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# TAKING SUPREMACY SERIOUSLY: THE CONTRARIETY OF OFFICIAL IMMUNITIES

*Donald L. Doernberg\**

## INTRODUCTION

Immunities from suit, whether for governments or government officials, occupy a semi-sacred place in our jurisprudence. Trumpeting sovereign immunity,<sup>1</sup> state and federal governments have long asserted that they are not subject to suit unless they have consented, and the courts have supported them. The U.S. Supreme Court has also created common law immunities for government officials and municipalities. Both kinds of immunity rest on a pervasive misunderstanding of English legal history and a convenient disinclination to consider the distinctive history and political philosophy that underlies the federal government. This Article does not examine the nuances of the official and municipal immunity doctrines, but rather questions their legitimacy in light of constitutional supremacy.<sup>2</sup> It focuses on immunity of executive department officials and municipalities, but casts some doubt on judicial immunity as well.

The remaining three parts of this Article elaborate the thesis that neither English legal history, the United States Constitution, nor the political philosophy that underlies it offers any support for the common law immunities from civil damages that the Supreme Court has created for officials and municipalities that violate constitutional rights. Because these immunities descended from the concept of sovereign immunity, Part I discusses that concept. Part I.A addresses the political philosophy that formed the foundation of the American government. It also briefly canvasses what sovereign immunity has meant in England—at least since the time of Edward I in the late thirteenth century—where its monarchs are

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1. “A government’s immunity from being sued in its own courts without its consent.” *BLACK’S LAW DICTIONARY* 818 (9th ed. 2009).

2. *See* U.S. CONST. art. VI, § 2.

immune in their persons, but where subjects suffering violation of their rights at government hands have always had effective remedies, either against the Crown by way of the petition of right or against Crown officials in ordinary actions for damages. Part I.B then reviews sovereign immunity in the United States, contrasting it with its English forbear.

Part II discusses officials' and municipalities' immunities. Part II.A considers the English practice and shows that Crown officials enjoyed no immunity from suit for unlawful actions undertaken in the name of the Crown. Part II.B reviews immunity in the United States. It notes that the original Constitution did contain one immunity—for federal legislators<sup>3</sup>—but no others. As Part II.B points out, that legislative immunity mirrors one established in England after the Glorious Revolution. The Supreme Court takes the position that the other immunities that it has created also find their roots in England. Part II.B questions that assumption, arguing the implausibility that the Framers constitutionalized only one immunity of many. In fact, the other immunities did not exist in England; they are home-grown and constitutionally unsupportable. Finally, Part II.C will examine the extension of the Court's flawed reasoning in creating municipal immunities.

This Article concludes that the Court has led itself astray with its immunity doctrines. It argues that the Court's supposition of immunities flies in the face of the intense interest in the former colonies in having a bill of rights appended to the Constitution as quickly as possible after ratification. Finally, it points out that the Court's doctrines condone and protect official disobedience to constitutional commands establishing individual rights and suggests that by so doing, the doctrines negate constitutional supremacy and undermine the rule of law.

### I. PRELIMINARY THOUGHTS ON SOVEREIGN IMMUNITY

This symposium concerns official and municipal immunities, but a brief discussion of sovereign immunity in the United States and England is necessary to set the stage. Relations between England and its American colonies soured through the mid-eighteenth century; the story needs no repetition. The resulting revolution was the first recorded instance of colonies overthrowing the colonial power and establishing their own government.<sup>4</sup> The real novelty, however, occurred after the war ended.

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3. *See id.* art. I, § 6, cl. 1. The Eleventh Amendment, ratified in 1795, provides some sort of immunity-like protection to the states from being sued by individuals in federal court, but its contours are unclear. *See infra* note 225.

4. In the musical *1776*, Benjamin Franklin remarks to John Adams, "You talk as if independence were the rule! *It's never been done before!* No colony has ever broken from the parent stem in the history of the world!" PETER STONE & SHERMAN EDWARDS, *1776: A MUSICAL PLAY* (1970). That was not the only unique thing about the American experience. "[T]he impartial historian would report that *no* government had *ever* been instituted on the basis of popular consent[.]" Peter S. Onuf, *Introduction, in* DECLARING INDEPENDENCE: THE ORIGIN AND INFLUENCE OF AMERICA'S FOUNDING DOCUMENT ix, ix (Christian Y. Dupont & Peter S. Onuf eds., 2008).

The first attempt to create a national government was a well known flop.<sup>5</sup> The Articles of Confederation took effect in 1781, and within six years, their inadequacy caused the Americans to discard them.<sup>6</sup>

A. *The Philosophical Foundation of America and Sovereign Immunity in England*

The ensuing convention to remedy the Articles of Confederation's flaws produced the Constitution, and its Preamble differs markedly from the Articles' Preamble. The latter recited that the states were creating the national government,<sup>7</sup> but by 1787, "We the People" created the federal government.<sup>8</sup> The state ratification conventions represented the people, not the states.<sup>9</sup> Sovereignty exists in the people, not in the government.<sup>10</sup> In

5. See JOHN C. MILLER, *THE FEDERALIST ERA 1789-1801*, at 1 (1960) (explaining that Americans' "first effort, the Articles of Confederation, . . . failed to meet the urgent financial needs of the nation, uphold national rights abroad, and counteract the strong centrifugal forces at work in the United States").

6. See, e.g., DONALD L. DOERNBERG, C. KEITH WINGATE & DONALD H. ZEIGLER, *FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS* 607 (4th ed. 2008) ("The colonial experience had sensitized the colonists to the problems of a strong and unresponsive central government. The Articles of Confederation reflected that sensitivity too well: they created so weak a central government that the nation was forced to discard it in only four [sic] years."). Professor Corwin, however, cautions us to remember that "the task before the Convention arose by no means exclusively from the inadequacies of the Articles of Confederation for 'the exigencies of the Union'; of at least equal urgency were the questions which were thrust upon its attention by the shortcomings of the state governments for their purposes." EDWARD S. CORWIN, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511 (1925), reprinted in *AMERICAN CONSTITUTIONAL HISTORY: ESSAYS BY EDWARD S. CORWIN* 1, 3 (Alpheus T. Mason & Gerald Garvey eds., 1964).

7. See ARTICLES OF CONFEDERATION of 1781, pmbl. ("Whereas the Delegates of the United States of America in Congress assembled . . . agree to certain articles of Confederation and perpetual Union . . .").

8. U.S. CONST. pmbl.; see also *United States v. Lee*, 106 U.S. 196, 208 (1882) ("Under our system the *people*, who are there [in England] called *subjects*, are the sovereign.").

9. The ratification statements of all thirteen original states recite that the ratification is on behalf of the *people* of the state, not the state. See 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1787-1870, at 25 (1894) [hereinafter DOCUMENTARY HISTORY] (Delaware); *id.* at 44 (Pennsylvania); *id.* at 61 (New Jersey); *id.* at 83 (Georgia); *id.* at 87 (Connecticut); *id.* at 93 (Massachusetts); *id.* at 121 (Maryland); *id.* at 138 (South Carolina); *id.* at 144 (New Hampshire); *id.* at 144-45 (Virginia); *id.* at 190 (New York); *id.* at 290 (North Carolina); *id.* at 310 (Rhode Island). Chief Justice Marshall, who was a member of the Virginia ratification convention, see CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at 297 (1966), took great pains to emphasize this critical distinction in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-04 (1819):

The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. . . .

[T]he people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the state governments.

discussing the origin of states' sovereign immunity, however, Justice Holmes misunderstood that relationship:

Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. . . . 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.<sup>11</sup>

Holmes failed to realize that the United States did not *make* the Constitution; the Constitution made the United States.<sup>12</sup> That sequence is critical to understanding the proper relationship of the government to its charter. Holmes's statement is irrelevant to whether the federal government, the states, or either's agents are subject to suit for constitutional violations. The former colonists did not create the nation on the theory of Hobbes,<sup>13</sup> but rather on that of Locke, who viewed the people,

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*Id.* at 402–04. In his book written nearly 200 years later, Justice Breyer emphasizes the same theme. *See* STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 122 (2010). Justice Souter has also emphasized this point in the context of states' amenability to suit on federal claims:

[R]atification demonstrated that state governments were subject to a superior regime of law in a judicial system established, not by the State, but by the people through a specific delegation of their sovereign power to a National Government that was paramount within its delegated sphere. When individuals sued States to enforce federal rights, the Government that corresponded to the "sovereign" in the traditional common law sense was not the State but the National Government, and any state immunity from the jurisdiction of the Nation's courts would have required a grant from the true sovereign, the people, in their Constitution, or from the Congress that the Constitution had empowered.

*Seminole Tribe v. Florida*, 517 U.S. 44, 153–54 (1996) (Souter, J., dissenting). State immunity to federal law or federal claims turns the Supremacy Clause on its head. Had the Framers contemplated such immunity, they would have recreated the very kind of central government inefficacy that destroyed the Articles of Confederation. If the states were to remain immune from federal power, the Framers need not have been in Philadelphia at all.

10. Professor Dworkin criticized this notion "that the 'people' are sovereign" as "mean[ing] almost nothing." RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 18 (1978). I see it slightly differently from Professor Dworkin: I think it means almost everything.

11. *Kawanakoa v. Polyblank*, 205 U.S. 349, 353 (1907). Justice Holmes repeated that idea in *The Western Maid*, 257 U.S. 419 (1922): "[W]e must realize that the authority that makes the law is itself superior to it, and that if it consents to apply to itself the rules that it applies to others the consent is free and may be withheld." *Id.* at 432. That may be true with respect to a statute passed by the legislature, but it cannot apply to a constitutional right established by the people. Congress can enact laws that do not allow recovery against the federal government for violations of them. Government liability founded upon a statute rather than the Constitution is different. Congress lacks the power to exempt the government or its agents from constitutional obedience.

