efforts to understand the relations among these issues or to justify particular doctrines in terms applicable to all."[437]

The organizing principle of constitutional torts, Professor Jeffries argues, is or should be "fault"—that is, normative culpability.[438] With few

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432. See Ciraolo v. City of New York, 216 F.3d 236, 247–48 (2d Cir. 2000) (Calabresi, J., concurring) (arguing punitive damages can deter constitutional violations by municipalities); Schuck, supra note 425, at 102–06 (arguing government liability would strengthen general deterrence); Myriam E. Gilles, In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies, 35 Ga. L. Rev. 845, 880 (2001) ("In sum, making governments pay may not prove optimal, but this regime does effectuate deterrence against future constitutional violations."). But see Levinson, Making Government Pay, supra note 424, at 347 (arguing damages are less effective deterrent for public actors because they do not internalize costs in same way as private actors).

433. See Epp, supra note 40, at 95–98, 98 fig.5.1 (summarizing review of discussions of legal liability in *Police Chief* magazine and surveys of officers on impact of liability).

434. See id. at 104–05 (discussing increased training recommended by articles in *Police Chief* magazine after post-*Monell* police liability cases were handed down, including *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

435. See generally Devon W. Carbado, The Legalization of Racial Profiling: Setting the Stage for Police Violence, 104 Geo. L. J. (forthcoming 2016) (manuscript at 6–23) (on file with the *Columbia Law Review*) (describing model of racialized police violence composed of six factors—"racial stereotyping, residential segregation and economic disinvestment, mass criminalization, 'broken windows' policing, and Fourth Amendment law"—that "continually expose African Americans to the possibility of police violence by continually exposing them to law enforcement surveillance and contact").

436. Jeffries, Liability Rule, supra note 338, at 208.

437. Id.

438. Id. at 209.

exceptions, this principle should control regardless of whether the defendant is a police officer, a city, or a state. In each of these instances, a modified form of qualified immunity should guide whether a defendant is liable. "Modified" because the doctrine of qualified immunity has far outpaced its goal of simply not holding a public servant liable when it is unreasonable to have expected her to know the law.[439] He argues that this problem is particularly troubling in some federal judicial circuits, agreeing with two scholars' observation that the Eleventh Circuit has become the land of "'unqualified immunity.'"[440] As for judges and prosecutors, he recommends reining those absolute immunities in as well when there is no other adequate remedy available at law.[441]

Professor Jeffries's proposal would represent a profound improvement over the current state of the law. Amending qualified immunity doctrine as he suggests would undoubtedly narrow the rights–remedies gap. And his observation that there are some circuits, like the Eleventh, where this problem is particularly acute comports with my own observations. In Part III of this paper, the story of John Buckley is emblematic—where officers received qualified immunity for tasing a homeless, unarmed, sobbing man on the side of the road for failing to stand up.[442]

What is more, recent actions of the United States Supreme Court suggest that it is likely time to add the Fifth Circuit to the list where unqualified immunity appears to be the norm. In 2014, within the span of two weeks, the Court vacated two Fifth Circuit excessive-force decisions that granted qualified immunity to officers who used potentially lethal force against unarmed men.[443] One of those cases involved gunshots fired at an unarmed young black man on his own front porch, who was fifteen to twenty feet from the shooting officer.[444] The other case involved a *handcuffed*, unarmed young black man who died after being tased eight times, despite his pleas that the jolts of electricity were literally killing him.[445] Reining in qualified immunity would bring the reach of § 1983 much closer to its republican promise.

That said, a proposal along the lines tentatively offered here—damages against cities when individual liability is not available—would better achieve accountability as a matter of both principle and practice

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439. See id. at 261 ("Qualified immunity as currently administered protects much error that is plainly *un*reasonable, simply because of the vagaries of prior adjudication.").

440. Id. at 250 n.151 (quoting Elizabeth J. Normal & Jacob E. Daly, Statutory Civil Rights, 53 Mercer L. Rev. 1499, 1556 (2002)).