12. *Cf.* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 *HARV. L. REV.* 1, 4 (1963) ("[Holmes's] theory, even if analytically possible, clearly does not express either the moral or psychological premises of the Middle Ages. Nor does it adequately account for the law as it existed when he wrote, or as it exists today."):

13. *See generally* THOMAS HOBBS, *LEVIATHAN* (Oxford Univ. Press 1909) (1651). Hobbes's Leviathan was an absolute ruler, who "knows no terms, limits or conditions, and . . . recognizes no other source of authority." DONALD L. DOERNBERG, *SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE* 26 (2005).

not the government, as sovereign.<sup>14</sup> Whereas Hobbes and Filmer<sup>15</sup> saw creation of the civil state as the people's irrevocable *alienation* of sovereignty, Locke characterized legitimate government as *trustee* of the people's sovereign power, which they could withdraw if government breached the trust. The idea that a government—created by the people through a constitution—could exempt itself from obedience to or liability under that constitution would have struck Locke as both laughable and extraordinarily menacing.<sup>16</sup> It would have been the antithesis of government by consent, which lay at the heart of Locke's philosophy.<sup>17</sup> The cognitive dissonance would have been unbearable (as it should be today). The government was supposed to be the people's trustee, not their master.

Why should anyone have thought sovereign immunity was consistent with the American constitutional system? The Constitution has only two purposes: to create government and to restrain it. Sovereign immunity, however, permits the government to cast off the Constitution's restraints with impunity. It demonstrates that government is not subject to the law. It violates Article VI's declaration that "[t]his Constitution . . . shall be the supreme Law of the Land,"<sup>18</sup> by placing government conduct beyond the reach of that "supreme law." In Locke's terms, it permits the trustee to violate the terms of the trust. Perhaps the strangest thing about sovereign immunity in America is that it imports the monarchical model of government that the colonists fought a war to throw off.

What is worse, the model does not even properly reflect English practice. English legal history is replete with instances of individuals obtaining relief against wrongs done in the name of the Crown:

Magna Carta ma[de] clear that early thirteenth-century English society expected the king and all his officers to act consistently with the law of the land, and it provided a remedy for their failure to do so.

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14. See DOERNBERG, *supra* note 13, at 63–70. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1963) (1690).

15. See generally ROBERT FILMER, PATRIARCHA AND OTHER WRITINGS (Johann P. Sommerville ed., Cambridge Univ. Press 1991) (1680).

16. This also demonstrates the weakness of Justice Holmes's statement. Jean Bodin was the first political thinker to articulate the idea of a single, immutable power source, see generally JEAN BODIN, ON SOVEREIGNTY (Julian H. Franklin ed., Cambridge Univ. Press 1992) (1576), and Hobbes further elaborated that view, see generally HOBBS, *supra* note 13. The point upon which Justice Holmes relied is precisely the concept that the colonists rejected by adopting Locke's theory.

17. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. VIII, § 95 (1690), reprinted in LOCKE, *supra* note 14, at 283, 365 ("Men being, as has been said, by Nature, all free, equal, and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own *Consent*. The only way whereby any one divests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it. . . . When any number of Men have so consented to make one Community or Government, they are thereby presently incorporated, and make one Body Politick, wherein the Majority have a Right to act and conclude the rest.").

18. U.S. CONST. art. VI, § 2.

Representative lords were entitled to petition the king for redress and, if the king failed to make good the wrong done, were entitled to raise the populace against him to secure redress. Although the king's and his family's persons were inviolate, royal property was not.<sup>19</sup>

During the reign of Edward I, the aggrieved subject could petition the King for relief. The ability to sue the Crown was “an uncontested point.”<sup>20</sup> Under the legal theory of the day, such suits depended on the King's consent: “The petition of right asked the Crown to submit itself to the laws that applied to private persons. With the standard notation, ‘Let right be done,’ the King usually endorsed such petitions.”<sup>21</sup>

“[U]sually” is particularly important in English law. After all, the English Constitution is unwritten; it is the collection of governmental powers, limitations, and practices that have accumulated over the centuries.<sup>22</sup> Where custom was the law, the king's practice of “seldom openly defy[ing] a request for justice simply on the ground that he had the power to do what he pleased” meant English law provided remedies for wrongs done in the King's name.<sup>23</sup> So, merely to state that the government is not suable without its consent, as Hamilton<sup>24</sup> and Madison<sup>25</sup> did, strips the theory from historical practice.<sup>26</sup> In England, consent was routinely forthcoming.

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19. DOERNBERG, *supra* note 13, at 71 (citing MAGNA CARTA, ch. 61 (Eng. 1215), translated and reprinted in JAMES C. HOLT, MAGNA CARTA app. 6, at 448, 471 (2d ed. 1992)).

20. Paul F. Figley & Jay Tidmarsh, *The Appropriation Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1212 (2009).

21. *Id.* at 1213. The phrase used was “*soit fait droit*.” Ludwik Ehrlich, *Proceedings Against the Crown (1216–1377)*, in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY pt. XII, at 97 (Paul Vinogradoff ed., 1921).

22. See, e.g., Jack Beatson, *Reforming an Unwritten Constitution*, 126 LAW Q. REV. 48, 48 (2010) (“It differs from many others in not being embodied in a written document but in a complex mixture of institutional practices; that is, of history, custom, tradition, and politics reflected in conventions, procedures, and protocols as well as within the body of statute and common law.”).

23. Ehrlich, *supra* note 21, at 26. Remedies lay for disseisin, for a “wrong inflicted by a sheriff, or a bailiff, or even the exchequer” by summoning the derelict official before the exchequer for an inquiry into the lawfulness of his behavior, which might result in an order to desist. *Id.* at 28.

24. THE FEDERALIST No. 81, at 548–49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union.”). Hamilton, however, did not address the question of where sovereignty itself (as distinguished from its attributes) lies in the United States.

25. See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (Jonathan Elliot ed., 2d ed. 1881) (recording Madison's argument at the Virginia ratifying convention that the Constitution did not give any individual the right “to call any state into court”).

26. See WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 251 (London, W. Green 1817) (1783) (“In the British, and possibly in all other constitutions, there exists a wide difference between the actual state of the government and the theory. The one results from the other; but still they are different. When we contemplate the *theory* of the British government, we see the king invested with the most absolute personal impunity . . . . Yet, when we turn our attention from the legal existence, to the actual

*B. Sovereign Immunity in the United States*

It is therefore too facile simply to assert that sovereign immunity was the rule without looking at the practice.<sup>27</sup> The norm in England was that some form of remedy existed.<sup>28</sup> Thus, sovereign immunity in the United States suffers ultimately from three defects: (1) it misidentifies the sovereign in a way that repudiates the political philosophy that underlay the American revolution, (2) it borrows an English monarchical model of government, and (3) it fails even to borrow the model correctly.

Irrespective of its philosophical and political illegitimacy, the concept of sovereign immunity has long roots in the United States. In *United States v. Lee*,<sup>29</sup> referring to Chief Justice Marshall's unquestioning recognition of that principle,<sup>30</sup> the Supreme Court noted that such immunity "has always been treated as an established doctrine" even though "the principle has never been discussed or the reasons for it given."<sup>31</sup> There is good reason that it had never been discussed: the political philosophy of sovereign immunity did not transfer to the United States. Pretending that it did ignores the English practice of several hundred years and imposes the mistake on the American constitutional system. *Lee* cautioned against relying heavily on English sovereign immunity precedent for two reasons. First, English courts at law had little opportunity to address the issue because of the effectiveness of the alternative petition of right.<sup>32</sup> Second, "of much greater weight," was "the vast difference in the essential character of the two governments as regards the source and depositories of power."<sup>33</sup> Having expounded the lack of a philosophical foundation for English

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exercise of royal authority in England, we see these formidable prerogatives dwindled into mere ceremonies . . .").

27. Ironically, this calls to mind Justice Holmes's famous aphorism: "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881). Holmes's further explanation that "the prevalent moral and political theories" and "the story of a nation's development" often "had a good deal more to do than the syllogism in determining the rules by which men should be governed" was equally revealing. *Id.*

28. The remedy was not always in the form of damages. The struggle for financial supremacy between king and parliament routinely left the king short of cash. *See generally* Figley & Tidmarsh, *supra* note 20, at 1217–29 (discussing the struggle and how it ended "in favour of parliamentary supremacy") (quoting E.A. Reitan, *The Civil List in Eighteenth-Century British Politics: Parliamentary Supremacy Versus the Independence of the Crown*, 9 *HIST. J.* 318, 337 (1966)). Therefore, where equitable relief was not possible, the practice was for the king to make a non-monetary grant of some sort to the wronged subject, whether of "land, avowdsons, liberties, [or] rights to hold markets; in short, anything rather than hard cash." Ehrlich, *supra* note 21, at 32.

29. 106 U.S. 196 (1882).

30. *See* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1821) ("This general proposition [sovereign immunity] will not be controverted.").

31. *Lee*, 106 U.S. at 207 (citing *Cohens*, 19 U.S. (6 Wheat.) at 380).

32. *Id.* at 208. *Lee* noted that the petition of right often eliminated the need to sue Crown officials, *id.*, because the Crown was the deep pocket. Eight decades before *Lee*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), had noted, "In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." *Id.* at 163.

33. *Lee*, 106 U.S. at 208.



sovereign immunity in the United States, where no person exercises full sovereign power,<sup>34</sup> *Lee* nonetheless implicitly relied on that theory. It concluded that, there being no sovereign executive power, only Congress could consent to suit against the federal government.<sup>35</sup> It borrowed the *principle* without the *principal* upon whom it depended, importing sovereign immunity without its corresponding remedial system.

Professor Louis Jaffe commented extensively on what one might call the myth of sovereign immunity:

Perhaps the question has been not whether the doctrine of sovereign immunity was “right” but whether as a practical matter it ever has existed. From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown. And when it was necessary to sue the Crown *eo nomine* consent apparently was given as of course. *Long before 1789 it was true that sovereign immunity was not a bar to relief.* Where the doctrine was in form applicable the subject had to proceed by petition of right, a cumbersome, dilatory remedy to be sure, but nevertheless a remedy. If the subject was the victim of illegal official action, in many cases he could sue the King’s officers for damages. And the writs of certiorari, mandamus, quo warranto, and habeas corpus ran against many official boards and commissions, though until recent times we do not find cases where they have run against the King’s high secretaries of state. This was the situation in England at the time the American Constitution was drafted.<sup>36</sup>

In what Professor Jaffe termed “a magnificent irony,”<sup>37</sup> the new American states believed that in the absence of an individual sovereign, consent to suit was not possible as it had been under the Crown. Therefore, the power to consent passed mystically to the state and federal legislatures, which took “many years to authorize suit.”<sup>38</sup>

The irony is greater than Professor Jaffe imagined. The most important cause of the American Revolution was the colonists’ belief that England was denying them the rights of Englishmen. All of their other grievances resembled a bill of particulars explicating that general dissatisfaction.<sup>39</sup>

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34. *See id.* at 206 (“As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests.”).

35. *Id.* at 205–06. It may have been this sort of reasoning that caused Professor Davis to remark that “[h]ardly any other branch of Supreme Court law is so permeated with sophistry as the law of sovereign immunity.” KENNETH C. DAVIS, ADMINISTRATIVE LAW TEXT § 27.04, at 501 (3d ed. 1972).

36. Jaffe, *supra* note 12, at 1–2 (second emphasis added).

37. *Id.* at 2.

38. *Id.*; *see also supra* text accompanying note 35.

39. *See* PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776, at 245 (1972) (noting James Madison’s hope in 1774 that “a ‘Bill of Rights’ might be adopted by Congress and confirmed by the King or Parliament, such that America’s liberties would be ‘as firmly fixed, and defined as those of England were at the [glorious] revolution.’” (quoting Letter from James Madison to William Bradford (Aug. 1, 1774), *in* 1 THE PAPERS OF JAMES MADISON 118 (William T. Hutchinson & William M. Rachel eds., 1962)). Madison’s

Yet, the American form of sovereign immunity created a system of official accountability even less protective of individual rights vis-à-vis government than the English system the colonists had thrown off because it denied them those rights.<sup>40</sup>

Although Alexander Hamilton endorsed sovereign immunity in one of his Federalist papers,<sup>41</sup> he had said something quite different in another, published only a few days earlier, when discussing constitutional supremacy:

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.<sup>42</sup>

This statement, often cited as supporting judicial review,<sup>43</sup> also powerfully reflects John Locke's influence: (1) the United States

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comment underscores the colonists' feeling that England was denying them the fundamental rights of Englishmen:

Whether the Crown could—or could not—alter colonial rights and privileges established through usage and founded on either custom or the colonists' inherited rights as English people was certainly the most divisive issue separating metropolis and colonies during the seven decades following the Glorious Revolution. That issue was at the heart of the recurring controversies over the applicability of English law in the colonies and the status of the colonial assemblies.

JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 18 (2011).

40. See, e.g., Onuf, *supra* note 4, at x (describing “rebellious colonists who had taken up arms to vindicate their rights as Englishmen and who hoped to redeem their mother country and its empire from corruption and incipient despotism.”). In fact, the colonists originally took to arms to regain their English rights, rather than to create new rights protected by a new American government. See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 17–30* (1997) (describing the repeatedly expressed desire of the colonists to mend relations with England rather than separate from it); Onuf, *supra* note 4, at x (“The colonists originally resorted to violence because they were Britons, not because they were ‘Americans.’”); see also GREENE, *supra* note 39, at 8 (“For English people migrating overseas to establish new communities of settlement, the capacity to enjoy—to possess—the English system of law and liberty was thus crucial to their ability to maintain their identity as English people and to continue to think of themselves and be thought of as English. . . . [T]he attempt to establish English law and the rights and liberties of Englishmen was constant from the first settlement to the [American] Revolution’ and beyond.” (quoting GEORGE DARGO, *ROOTS OF THE REPUBLIC: A NEW PERSPECTIVE ON EARLY AMERICAN CONSTITUTIONALISM* 58 (1974) (internal quotation marks omitted))).

41. See *supra* note 24.

42. THE FEDERALIST NO. 78, *supra* note 24, at 524 (Alexander Hamilton). It seems a fair inference that Hamilton would have applied this reasoning to the other two branches of government as well.

43. See, e.g., Jack Wade Nowlin, *Conceptualizing the Dangers of the “Least Dangerous” Branch: A Typology of Judicial Constitutional Violation*, 39 CONN. L. REV. 1211, 1218 (2007) (referring to Hamilton's defense of judicial review as “canonical”); Nicholas Quinn Rosenkrantz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1221 n.32 (2010).

government possesses only delegated, not inherent, power; (2) the government can never legitimately violate the Constitution; and (3) the government is the deputy—the servant—of the people. Had Hamilton said “trustee”<sup>44</sup> instead of “servant,” he might have been accused of plagiarizing Locke.<sup>45</sup>

When the Constitutional Convention met, the maxim *ubi jus ibi remedium* reigned.<sup>46</sup> Chief Justice Marshall went out of his way to make that point in *Marbury v. Madison*.<sup>47</sup> First, he quoted Blackstone: “[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.”<sup>48</sup> Then, he penned one of the most famous lines in American jurisprudence: “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”<sup>49</sup> It is senseless to speak of a right for which there is no remedy.<sup>50</sup> Yet, the effect of an immunity is “freedom from the legal power or ‘control’ of another as regards some legal relation.”<sup>51</sup> Thus, immunities insulate one from the law’s remedy. If there is no remedy, there is no right;

44. See *supra* notes 15–17 and accompanying text.

45. Jefferson had suffered that exact accusation after writing the Declaration of Independence. See Letter from Thomas Jefferson to James Madison (Aug. 30, 1823), in 3 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 1875, 1876 (James Morton Smith ed., 1995) (“Richard Henry Lee charged it as copied from Locke’s treatise on government.”). Jefferson denied it in a letter to Madison: “I know only that I turned to neither book or pamphlet while writing it.” *Id.*

46. See, e.g., THE FEDERALIST NO. 15, *supra* note 24, at 95 (Alexander Hamilton) (“It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.”). Hamilton also noted that without effective remedies for violations of the law, everything would devolve to the “execution by the sword.” *Id.* “Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it.” *Id.* at 96.

47. 5 U.S. (1 Cranch) 137, 163 (1803).

48. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*23).

49. *Id.* The idea was certainly not original with Marshall; Chief Justice Holt of the King’s bench had expressed the same thought a century earlier:

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal.

Ashby v. White, (1703) 92 Eng. Rep. 126 (K.B.) 136; 2 Ld. Raym. 938, 953.

50. See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 207 (9th ed. 1952) (“The proclamation in a constitution or charter of the right to personal freedom, or indeed of any other right, gives of itself but slight security that the right has more than a nominal existence, and students who wish to know how far the right to freedom of person is in reality part of the law of the constitution must consider both what is the meaning of the right and, a matter of even more consequence, what are the legal methods by which its exercise is secured.”).

51. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 55 (1913).

there is merely a hope, wish, or aspiration.<sup>52</sup> In the context of the present discussion, sovereign immunities grant the government “freedom from the legal power or ‘control’ of”<sup>53</sup> the Constitution, the document designed both to create and to control that government. The Constitution’s recognition of individual “rights” against the power of the government becomes a hollow mockery.

## II. OFFICIAL AND MUNICIPAL IMMUNITIES

### A. English Practice

And what of the King’s officials? The well-known but oft-misconstrued phrase “the King can do no wrong” controlled their liability:

[O]riginally [it] meant precisely the contrary to what it later came to mean. “[I]t meant that the king must not, was not allowed, not entitled, to do wrong . . . .” It was on that basis that the King, though not suable in his court (since it seemed an anomaly to issue a writ against oneself), nevertheless endorsed on petitions “let justice be done,” thus empowering his courts to proceed.<sup>54</sup>

Accordingly, no wrongful act by a Crown official was attributable to the King.<sup>55</sup> If the King’s official committed a tort, it was no defense that he acted for the Crown.<sup>56</sup> *Feather v. The Queen*<sup>57</sup> cemented that

52. See generally Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 677–78 (1987).

53. Hohfeld, *supra* note 51, at 55.

54. Jaffe, *supra* note 12, at 4 (second alteration in original) (quoting Erlich, *supra* note 21, at 42); see also James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 901 (1997) (pointing out that Blackstone described this petition process). Professor Pfander quotes Blackstone’s elaboration of the phrase, which bears repeating:

“That the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only, . . . that in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king . . . ; and, secondly, that the prerogative of the crown extends not to do any injury . . . . Whenever therefore it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign, . . . yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to *know of* an injury and to *redress* it are inseparable in the royal breast, it then issues as of course, in the king’s own name, his orders to his judges to do justice to the party aggrieved.”

*Id.* at 901 n.6 (alterations in original) (quoting 3 BLACKSTONE, *supra* note 48, at \*254–55).

55. DICEY, *supra* note 50, at 25 (“[N]o one can plead the orders of the Crown or indeed of any superior officer in defence of any act not otherwise justifiable by law . . . .”).