441. Id. at 220, 230.

442. Supra notes 339–349 and accompanying text.

443. Thomas v. Nugent, 134 S. Ct. 2289 (2014); Tolan v. Cotton, 134 S. Ct. 1861 (2014).

444. *Tolan*, 134 S. Ct. at 1863.

445. Thomas v. Nugent, 539 F. App'x 456, 456–57 (5th Cir. 2013), vacated, 134 S. Ct. 2289.

than Professor Jeffries's. First, under Professor Jeffries's proposal, there would still be instances in which a federal-constitution right has been violated, but there is no remedy available at law. Foreseeing this potential critique, Professor Jeffries contends that if damages are available *every* time there is a constitutional violation—even a newly announced one—this could dampen the development of constitutional rights.[446] He invites us to ask, if damages had been available against school boards, would school desegregation cases have progressed they way they did?[447] He posits that the pace of change would have been much slower.

While this point has some force (and I have engaged in a similar thought experiment[448]), I am skeptical that this justifies a rights–remedies gap in constitutional law. This skepticism stems in part from the fact that constitutional law has seemed to develop just fine, even after the Supreme Court rejected qualified immunity for cities in 1980.[449] Consider, for example, the recent litigation over same-sex marriage. Increasingly, federal courts sided with plaintiffs in same-sex marriage cases.[450] The hypothetical availability for damages liability did not seem to dissuade federal courts from articulating a more inclusive vision of equality and liberty than was imaginable two decades ago when the Defense of Marriage Act (DOMA) sailed through Congress.[451]

A second reason that this tentative proposal is likely preferable to Professor Jeffries's is that it is unclear what stops a new "modified" qualified immunity as a matter of theory from becoming the old qualified immunity as a matter of practice. Indeed, he does not object to the extant formulation of qualified immunity, in which qualified immunity is appropriate "'insofar as . . . conduct does not violate clearly established statutory or constitutional rights of which a reasonable

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446. See Jeffries, Liability Rule, supra note 338, at 246 ("In my view, some gap between constitutional rights and the damages remedy is a good thing. It is not a problem to be solved, but an asset to be preserved. Eliminating that gap entirely would have a baleful effect on the content and development of constitutional law.").

447. See id. at 247–48 (noting pace of ending American apartheid might have slowed if money damages had been available); see also Jeffries, Right–Remedy Gap, supra note 36, at 100–02 (same).

448. See Smith, Awakening, supra note 13, at 1973 ("Outside the educational contexts, would de jure racial equality have happened more quickly if lawsuits had been permitted to vindicate the types of psychic and economic harms that state-sponsored apartheid likely exacted? We will never know.").

449. See Owen v. City of Independence, 445 U.S. 622, 650 (1980) (rejecting "construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations").

450. See Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) (observing "petitioners are 14 same-sex couples" and "[e]ach District Court ruled in their favor").

451. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1783C (2012)), invalidated by United States v. Windsor, 133 S. Ct. 2675 (2013).

person would have known.'"[452] The problem, he contends, is that its application is "hyper-technical and unbalanced," focusing too much on what is clearly established and too little on what is reasonable.[453] The focus, and therefore the standard itself, should be what is "clearly unconstitutional."[454]

But as Professor Jeffries notes, the Supreme Court already basically said this in *Hope v. Pelzer*, where it reversed the Eleventh Circuit's conclusion that a plaintiff must identify materially indistinguishable case law to overcome qualified immunity.[455] Some violations, the Court admonished, are clear or "obvious" without such precedent.[456] And still, in his estimation and my own, problems of unqualified immunity persist.

Finally, if there are legitimate reasons to be concerned about damages judgments against local governments for unconstitutional violations, perhaps part of our collective thinking in this area should be on limiting damages or the *execution* of judgments against governments when the constitutional violation at issue is unclear. This is discussed further below.

In sum, while Professor Jeffries's proposal would improve the law and better protect accountability than the current legal regime, there are reasons to question whether other proposals of the kind I offer for further study here may be closer to optimal.