56. 6 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 266–67 (1927) (“It was well recognized that no tort could be imputed to the crown, because the king could do no wrong. It was also fully recognized after the [Glorious] Revolution [of 1689] that all servants of the crown were personally responsible for torts committed by them, even though they had been in fact committed on the instructions of the crown.”). This is reminiscent of the construction of the Fourth Amendment that the defendants in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), unsuccessfully urged on the Court, which Justice Brennan’s majority opinion summarized this way:

understanding,<sup>58</sup> but long before that, Crown officials who violated the law were liable in tort. For example, “[a]s against sheriffs and inferior ministers, persons who claimed to be wrongly imprisoned had the remedies of *de homine replegiando* (to secure release) or false imprisonment (to recover damages).”<sup>59</sup>

Magna Carta and its requirement of adherence to the “law of the land”<sup>60</sup> gave rise to those rules.<sup>61</sup> Sir Edward Coke traced the condemnation of misuse of official power to that document: “[I]f any man by colour of any authority, where he hath not any in that particular case, arrest, or imprison any man, or cause him to be arrested, or imprisoned, this is against this Act, and it is most hatefull, when it is done by countenance of Justice.”<sup>62</sup> He emphasized that Magna Carta was supreme law and other laws had to be consistent with it, as the Crown had recognized.<sup>63</sup>

### B. American Practice

The Constitution does establish one official immunity. The Speech and Debate Clause<sup>64</sup> immunizes members of Congress with respect to legislative activities.<sup>65</sup> The Constitution prescribes no other official

[T]he Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals.

*Id.* at 390–91.

57. (1865) 122 Eng. Rep. 1191 (Q.B.); 6 B. & S. 257.

58. *Id.* at 1205; 6 B. & S. at 296 (“As the Sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown.”).

59. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 473 (4th ed. 2002).

60. MAGNA CARTA, ch. 39 (Eng. 1215), *translated and reprinted in* HOLT, *supra* note 19, app. 6, at 461.

61. One is apt to think of Magna Carta in constitutional terms, but it is not the British Constitution, although many of the ideas contained within it are part of the British Constitution and, according to Sir Edward Coke, even antedate Magna Carta. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND (1642), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 745, 750 (Steve Sheppard ed., 2003) (referring to Magna Carta and other documents of agreement between the monarch and the lords as “for the most part, but declaratories of the ancient Common Laws of *England*, to the observation, and keeping whereof, the King was bound and sworn.”). The American concept of due process of law and many other rights in the Constitution trace back to Magna Carta’s words. In examining Magna Carta’s language, Coke noted that “[u]pon this Chapter, as out of a roote, many fruitful branches of the Law of England have sprung,” *id.* at 848, including the rights of due process of law, *see id.* at 849, trial by jury, *id.* at 849, 854–55, 857, indictment or presentment, *id.* at 858, and confrontation, *id.* at 856. All of these rights became part of the American Bill of Rights. *See* U.S. CONST. amends. V, VI. This is hardly surprising since the critical issue that drove the colonies away from England was whether the colonists had all the rights of Englishmen residing in England or whether the Crown had acquired greater prerogative with respect to them than it had over its domestic subjects. *See supra* notes 39–40 and accompanying text.

62. COKE, *supra* note 61, at 867.

63. *See id.* at 867–70.

64. U.S. CONST. art. I, § 6, cl. 1.

65. *See Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 501, 507–08 (1975).

immunity.<sup>66</sup> Referring to legislative immunity, *Tenney v. Brandhove*<sup>67</sup> noted that “[t]he provision in the United States Constitution was a reflection of political principles already firmly established in the states,”<sup>68</sup> and traced it to “taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.”<sup>69</sup> One might have expected, if official immunities generally were well established, that the Framers would have included them in the Constitution as well. They did not, however, and the question is why not. There are several possibilities.

First, immunities might have been so well established that the Framers felt no need to include them. If the other immunities did exist at common law, and the Framers intended to leave them in place, that raises the uncomfortable question of why the Framers picked out one immunity for explicit constitutional protection and left the others unstated. That flies in the face of the well-known maxim *expressio unius est exclusio alterius*,<sup>70</sup> and there is no reason to believe that the Framers abandoned such reasoning. The Necessary and Proper Clause<sup>71</sup> and the Ninth Amendment<sup>72</sup> implicitly recognize the maxim. The former specifies that the enumeration of congressional powers in Article I is not exclusive; the latter does the same with respect to the enumeration of rights in the first eight Amendments.<sup>73</sup>

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66. The only suggestion that sovereign immunity has other textual roots in the Constitution has come from Professors Figley and Tidmarsh. See generally Figley & Tidmarsh, *supra* note 20. They argued that the Appropriations Clause, U.S. CONST. art. I, § 9, cl. 7, provides the constitutional underpinning for sovereign immunity because Congress, by refusing to appropriate money to satisfy a judgment, would effectively make the government immune, see Figley & Tidmarsh, *supra* note 20, at 1259. I see it differently. Congress’s refusal would repudiate the rule of law and implicitly deny the federal judiciary’s power to adjudicate constitutional questions, all of which involve the power, prerogative, and behavior of government. When the Framers drafted the Appropriations Clause, they sought to keep power out of the hands of the executive branch, not to immunize the government from constitutional obedience. See *id.* at 1210 (“[T]he Clause was a political given. Its ‘power of the purse’ was intended as the counterweight to the President’s ‘power of the sword.’”). Professors Figley and Tidmarsh assert that “[i]t is only a small, and logical, step from constitutionally commanded legislative control over disbursements from the purse to constitutionally commanded legislative control over private claims against the purse.” *Id.* at 1259. That conclusion rests on an unspoken and unsupportable premise: that Congress can create sovereign immunity by simply refusing to appropriate money to pay judgments supposes that Congress will refuse to recognize judicial determination of individuals’ constitutional rights. Congress thus would become complicit in the executive branch’s violation. The Constitution, however, gives individuals rights against government. Those rights bind the government—the entire government, including Congress. Professors Figley and Tidmarsh’s interpretation of the Appropriations Clause makes individuals’ constitutional rights subordinate to Congress in all matters having to do with federal money. I submit that it is a very large and illogical step.

67. 341 U.S. 367 (1951).

68. *Id.* at 373.

69. *Id.* at 372.

70. “A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.” BLACK’S LAW DICTIONARY 661 (9th ed. 2009).

71. U.S. CONST. art. I, § 8, cl. 18.

72. *Id.* amend. IX.

73. The prevalence of the kind of legal thinking that *expressio unius est exclusio alterius* exemplifies caused objection in the Constitutional Convention when it discussed a bill of

Second, immunities might have been well established, but the Framers deliberately omitted all but legislative immunity from the Constitution. Perhaps the common law immunities existed, and the Framers decided to exclude them and retain only the legislative immunity that English law had codified.<sup>74</sup> Although they did not specify that they were abandoning them, codifying bodies do not commonly mention rules or principles that they are *not* adopting. Remember that the Constitution is a document of enumerated powers and mandated restrictions. It contains nothing like a reception provision, and there is no federal reception statute. Federal law began with the Constitution, and all *federal* law flows from it.<sup>75</sup>

Third, the immunity principles (that the Supreme Court assumes) may not have existed at all.<sup>76</sup> Although the Court keeps asserting that these immunities existed, they may not have. That is consistent with the Constitution's specification of only legislators' immunity. The English had explicitly established it nearly a century earlier.<sup>77</sup>

The Supreme Court has adopted the first possibility, which seems the least plausible. Notably, it has not accorded constitutional status to any of the immunities it has recognized.<sup>78</sup> Instead, it has reasoned backward from a cost-benefit analysis to the unsupported assumption that the Framers intended to retain such immunities.<sup>79</sup> This undisguised, self-proclaimed utilitarian analysis causes some individual constitutional rights to be unenforceable when government violates them. Such results are irreconcilable with constitutional supremacy:

The prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do, and the supposed gains in respect for law

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rights. The concern was that having the Constitution explicitly guarantee some rights would imply that the list was exclusive. *See infra* note 169 and accompanying text.

74. *See* An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown, 1688, 1 W. & M., 2d Sess., c. 2, § 9 (Eng.).

75. One must take that sentence literally. Under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), the federal courts routinely applied principles of "general law," a form of common law based upon a natural-law conception of law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), overruled *Swift*, recognizing the shift in jurisprudential thinking from the natural-law model to a positivist model: "There is no federal general common law." *Id.* at 78. The Court made clear that the common law the federal courts had declared and applied under the *Swift* regime could not have been federal law within the meaning of the Supremacy Clause when it complained that "[p]ersistence of state courts in their own opinions on questions of common law prevented uniformity." *Id.* at 74 (footnote omitted). If the general common law the federal judiciary had announced had been *federal* law, the states would have been obliged to follow it, achieving the federal/state uniformity of which Justice Brandeis wistfully spoke. *See generally* Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV. 611 (2007).

76. Given the antebellum history of suits against government officials, this is the most probable explanation. *See generally* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010).

77. *See supra* note 74.

78. *See infra* notes 102–20 and accompanying text.

79. *See supra* notes 70–73 and accompanying text; *see also supra* note 18 and accompanying text.

are simply utilitarian gains. There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient.<sup>80</sup>

The Court superimposes its cost-benefit balance on the Bill of Rights and some of the amendments that have followed it, notably the Civil War Amendments. That ignores the balance the Supremacy Clause has already struck. If the Court had construed constitutional rights more narrowly than plaintiffs wished—simply not to reach the challenged conduct—then its results would at least have the veneer of constitutional respectability.<sup>81</sup> But it has not done that.

*Kendall v. Stokes*,<sup>82</sup> an early official immunity case, discusses immunity entirely in conclusory terms. “We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his judgment and from a sense of duty, in a matter of account with an individual, has been held liable to an action for an error of judgment.”<sup>83</sup> The Court articulated no policy, referring only to the “greatest mischiefs”<sup>84</sup> that would attend the contrary rule. It cited *Gidley v. Palmerston*,<sup>85</sup> an English case that declared that well-qualified people would decline public service if individual liability on contracts entered into on behalf of the government might follow.<sup>86</sup> *Gidley*, however, did not regard plaintiffs as remediless; the Crown supplied a remedy in the form of the petition of right.<sup>87</sup> Furthermore, *Gidley* was an assumpsit action, involving the government’s obligation to pay a pension that Parliament had allotted to military retirees, and the case it relied on was also a contract case.<sup>88</sup> The American official immunities cases do not sound in contract; they are in the nature of tort founded on constitutional rights. Nonetheless, they have borrowed heavily from the English contract cases.

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80. DWORKIN, *supra* note 10, at 193.

81. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 695–96, 701, 710 (1976) (disallowing a § 1983 action seeking damages for a police flyer labeling plaintiff as a known shoplifter, even though he had no shoplifting conviction, because the Court found no Fourteenth Amendment liberty interest in reputation alone, without any attendant loss of property, right, or privilege).

82. 44 U.S. (3 How.) 87 (1845).

83. *Id.* at 97–98.

84. *Id.* at 98.

85. (1822) 129 Eng. Rep. 1290 (C.P.); 3 Brod & B. 275; *see Kendall*, 44 U.S. (3 How.) at 98 (citing *Gidley*, 129 Eng. Rep. 1290; 3 Brod & B. 275).

86. *See Gidley*, 129 Eng. Rep. at 1294–95 & n.a.; 3 Brod & B. at 286 & n.a. (“No man would accept of any office of trust under government upon such conditions . . . .” (quoting Macbeath v. Haldimand, (1786) 99 Eng. Rep. 1036 (K.B.) 1041; 1 T.R. 172, 181–82)).

87. *Id.* (“[N]o individual is answerable for any engagements which he enters into on [the government’s] behalf. There is no doubt but the crown will do ample justice to the plaintiffs demands, if they be well founded.”).

88. It is significant that *Gidley* rested on utilitarian, not constitutional, grounds. *See infra* notes 102–32 and accompanying text.



*Wilkes v. Dinsman*<sup>89</sup> sounded in tort,<sup>90</sup> and the Court's discussion of the protection available to the defendant is illuminating both for what it said and what it did not say. Dinsman was a marine retained beyond the original ending date of his enlistment, pursuant to a statute.<sup>91</sup> When Dinsman refused to perform his duties, Wilkes punished him by lashes and imprisonment, as authorized by military law.<sup>92</sup> Dinsman asserted claims of trespass *vi et armis*, assault, battery, and false imprisonment, some of it in a foreign jail.<sup>93</sup> His only constitutional claim was an Eighth Amendment claim with respect to the foreign confinement.<sup>94</sup> In a tort case between private individuals, the plaintiff states a prima facie case by introducing proof of "acts of violence," after which "the person using them must go forward next, and show the moderation or justification of the blows used."<sup>95</sup> A case against a public official invested with discretion, the Court noted, was entirely different:

[T]he officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression, or, in the words of Lord Mansfield, . . . that he exercised it as "if the heart is wrong." In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error.<sup>96</sup>

This is immunity but far more limited than the Supreme Court recognizes. It amounts to good faith immunity—a concept the Court toyed with in *Wood v. Strickland*<sup>97</sup> and abandoned in *Harlow v. Fitzgerald*,<sup>98</sup>

89. 48 U.S. (7 How.) 89 (1849).

90. *See id.* at 122.

91. *See id.* at 122, 124.

92. *See id.* at 127.

93. *See id.* at 122; *see also id.* at 89.

94. *See id.* at 114–15.

95. *Id.* at 130.

96. *Id.* at 130–31 (quoting *Wall v. McNamara*, (1779) (original not available), *quoted in* *Hannaford v. Hunn*, (1825) 172 Eng. Rep. 68 (K.B.) 72 note; 2 Car. & P. 148, 158 note).

97. 420 U.S. 308, 322 (1975) ("A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."). *Wood* announced a standard with both subjective and objective components. *See id.* at 322 (citing *Pierson v. Ray*, 386 U.S. 547, 557 (1967)) (holding that there was no immunity where a school board member "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student").

98. 457 U.S. 800 (1982). *Harlow* represents a considerable shift in Justice Powell's perspective. In *Wood*, he disliked the objective component of the majority's standard. He thought the majority's reliance on terms like "settled, indisputable law," *Wood*, 420 U.S. at 321, and "basic, unquestioned constitutional rights," *id.* at 322, was unrealistic. "One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'" *Id.* at 329 (Powell, J., concurring in part and dissenting in part). In 1975, Justice Powell favored a good faith standard. "[A]s I view

where it instead allowed an immunity defense except in cases involving violations of “clearly established statutory or constitutional rights.”<sup>99</sup>

Consider the rationale supporting official immunities. Sovereign immunity springs from a theory of government power,<sup>100</sup> however

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it, the correct standard for qualified immunity of a government official [is]: whether in light of the discretion and responsibilities of his office, and under all of the circumstances as they appeared at the time, the officer acted reasonably and in good faith.” *Id.* at 330. By the time he wrote *Harlow* seven years later, Justice Powell had entirely reversed his field:

[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

*Harlow*, 457 U.S. at 817–18. He did not explain the apparent Damascus conversion that occurred on the road from *Wood* to *Harlow*. The primary effect of the shift, removing the element of good faith from the equation, was to deny plaintiffs discovery with respect to the defending official’s state of mind by making it irrelevant. This was a startling reversal of both the English immunity rule, *see supra* note 96 and accompanying text, and the American practice as described in *Dinsman*, *see supra* notes 89–97 and accompanying text. *Harlow* may be doubly surprising because there was evidence of bad faith on the part of one of the defendants. *See Nixon v. Fitzgerald*, 457 U.S. 731, 735–36 (1982) (quoting from an internal memorandum indicating that the White House should not rehire Fitzgerald, despite his “top-notch” skills, but instead “should let him bleed, for a while at least” because he had “very low marks in loyalty; and after all, loyalty is the name of the game.”).

99. *Harlow*, 457 U.S. at 818. *United States v. Lanier*, 520 U.S. 259 (1997), unanimously declared that *Harlow* intended “to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.” *Id.* at 270–71. The Sixth Circuit had reversed convictions under 18 U.S.C. § 242 (2006), the criminal counterpart to 42 U.S.C. § 1983 (2006), holding that (1) only Supreme Court declarations of the constitutional rights that statute protects give sufficient clarity to avert a void-for-vagueness ruling, and (2) the charge against the defendant must rest on facts fundamentally similar to the Supreme Court precedents. *United States v. Lanier*, 73 F.3d 1380, 1392–93 (6th Cir. 1996) (en banc), *vacated and remanded*, 520 U.S. 259 (1997). By vacating and remanding, the Supreme Court gave the criminal statute broader scope than had the Sixth Circuit. “The question is whether this standard of notice is higher than the Constitution requires, and we hold that it is.” *Lanier*, 520 U.S. at 261.

Five years later, it relied on *Lanier* and issued a similar ruling with respect to qualified immunity in civil suits under *Harlow*’s standard. *See Hope v. Pelzer*, 536 U.S. 730, 739–41 (2002). Yet, in *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court required fundamentally similar—almost identical—facts to overcome the official’s claim of qualified immunity to civil damages. *Id.* at 640–41 (reversing the circuit court’s erroneous refusal “to consider the argument that it was *not* clearly established that *the circumstances with which Anderson was confronted* did not constitute probable cause and exigent circumstances” even though “it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment” (second emphasis added)). Although *Creighton* antedated *Pelzer*, the Court returned to the fact-specific *Creighton* approach in *Brosseau v. Haugen*, 543 U.S. 194 (2004), two years after *Pelzer*: “It is important to emphasize that this inquiry ‘must be undertaken in light of the specific context of the case, not as a broad general proposition.’” *Brosseau*, 543 U.S. at 198 (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). *Saucier* also relied specifically on *Creighton*. *See Saucier*, 533 U.S. at 201–02 (citing *Creighton*, 483 U.S. at 640). Accordingly, there is a plausible argument that officials faced with possible civil liability for constitutional violations get more protection than they would if faced with criminal charges for the same violations.

100. *See supra* text accompanying note 11.

inapplicable it may be to the United States.<sup>101</sup> That is not true for official immunities. None rest on political or constitutional philosophy. They rest on arguments like the government-function or over-deterred-officials arguments, discussed below. All are theories of expediency;<sup>102</sup> the Court engages openly and unashamedly in cost-benefit analysis. In Professor Dworkin's terms, arguments of policy try to overcome arguments of principle.<sup>103</sup> According to Professor Tribe, arguments of policy generally triumph because the Court's incomplete cost-benefit analysis fails to allocate value to constitutionalism itself.<sup>104</sup> This balancing approach ignores the Supremacy Clause. The Constitution does not declare itself the "supreme Law of the Land [unless the Supreme Court shall find that the costs it exacts are too high compared with the benefits that it provides]."<sup>105</sup> The Supremacy Clause *is* the balance. In official immunity cases, the Court finds that balance inconvenient, so it removes the Constitution from the balance in favor of the Justices' parade of horrors.

### 1. The Government-Function Argument

The most common argument supporting official immunities—the utilitarian argument that officials need to act without fear of civil liability if they violate the Constitution<sup>106</sup>—has always seemed to me one of those arguments that makes sense, provided that one reads it quickly enough. Its implications are remarkable. It suggests that government cannot function unless its officers can act without consideration of the constitutionality of their conduct. Were that true, it would be difficult to find a broader statement of the failure of the American experiment of government under law. Of course, the implication is hyperbole of the type often employed to

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101. See *supra* notes 7–18 and accompanying text.

102. The government's most recent Supreme Court argument in favor of official immunity made that abundantly clear. See Transcript of Oral Argument at 4, 16–18, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (No. 10-98), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-98.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-98.pdf).