2. *Damages and Execution of Judgments.* — This Article accepts that suits against the government can present challenges to constitutional norms like representative government. Yet, some of these concerns are rooted in the potential size of monetary damages. When a town is ordered to pay millions, what does that mean for the budgetary decisions the people have collectively made? And which citizens are most likely to bear the brunt of the budget cuts? Other concerns are more about the ability to execute on a judgment than the judgment itself. If a town fails to pay, is the prevailing party entitled to garnish city property?

As we consider how to move toward a better system of constitutional torts, damages caps or limits on execution of judgment (for constitutional violations previously unapparent) warrant consideration. As noted in Part II, damages caps are one mechanism that many states have used to address the problem of excessive damages awards against

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452. Jeffries, Liability Rule, supra note 338, at 262 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) ("This statement is not itself objectionable.").

453. Id.

454. Id. at 263.

455. 536 U.S. 730, 741 (2002) ("Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.").

456. Id. at 745 (concluding "obvious cruelty" of challenged practice "should have provided respondents with some notice that their alleged conduct violated" plaintiff's constitutional rights).

state and local governments.[457] As laboratories of experimentation, states' efforts in the area of *traditional* torts may teach us about the direction we should take constitutional torts.

A related proposal was offered a few years ago by James Pfander in an important piece in the *Columbia Law Review*.[458] He argued that when a plaintiff only seeks nominal damages (say, for example, $1), qualified immunity should not stand as a barrier to suit against governmental officials.[459] This would significantly narrow the rights–remedies gap, he explained. Further, normative concerns about holding individuals liable for unclear constitutional torts are mitigated substantially when a defendant is on the hook for little.

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457. States that have damages caps include Colorado, Colo. Rev. Stat. § 24-10-114 (2015) ($350,000 per claimant and $990,000 per incident); Delaware, Del. Code. Ann. tit. 10, § 4013 (2016) ($300,000 unless government is insured); Florida, Fla. Stat. Ann. § 768.28 (2015) ($200,000 per claimant and $300,000 per incident); Georgia, Ga. Code Ann. § 50-21-29 (2015) ($1,000,000 per claimant and $3,000,000 per incident); Hawaii, Haw. Rev. Stat § 662-12 (2013) (25% cap on attorney's fees); Idaho, Idaho Code Ann. § 6-926 (2015) ($500,000 per incident unless covered by insurance); Illinois, Ill. Ann. Stat. ch. 705, §§ 505/8 (2014) (varies depending on nature of claim); Indiana, Ind. Code § 34-13-3-4 (2014) ($700,000 per claimant and $5,000,000 per incident); Kan. Stat. Ann. § 75-6105 (2014) ($500,000 per incident); Kentucky, Ky. Rev. Stat. Ann. § 44.070 (2015) ($200,000 per claimant and $350,000 per incident); Louisiana, La. Stat. Ann. § 13:5106 (2015) ($500,000 per claimant with certain exceptions); Maine, Me. Rev. Stat. Ann. tit. 14, § 8105 (2015) ($400,000 per incident); Maryland, Md. Code Ann., State Gov't § 12-104 (2014) ($400,000 per claimant); Massachusetts, Mass. Gen. Laws. Ann. ch. 258, § 2 (2015) ($100,000 per claimant); Minnesota, Minn. Stat. Ann. § 3.736 (2014) ($1,500,000 per incident); Mississippi, Miss. Code. Ann. § 11-46-15 (2014) ($500,000 per incident); Missouri, Mo. Rev. Stat. § 537.610 (2014) (limits insurance coverage—and liability—to $300,000 per claimant and $2,000,000 dollars per incident); Montana, Mont. Code Ann. § 2-9-108 (2015) ($750,000 per claimant and $1,500,000 per incident); Nebraska, Neb. Rev. Stat. § 81-8,224 (2014) ($50,000 absent authorization); Nevada, Nev. Rev. St. § 41.035 (2014) ($100,000 per claimant); New Hampshire, N.H. Rev. Stat. Ann. § 541-B:14 (2015) ($475,000 per claimant and $3,750,000 per incident, absent insurance); New Mexico, N.M. Stat. Ann. § 41-4-19 (2015) ($750,000 per incident); North Carolina, N.C. Gen. Stat. § 143-299.2 (2015) ($1,000,000 for all claimants for "injury and damage to any one person arising out of any one occurrence"); Oklahoma, Okla. Stat. tit. 51 § 154 (2015) ($1,000,000 per incident and less for particular claims); Pennsylvania, Pa. Stat. and Cons. Stat. Ann. tit. 42, § 8528 (2016) ($250,000 per claimant and $1,000,000 per incident); Rhode Island, R.I. Gen. Laws § 9-31-2 ($100,000) (2012); South Carolina, S.C. Code Ann. § 15-78-120 (2015) ($300,000 per claimant and $600,000 per incident); Tennessee, Tenn. Code Ann. § 9-8-307 (2016) ($300,000 per claimant and $1,000,000 per incident); Texas, Tex. Civ. Prac. & Rem. Code Ann. § 101.023 (2015) ($250,000 per person and $500,000 "for each single occurrence for bodily injury or death"); Utah, Utah Code Ann. § 63G-7-604 (2015) ($583,900); Vermont, Vt. Stat. Ann. tit. 12, § 5601 (2015) ($500,000 per claimant and $2,000,000 per incident); Virginia, Va. Code Ann. §§ 8.01-195.1 (2015) ($100,000 or amount of insurance policy); Wisconsin, Wis. Stat. Ann. § 895.46(6) (2015) ($250,000 against a state officer, employee, or agent); Wyoming, Wyo. Stat. Ann. § 1-39-118 ($250,000 per claimant and $500,000 per incident) (2015).