103. See DWORKIN, *supra* note 10, at 90 ("Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals.").

104. Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 157–58 (1984) ("[I]n that kind of calculus, the costs will always seem weightier than the benefits. The benefits will be elusive, intangible, diffuse. Costs will be visible and concrete: 'There he goes, getting away, someone who committed a crime!'"). Professor Tribe wrote in response to the Court's analysis in *United States v. Leon*, 468 U.S. 897 (1984), in which a divided Court ruled that evidence seized pursuant to an invalid search warrant is nonetheless admissible if the police have made a "reasonable" mistake. *Id.* at 922–23; see Tribe, *supra*, at 157–58. His argument applies just as well to any of the areas in which the Court recognizes official immunities. In all of those cases, the Court balances constitutional entitlements against non-constitutional considerations.

105. Cf. U.S. CONST. art. VI, § 2.

106. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 806–07, 814 (1982); *Butz v. Economou*, 438 U.S. 478, 506–07, 512–16 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 422–28 (1976); *Wood v. Strickland*, 420 U.S. 308, 318–21 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 241–42 (1974).

make constitutional rights less effective or ineffective. For example, consider the hostility to the exclusionary rule when the Court applied it to the states in 1961.<sup>107</sup> The same sort of apocalyptic commotion followed *Miranda v. Arizona*,<sup>108</sup> which many now regard as benign and some have argued enhances the quality and effectiveness of law enforcement.<sup>109</sup> When the Court announced *Marbury*, President Jefferson's view was at least hostile, and perhaps filled with foreboding.<sup>110</sup> Yet, the nation has survived with judicial review, the exclusionary rule, and *Miranda* intact.<sup>111</sup>

*Van de Kamp v. Goldstein*'s<sup>112</sup> discussion of absolute prosecutorial immunity exemplifies both the Court's parade of horribles technique and subtle substitution of an ad hoc cost-benefit analysis, divorced from constitutional considerations, for what should be a fundamental constitutional debate. The unanimous Court invoked both the government-

107. See *Mapp v. Ohio*, 367 U.S. 643, 655–57 (1961); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1374 (2004) (“Not surprisingly, *Mapp* was less than well received in certain quarters. Police across the country cried loudly in protest, blaming the decision for a burglary wave in Minneapolis (which they later attributed to lack of snow) and a decrease in narcotics convictions in New York. In their view, *Mapp* posed a serious obstacle to law enforcement, one that the public might not be able to tolerate. Those more solicitous of states’ rights than the Court found *Mapp* disturbing as well. The President of the American Bar Association, for example, publicly criticized the Court for turning state criminal law into ‘a mere appendage of [f]ederal constitutional law’ while giving ‘inordinate weight’ to defendants’ rights. With comments like that, *Mapp*’s holding appeared to be as controversial as it was consequential. Indeed, scholars have long regarded *Mapp* as one of the two most unpopular criminal procedure decisions [with *Miranda v. Arizona*] in Supreme Court history . . . .” (footnotes omitted)).

108. 384 U.S. 436 (1966); see, e.g., Craig M. Bradley, *Interrogation and Silence: A Comparative Study*, 27 WIS. INT’L L.J. 271, 271–72 (2009) (“Initially, the political reaction to *Miranda* in the United States (U.S.) was strong. At a time of rising crime rates, many people complained that the Supreme Court was ‘handcuffing’ the police. In 1968, Congress passed a statute attempting to overrule *Miranda*, an effort that the Supreme Court condemned as unconstitutional in 2000.” (footnotes omitted)); see also Lain, *supra* note 107, at 1399–1400. See generally FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 6–9, 184–85 (1970).

109. GRAHAM, *supra* note 108, at 7 (“[S]ome law enforcement officials say that the ruling has improved law enforcement by making the police rely more on ‘hard’ evidence.”).

110. See, e.g., Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 8 THE WRITINGS OF THOMAS JEFFERSON 310 n.1, 311 n.1 (Paul Leicester Ford ed., 1897) (“[T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.”); see also G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1484–91 (2003) (discussing contemporary reactions to *Marbury*).

111. Some might argue that the Court’s decisions since the end of the Warren Court era have substantially whittled away at the protection that *Mapp* and *Miranda* initially afforded criminal defendants. See, e.g., Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 178–84, 197–203 (2007) (canvassing the cases with which the Court has narrowed the protection the Warren Court had intended *Miranda* to provide); Sean D. Doherty, Note, *The End of an Era: Closing the Exclusionary Debate Under Herring v. United States*, 37 HOFSTRA L. REV. 839, 845–53 (2009) (surveying the Court’s decisions weakening the protection *Mapp* originally provided). I have no quarrel with that hypothesis, but discussion of that history is beyond the scope of this Article.

112. 129 S. Ct. 855 (2009).

function and the over-deterred-official<sup>113</sup> arguments.<sup>114</sup> It reiterated the argument from *Imbler v. Pachtman*<sup>115</sup> that the public's confidence in its prosecutors will suffer if the public believes prosecutors make decisions partly based on concern about subsequent civil suits by defendants claiming constitutional violations.<sup>116</sup> Curiously, the Court did not accord the constitutional violations themselves any weight in the balance or think that prosecutors would do so.<sup>117</sup> The Court aligned itself with the public and the prosecutors: its concern was with civil suits, not with constitutional violations. No one ever discusses whether it casts prosecutors, and law enforcement more generally, in a bad light when evidence of constitutional violations—especially intentional ones—surfaces.<sup>118</sup>

## 2. The Over-Deterred-Official Argument

The utilitarian argument also connotes that there is no way, short of implicitly repudiating constitutional rights, to safeguard officials' willingness to exercise their powers.<sup>119</sup> It should go without saying that official power in the United States never embraces the power to violate the Constitution. It is not clear why officials should be empowered to act without considering the constitutionality of their conduct. Even stipulating

113. See *infra* notes 120–32 and accompanying text.

114. *Van de Kamp*, 129 S. Ct. at 859–60.

115. 424 U.S. 409 (1976).

116. *Van de Kamp*, 129 S. Ct. at 860 (citing *Imbler*, 424 U.S. at 424).

117. See *id.*

118. The most recent example in the Supreme Court (and one of the most egregious examples in history) is *Connick v. Thompson*, 131 S. Ct. 1350 (2011). New Orleans prosecutors charged Thompson with a murder, seeking the death penalty, and an unrelated robbery, and obtained convictions for both in separate trials. *Id.* at 1356. During the proceedings, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), see *Connick*, 131 S. Ct. at 1357, the prosecutors concealed evidence, such as blood from the perpetrator of the robbery and prior inconsistent descriptions of the perpetrator of the murder by a witness who testified for the prosecution at the murder trial, see *id.* at 1371–74 (Ginsburg, J., dissenting). When the concealed evidence came to light, the prosecutor's office withdrew the robbery charge, and a Louisiana court ordered retrial of the murder case, in which the jury returned a not guilty verdict in 35 minutes. See *id.* at 1356–57 (majority opinion); *id.* at 1376 (Ginsburg, J., dissenting). Thompson then sought damages for his wrongful convictions, asserting claims under § 1983. *Id.* at 1357 (majority opinion). The jury returned with a plaintiff's verdict and awarded him \$14 million in damages for the eighteen years he had spent in prison, fourteen of them on death row. *Id.* at 1355, 1357. The Supreme Court did not dispute the jury's findings, but reversed on the grounds of municipal immunity. *Id.* at 1359–60, 1365–66. Given the underlying facts, it is not clear why the prosecutors who participated directly in Thompson's criminal cases could not be charged with attempted murder under Louisiana law. See LA. REV. STAT. ANN. §§ 14:27, 14:30.1 (2007). For another shocking example, consider *Friedman v. Rehal*, 618 F.3d 142 (2d Cir. 2010) (detailing allegations of a police investigation that involved coercion of child witnesses, deliberate misrepresentations by police to children and parents and other constitutional violations of defendants' rights that, although the court was unable to grant habeas corpus relief because of the one-year limitation of 28 U.S.C. § 2244(d)(1), caused the court strongly to recommend that the district attorney reinvestigate the case).

119. See, e.g., *Imbler*, 424 U.S. at 423 (arguing that “harassment by unfounded litigation would cause a deflection of the prosecutors energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust”).

that is a desirable outcome (at least in some extreme circumstances that demand instantaneous action), one can relieve officials' anxiety by having their governments provide a defense for them and indemnity to them if a court finds they have committed a transgression.

Some jurisdictions do that. In 1976, New York specifically provided such relief,<sup>120</sup> with some limitations that are particularly instructive because they echo common law practice. If an official acts outside the laws or instructions of her employer, she stands before the law as an individual.<sup>121</sup> If she acts within those constraints, even if a court subsequently finds that her actions have violated federal law that was obligatory upon the employer by supremacy, the employer shoulders the burden of defense and liability.<sup>122</sup>

It is a market system in microcosm. The employer will not countenance the employee violating the employer's rules. Within those rules, it wants the employee to act without fear of adverse personal consequences stemming from the violations of federal law, so it agrees to pay for the privilege. It releases the employee from having to anticipate new developments in the federal law before acting. One hopes that in all clear cases, officials will be aware of federal law and will conform their conduct. The statute offers relief in close cases, where official action consonant with state law may nonetheless violate federal law, though it is not clear whether it does.<sup>123</sup> So there *is* a way to ensure that officials invested with discretion will not hesitate to exercise it.

New York did not invent that idea. Congress did, more than 160 years earlier.<sup>124</sup> From the nation's beginning through at least the mid-nineteenth century, the assumption was that individuals should and did have effective remedies for injuries suffered from official misconduct.<sup>125</sup> A scholarly canvass of early American cases concluded that it was the truly exceptional case in which the plaintiff could not recover for official wrongdoing.<sup>126</sup> Recovery ostensibly came from the official, but Congress passed private bills authorizing indemnity (as, apparently, almost everyone expected).<sup>127</sup> “[W]hile the *right* to indemnity was understood in contractual terms, the *practice* of securing a determination of the right to indemnity almost

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120. See N.Y. GEN. MUN. LAW § 50-k (McKinney 2007).

121. See *id.* § 50-k(2).

122. *Id.* Section 50-k(5) relieves the employer of its burdens if the offense occurs while the employee is subject to a departmental disciplinary proceeding and if he is not exonerated. *Id.* § 50-k(5).

123. The Supreme Court has taken governments off the hook in such situations by abolishing official liability unless the constitutional right asserted is “clearly established.” See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); see *supra* notes 98–99 and accompanying text. In this respect, the New York legislature acted more responsibly than the Supreme Court by recognizing that constitutional injury deserves redress.

124. See Pfander & Hunt, *supra* note 76, at 1866–67, 1888 (explaining that Congress provided indemnification through private legislation).

125. See *id.* at 1929–30.

126. See *id.* at 1904–14.

127. See *id.* at 1911–12.

invariably entailed the submission of a petition to Congress for the adoption of private legislation.”<sup>128</sup>

“Congress applied established agency theory in determining whether to grant relief.”<sup>129</sup> In effect, the early Congress accepted respondeat superior liability, an interesting contrast to the modern Court’s view that the Reconstruction Congresses would never have contemplated such liability for municipalities it had subjected to the Civil Rights Act of 1871.<sup>130</sup> Before the Civil War, when officials had acted in accord with their instructions and in good faith,

Congress concluded that the government should bear responsibility for the loss; the [officials] were acting as honest agents of the government in taking the action that led to the imposition of liability. When, by way of contrast, the government official acted outside the scope of his agency or beyond the authority conferred by law or his instructions, the officer was left to bear any resulting liability on his own.<sup>131</sup>

Private legislation provided indemnity about 60 percent of the time the official found liable sought such relief.<sup>132</sup> In contrast, the modern Court has substituted its own poorly disguised policy judgment that the community should not bear the cost of its agents’ constitutional errors; the victim of the unconstitutional conduct should.

### 3. The Inconvenient Hierarchy

Most important, immunities upset the hierarchy the Supremacy Clause establishes. As *Butz v. Economou*<sup>133</sup> pointed out, “the doctrine of official immunity from § 1983 liability . . . [is] *not constitutionally grounded*.”<sup>134</sup> If any immunity other than legislative immunity rests on a constitutional basis, attorneys representing officials seem at some pains to conceal it. During oral argument in *Ashcroft v. al-Kidd*,<sup>135</sup> the Acting Solicitor General conceded that the Court’s absolute immunity doctrines are of less than constitutional stature.<sup>136</sup> Justice Alito asked why, if former Attorney General Ashcroft’s conduct was lawful under the Fourth Amendment, the Court should decide the question of absolute immunity. Counsel responded: “I think that’s the way this Court has historically gone about it, probably for reasons of constitutional avoidance, to not reach constitutional questions if there’s an absolute immunity question.”<sup>137</sup> If applying

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128. *Id.* at 1866.

129. *Id.* at 1906.

130. See *infra* notes 187–99 and accompanying text.

131. Pfander & Hunt, *supra* note 76, at 1907.

132. See *id.* at 1867.

133. 438 U.S. 478 (1978).

134. *Id.* at 497 (emphasis added) (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)); *accord* *Wood v. Strickland*, 420 U.S. 308, 321 (1975) (“We think there must be a degree of immunity if the work of the schools is to go forward.”).

135. 131 S. Ct. 2074 (2011).

136. See Transcript of Oral Argument, *supra* note 102, at 9.

137. *Id.*

immunity doctrine is constitutional avoidance,<sup>138</sup> then immunity itself cannot be constitutional doctrine.<sup>139</sup> That calls into question the legitimacy of any immunity (whether individual or governmental) that the Constitution does not establish. On what principled basis can sub-constitutional doctrine trump constitutional rights?

The Court has flirted with this reasoning, but the decisions it makes supporting officials' insulation from actions for damages are inconsistent with its statements of constitutional principle. For example, in *Economou*, the majority noted "the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers."<sup>140</sup> The Court also mentioned the longstanding rule that a federal official acting in excess of his "federal statutory authority" was liable for "his trespassory acts."<sup>141</sup> A fortiori,<sup>142</sup> official violations of the Constitution should be subject to judicial remedy, as *Economou* recognized: "Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense."<sup>143</sup>

Having championed legal supremacy, and having relied explicitly upon both *Lee* and *Marbury* for the proposition that "all individuals, whatever their position in government, are subject to federal law,"<sup>144</sup> the Court promptly forgot its own lesson. It reaffirmed qualified immunity for federal executive officials, resting not on constitutional principle or the political philosophy that underlies it, but on naked expediency: reasons of public policy, which Justice White elaborated with respect to participants in the

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138. Justice Brandeis explained this doctrine in his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936):

The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

*Id.* at 347 (Brandeis, J., concurring).

139. Of course, states' general immunity from suit by an individual in federal court, *see* U.S. CONST. amend. XI, despite all of its uncertainties and fuzzy boundaries, *see infra* note 184 and accompanying text, *is* of constitutional stature.

140. *Butz v. Economou*, 438 U.S. 478, 489 (1978).

141. *Id.* at 490.

142. *See id.* at 495 ("[I]f [federal officials] are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.").

143. *Id.* at 490–91 (citing *United States v. Lee*, 106 U.S. 196, 218–23 (1882)). In fact, the Court advanced several powerful arguments explaining why absolute immunity for executive officials is antithetical to constitutional supremacy. *See, e.g., id.* at 505 ("If, as the Government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs. Moreover, no compensation would be available from the Government, for the Tort Claims Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused." (footnote omitted)).

144. *Economou*, 438 U.S. at 506.



judicial process generally.<sup>145</sup> He argued that safeguards within the judicial process make remedies external to it less necessary.<sup>146</sup> He did not say that such remedies were unnecessary, leaving one to wonder about the apparently non-constitutional balance the Court uses to ignore constitutional rights when the judicial process's internal restraints fail to protect them.

*Economou* rested explicitly on *Imbler, Scheuer v. Rhodes*,<sup>147</sup> *Wood*, and *Pierson v. Ray*.<sup>148</sup> Regrettably—perhaps predictably—none of those cases mention any constitutional principle that allows an immunity not found in the Constitution to prevent enforcement of a right that is. *Pierson* involved immunity for a state judge, and the Court held only that the Civil Rights Act<sup>149</sup> did not abolish judges' common law immunity from civil suit for performance of their judicial duties.<sup>150</sup> It did not discuss whether that is compatible with the Constitution. The Court later held that the criminal counterpart to § 1983 recognized no immunity.<sup>151</sup>

*Scheuer* came down seven years after *Pierson* and, although *Harlow* discarded it, the majority opinion remains of interest because of its argument for official immunities and their historical background. Chief Justice Burger noted that official immunities find their roots in the same considerations as sovereign immunity, identifying two “mutually dependent rationales”:

(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.<sup>152</sup>

The first assumes away something Professor Dworkin identified: “Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.”<sup>153</sup> The Court spoke of discretion as if it were free-floating, untethered to the limits of the power that the law confers. It committed the classic error of keeping its eye upon the hole and ignoring the doughnut. Chief Justice Marshall spoke more than two hundred years ago about duty and discretion:

[W]hat is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a *mandamus*, directing the

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145. *See id.* at 506–07.

146. *See id.* at 512.

147. 416 U.S. 232 (1974), *abrogated by* *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

148. 386 U.S. 547 (1967).

149. 42 U.S.C. § 1983 (2006).

150. *Pierson*, 386 U.S. at 553–54.

151. *See supra* note 99 and accompanying text.

152. *Scheuer*, 416 U.S. at 240. The Chief Justice did not comment on the possible injustice of leaving an individual who has suffered constitutional injury without remedy.

153. DWORKIN, *supra* note 10, at 31.

performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?<sup>154</sup>

Discretion cannot justify violating constitutional rights. It is important that *Scheuer* traced its rationale back to sovereign immunity. It is more important that it overlooked the maxim that the King can do no wrong,<sup>155</sup> upon which the Court had partially relied in *Ex parte Young*<sup>156</sup>: “The State has no power to impart to [an official] any immunity from responsibility to the supreme authority of the United States.”<sup>157</sup> Neither the Supreme Court, acting as a common law court in creating sub-constitutional immunities, nor Congress, enacting statutes, has such power.

Yet, the whole thrust of an immunity is that it *excuses* violation of a right, not that it abrogates or modifies the right.<sup>158</sup> The immunity cases do not purport to narrow the scope of the constitutional rights plaintiffs assert. *Scheuer* did not say that the Fourteenth Amendment entitlement to protection from state deprivation of life or liberty was any narrower than the plaintiffs claimed. Compare that decision with *Paul v. Davis*,<sup>159</sup> where the Court did say that Davis’s Fourteenth Amendment liberty interest did not protect reputation *simpliciter*.<sup>160</sup>

This leads to another mistake the Court makes repeatedly in civil rights actions, most often under § 1983, to enforce constitutional rights. Professor Tribe might have catalogued it as an eighth deadly sin (although it would have ruined his article’s title): the sin of asking the wrong question.<sup>161</sup> The Court repeatedly asks whether Congress, enacting § 1983, intended to abrogate common law immunities.<sup>162</sup> There are three reasons this is the wrong question.

First, as the Court acknowledged in *Imbler*, § 1983 is silent about immunities.<sup>163</sup> After acknowledging that silence, Justice Powell pointed

154. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

155. See *supra* notes 54–59 and accompanying text.

156. 209 U.S. 123 (1908).