458. Pfander, Immunity Dilemma, supra note 36, at 1607.

459. Id.

While this proposal makes sound sense, a potential site for future study is whether this proposal is an even better fit for entity liability than for suits against individuals. Permitting nominal damages against *governments*, when individual immunities block damages against the city's agents, has a few potential advantages. First, it helps avoid the latent fairness concerns that attach when a court holds someone individually liable—even nominally—for breaking a law that was by definition unclear. Second, making cities rather than individuals liable under those circumstances helps prevent the doctrine from running up against the concern often expressed in the case law that qualified immunity is not just immunity from liability, but immunity from suit.[460] My suggested approach of treating cities rather than public servants as defendants when law is unclear helps shield governmental officials from the time it takes to defend a lawsuit—including those suits that ultimately turn out to lack merit. Third, as discussed, entity liability is likely a better agent for spurring systemic changes that may lead to an overall reduction in violations.

D. *Collateral Order Doctrine*

Under 28 U.S.C. § 1291, federal courts of appeals have jurisdiction to review "final decisions of the district courts."[461] "Final decisions" generally refer only to final judgments in which a trial court "disassociates itself from a case."[462] But this category also includes a set of prejudgment orders that are "too important" to proscribe immediate review.[463] These immediately appealable orders are called "collateral orders" because they vindicate important interests that are "collateral to" the merits of an action.

These collateral orders include the denial of immunities to governmental officials and government entities. Immunities avoid "'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'"[464] Further, "the collateral order doctrine in [sovereign immunity cases] is justified in part by a concern that States not be unduly burdened by litigation."[465]

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460. Harlow v. Fitzgerald, 457 U.S. 800, 808 (1982) ("[W]e [have] emphasized our expectation that insubstantial suits need not proceed to trial."). Other individual immunities cases express a similar view. As the Court reasoned in *Bogan* v. *Scott-Harris*, "the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace." 523 U.S. 44, 44–45 (1998).

461. 28 U.S.C. § 1291 (2012).

462. Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 42 (1995).

463. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

464. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 816).

465. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

The concerns about the burdens of litigation are also apt in suits against cities. Suits against cities are defended with public dollars—albeit sometimes in the form of insurance premiums.[466] The imposition of such costs on local treasuries, only to have a verdict overturned at a later date, expends dollars that could have been allocated through the processes of representative government. It also imposes unnecessary costs on local officials' time. The "cost and inconvenience and distractions of a trial" exist whether one sues an official or the government itself, for ultimately, it is governmental officials who must answer depositions and questions at trial.[467] Thus, while conceptualizing the municipal causation requirement as an immunity would bring the denials of *Monell* immunity within the reach of the collateral order doctrine, it is not immediately obvious that this is a bad thing.

CONCLUSION

Over the course of § 1983's life, local governments have changed significantly. In the 1870s, some municipalities lacked "general funds" or

466. Cf. Richard Frankel, Regulating Privatized Government through § 1983, 76 U. Chi. L. Rev. 1449, 1514 (2009) (observing less litigation means lower insurance premiums for cities with indemnification insurance). Frankel contends that courts have wrongly relied on the *Monell* line of cases in refusing to impose respondeat superior liability on *private* employers who violate federal rights. Id.

467. Tenney v. Brandhove, 341 U.S. 367, 377 (1951). Allowing immediate prejudgment appeal also has efficiency benefits for plaintiffs. A jury of John Thompson's peers, for example, awarded him $14 million following a lengthy trial. Connick v. Thompson, 131 S. Ct. 1350, 1357 (2011). When the Supreme Court reversed, it thwarted Thompson's expectation interest in this compensation. These emotional ups and downs could have been avoided if New Orleans had been permitted to immediately appeal the federal district judge's *Monell* decision. If we construe such decisions as denials of cities' municipal immunity defense, such orders would be immediately appealable. A number of authors have advocated revisiting the final judgment rule under some circumstances. See, e.g., Howard B. Eisenberg & Alan B. Morrison, Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules, 1 J. App. Prac. & Process 285, 287–88 (1999) (recommending "adoption of a new rule that would create a right to request interlocutory review" in certain situations); Martin H. Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 Colum. L. Rev. 89, 92 (1975) ("[T]here exists a need to relax the rule of finality still further by increased intelligent use of the pragmatic approach to the appealability of interlocutory orders."); Michael E. Solimine, Revitalizing Interlocutory Appeals in the Federal Courts, 58 Geo. Wash. L. Rev. 1165, 1167 (1990) (suggesting "somewhat more expanded use of interlocutory appeals"); Adam N. Steinman, Reinventing Appellate Jurisdiction, 48 B.C. L. Rev. 1237, 1243–44 (2007) (proposing reinvention of appellate jurisdiction to provide better foundation for interlocutory appellate review). Noting the efficiency benefits that immediate review can sometimes have for either party, James Pfander and Derek Krohn have advocated letting parties stipulate to immediate review. James E. Pfander & David R. Pekarek Krohn, Interlocutory Review by Agreement of the Parties: A Preliminary Analysis, 105 Nw. U. L. Rev. 1043, 1053 (2011).

treasuries.[468] The same cannot be said of most municipalities today, whose budgets sometimes total millions[469] or even billions of dollars.[470] In 1870, only two states and the District of Columbia had compulsory school attendance laws.[471] Today, virtually every school-age child attends schools, the majority of which are run by local governments.[472] In the 1870s, courts spoke of laws that permitted officers to carry revolvers and pistols in discharge of their official duties.[473] Today, local governments are considering the use of drone technology to police and surveil from the skies.[474] And the relative merits and dangers of police militarization have entered mainstream political discussion, especially in the post-Ferguson era.

With this power accretion, the common law has evolved in ways that render local governments more accountable for violations of the law. Interpretations of § 1983 have not kept up with the common law, however, as courts have cited judicial conceptions of sovereignty to protect local governments and their officials from suit for transgressions

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468. Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 123 (1873) (prohibiting equitable court from imposing tax to satisfy debt on ground municipalities had no general fund).

469. Bob Stuart, Teachers Call for Increased Funding, News Virginian (Mar. 25, 2010, 6:01 AM), http://www.dailyprogress.com/newsvirginian/news/teachers-call-for-increased-funding/article_226286f6-10c5-5836-9627-a410cb16c6d2.html [http://perma.cc/NS9A-G7S7] ("A $90-million budget passed Tuesday by the Augusta County School Board tentatively lowered county funding for the second straight year.").

470. See 2016 City Chi. Budget Overview 21, http://www.cityofchicago.org/content/dam/city/depts/obm/supp_info/2016Budget/2016BudgetOverviewCoC.pdf [http://perma.cc/H5KX-SA7G] ("The 2016 proposed City budget for all local funds is $7.84 billion . . . .").

471. Michael S. Katz, A History of Compulsory Education Laws 17 (1976).

472. See generally William Galston, Parents, Government, and Children: Authority over Education in a Pluralist Liberal Democracy, 5 Law & Ethics Hum. Rts. 284, 304 (2011) ("Today, after two decades of handwringing about the quality of U.S. public education, roughly 90 percent of all school-age children still attend public schools.").

473. E.g., Fife v. State, 31 Ark. 455, 456–57 (1876).

474. E.g., Colorado Senate Rejects Drone Surveillance Limits, CBS Denver (Feb. 25, 2015, 3:01 PM), http://denver.cbslocal.com/2015/02/25/colorado-senate-rejects-drone-surveillance-limits/ [http://perma.cc/8LXB-JM5L]; Orr, supra note 53 (describing ACLU of Northern California's attempt to regulate local law enforcement use of drones for surveillance). Some cities, like Los Angeles, already have drones. See Gregory S. McNeal, Los Angeles City Council Instructs Los Angeles Police Department to Create Drone Policy, Forbes (Oct. 31, 2014, 6:29 PM), http://www.forbes.com/sites/gregorymcneal/2014/10/31/los-angeles-city-council-instructs-los-angeles-police-department-to-create-drone-policy/ (on file with the *Columbia Law Review*) ("In May, the LAPD received two Draganflyer X6 Unmanned Aerial Vehicles (UAV's) from the Seattle Police Department, which initially purchased these vehicles using federal grant funds."). But see Berkeley Bans Use of Drones by Police, but Authorizes Fire Department for Disaster Response, CBS San Francisco (Feb. 25, 2015, 3:59 PM), http://sanfrancisco.cbslocal.com/2015/02/25/berkeley-bans-use-of-drones-by-police-but-authorizes-fire-department-for-disaster-response/ [http://perma.cc/62AK-WD29].

of constitutional guarantees.[475] Four Justices called for a "reexamination" of the heightened municipal causation requirement in 1997.[476] As local governments become more powerful, and the causation requirement becomes more stringent and expansive, this need is even stronger today.

To be sure, there are ways that suits against local governments may threaten representative government and local autonomy. Crippling money damages and intrusive executions of judgments have the power to undermine these important constitutional norms. Yet, there are countervailing reasons why prohibiting such suits also threatens representative government, placing citizens at risk of living in a nation where liberties may be trampled without consequence. Crippling and intrusive violations of rights warrant access to the courts and a form of accountability that says to Americans that their rights and their lives indeed matter. A jurisprudence of local accountability must take these two competing values seriously. Permitting suits against local governments when suits against governmental officials are unavailable facilitates this kind of accountability. So too does a regime that borrows from the more evolved common law by adopting limitations on damages and judgments rather than limiting access to the courts in the first instance. Federal judges have instead created a doctrine of de facto immunity—untethered from the language of any constitutional provision or statute—that locks Americans with real grievances out of court. It is time to revisit this proposition, especially given the pervasive sense ringing out in protests across the nation that there is insufficient accountability for governmental wrongdoing. It is time to revisit and reform this area of law in a manner that simultaneously respects the integrity of local governments *and* the integrity of individual rights alike.

475. See Achtenberg, Immunity, supra note 67, at 524–28 (discussing gap between common law development and static immunities under § 1983).

476. Bryan Cty. v. Brown, 520 U.S. 397, 430–37 (1997) (Breyer, J., dissenting); id. at 416, 429–30 (Souter, J., dissenting).