157. *Id.* at 160.

158. See *supra* note 51 and accompanying text.

159. 424 U.S. 693 (1976).

160. See *supra* note 81 and accompanying text. *Paul* distinguished *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), as having held that where government defamation also cuts off exercise of a state privilege, it is actionable under § 1983. See *Paul*, 424 U.S. at 708–09.

161. See generally Tribe, *supra* note 104.

162. See *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (“Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here?”); see also *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (“The decision in *Tenney* established that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.”); *Wood v. Strickland*, 420 U.S. 308, 317 (1975) (citing *Tenney* for the proposition that “there was no basis for believing that Congress intended to eliminate the traditional immunity of legislators from civil liability for acts done within their sphere of legislative action.”); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (“The legislative record [of § 1983] gives no clear indication that Congress meant to abolish wholesale all common law immunities.”).

163. *Imbler*, 424 U.S. at 417.

out in the next breath that “[this] view has not prevailed.”<sup>164</sup> He framed the issue instead as “whether the Reconstruction Congress had intended to restrict the availability in § 1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials.”<sup>165</sup> The Court’s approach assumes that Congress could constitutionally enact a statute making a constitutional right unenforceable. This overlooks that § 1983 does not concern itself with the existence *vel non* of any substantive right or any immunity.<sup>166</sup> The Constitution and statutes other than § 1983 create the rights. The Court has created the immunities, apparently based on the unstated hypothesis<sup>167</sup> that the Framers silently chose to leave in place a supposed immunity structure that made the United States government even less accountable for violations of fundamental rights than the British monarchy had been.<sup>168</sup> Given that several states’ documents ratifying the Constitution included specific proposed amendments to protect fundamental rights, some of which promptly found their way into the Bill of Rights,<sup>169</sup> that hypothesis is extraordinarily unlikely.

Second, there is a historical problem with the Court’s analysis. Consider the state officials the 1871 Congress had in mind when it passed § 1983. Think of the conditions that prevailed in 1871 and impelled Congress to act. *Monroe v. Pape*<sup>170</sup> discussed them at some length, focusing not merely on violence attributable to the Ku Klux Klan but repeatedly on the states’

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164. *Id.*

165. *Id.* at 417–18.

166. *See, e.g.,* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979).

167. *See supra* notes 39–40 and accompanying text.

168. The colonists’ rights as English citizens included remedies for official misconduct, both against the officials and against the Crown. *See supra* notes 19–26, 54–63 and accompanying text.

169. *See, e.g.,* Resolution of the Commonwealth of Massachusetts (1788), in 2 DOCUMENTARY HISTORY, *supra* note 9, at 93; Ratification Document of the State of New York (1788), in 2 DOCUMENTARY HISTORY, *supra* note 9, at 190. Explicitly recognizing the states’ concerns, Congress rapidly proposed a dozen amendments, ten of which became the Bill of Rights. *See* Resolution of Congress Proposing Amendatory Articles to the Several States, 1 Stat. 97 (1789), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 9, at 321 (quoting Congress’s resolution, explaining that it proposed the Bill of Rights because “[the] Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.”); *see also* BOWEN, *supra* note 9, at 245 (noting that “nothing created such an uproar [about ratification] as the lack of a bill of rights.”). Americans’ interest in a bill of rights antedated the Constitution, the Articles of Confederation, and even the outbreak of open hostilities in the Revolution. *See* MAIER, *supra* note 39, at 245 (noting interest in an American Bill of Rights recognized by England as a way of mending the split between the colonies and England). Interestingly, the Constitutional Convention had considered a bill of rights, but then rejected it as unnecessary. *See* BOWEN, *supra* note 9, at 244–45 & note. Some Framers believed “the Constitution covered the matter as it stood.” *Id.* at 245. Alexander Hamilton went further, arguing that “a bill of rights . . . would be dangerous” because there was no need to “declare that things shall not be done which there is no power [in Congress] to do.” *Id.* (second alteration in original) (quoting THE FEDERALIST No. 84 (Alexander Hamilton)).

170. 365 U.S. 167 (1961).

inability or unwillingness to enforce the law, depriving citizens of equal protection of the laws.<sup>171</sup> The Court in *Wood*, however, asks us to believe that the 1871 Congress was greatly concerned with retaining immunity from constitutional suit for officials responsible for enforcing the law who failed or refused to do so or who themselves violated the Constitution: “Common law tradition, recognized in our prior decisions, and strong public-policy reasons also lead to a construction of § 1983 extending a qualified good-faith immunity to school board members from liability from damages under that section.”<sup>172</sup> That is also an unlikely hypothesis. Given that § 1983 clearly targets state officials violating federal rights “under color of any law . . . of any State,”<sup>173</sup> providing or assuming immunities would have undermined Congress’s purpose.

The Court has written strongly about § 1983’s remedial scope and Congress’s clear intentions. In *Mitchum v. Foster*,<sup>174</sup> the Court noted that “[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’”<sup>175</sup> There was no dissent. Given that background, the modern Court’s creation of immunities for the persons and entities whose actions (or inactions) so clearly concerned and motivated the 1871 Congress (not to mention the Court’s attribution of those immunities to an invisible congressional intent) would be laughable if the consequences were not so serious.<sup>176</sup> Professor

171. *Id.* at 172–76.

172. *Wood v. Strickland*, 420 U.S. 308, 318 (1975). Given the post-Civil War context, it is natural to conclude that uppermost in the Reconstruction Congresses’ minds was the vexing problem of immunity for local school and school board officials.

173. Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2006)).

174. 407 U.S. 225 (1972). *Mitchum* concerned whether a federal court could enjoin a state court from proceeding in a pending public nuisance action under § 1983 without running afoul of the Anti-Injunction Act, 28 U.S.C. § 2283 (2006).

175. *Mitchum*, 407 U.S. at 242 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)) (emphasis added). The Court also quoted extensively from the congressional debates on § 1983’s predecessor. *See id.* at 240–41. It would be misleading, however, to consider *Mitchum* in isolation from *Younger v. Harris*, 401 U.S. 37 (1971), whose holding the *Mitchum* Court expressly preserved. *See Mitchum*, 407 U.S. at 243. The *Younger* majority argued that Congress had not intended § 1983 to subordinate “the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.” *Younger*, 401 U.S. at 41. Curiously, the Court cited—but did not rely on—the Anti-Injunction Act, which exempts injunctions that Congress had “expressly authorized.” 28 U.S.C. § 2283; *see Younger*, 401 U.S. at 43, 54. Instead, it reasoned that federalism considerations counseled the federal courts to exercise restraint in enjoining state courts, especially pending state criminal proceedings. *Younger*, 401 U.S. at 43–45, 52–54. Perhaps the Justices anticipated *Mitchum*’s holding that § 1983 is an “expressly authorized” exception to § 2283, *see Mitchum*, 407 U.S. at 242–43; one cannot know. For present purposes, the important thing is that cases involving official immunities are civil damage actions; they do not involve enjoining the pending state criminal prosecutions at issue in *Younger*. That abstention doctrine and its underlying rationale are not at issue in the official immunity cases.

176. The immunities should be an especially uncomfortable bone in the throat of those Justices who consider themselves to be originalists in whole or in part.

Zeigler's extensive research on the legislative history of the civil rights bills of the late 1860s and early 1870s amply documents Congress's quite self-conscious intent to authorize federal actions against state officials, *including judges*, who participated in constitutional violations.<sup>177</sup>

Third, the Court overlooks that § 1983 is only part of the story of protecting civil rights during Reconstruction. Congress had earlier passed a statute providing criminal penalties for violating citizens' federal rights under color of state law<sup>178</sup> and amended it in 1874 to include some of the critical language from § 1983.<sup>179</sup> The Court's cases concerning the criminal section do not even hint at the existence of any immunity.<sup>180</sup> Neither statute mentions immunities, and so neither gives any indication of congressional intent to embody the common law immunities the Court repeatedly asserts were so well established. Yet, the Court interprets congressional silence implicitly to adopt common law immunity defenses in the civil arena (§ 1983) and to dispense with them in the criminal arena (§ 242), thus providing broader protection of constitutional rights under the criminal statute.<sup>181</sup>

### C. Municipal Immunity

Given the preceding discussion of sovereign and official immunities, it will not be a stretch for the reader to infer the following view of municipal immunity. *Monell v. Department of Social Services*<sup>182</sup> reinterpreted § 1983 to include municipalities within § 1983's concept of "person."<sup>183</sup> It did not take long for the immunity question to arise; *Owen v. City of Independence*<sup>184</sup> reached the Court two years after *Monell*. A five-to-four Court held that there was no qualified immunity for the municipality and

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177. See generally Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987.

178. See The Civil Rights Act of 1866, § 2, 14 Stat. 27, *reenacted and amended* by Act of May 31, 1870, 16 Stat. 140 (following ratification of the Fourteenth Amendment) (codified at 18 U.S.C. § 242 (2006)).

179. See *Screws v. United States*, 325 U.S. 91, 99 (1945) (noting that the 1874 amendment added "the prohibition against the 'deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States,'" which was borrowed from § 1983).

180. See, e.g., *id.*; *United States v. Lanier*, 520 U.S. 259 (1997); *United States v. Price*, 383 U.S. 787 (1966).

181. I had always thought that courts construed criminal statutes narrowly, see, e.g., *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1891 (2009), and remedial statutes liberally, see, e.g., *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *Stewart v. Kahn*, 78 U.S. (1 Wall.) 493, 504 (1870) ("The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment.").

182. 436 U.S. 658 (1978).

183. In this respect, *Monell* overruled *Monroe v. Pape*, 365 U.S. 167 (1961), which had held the exact opposite only seventeen years earlier. *Monell*, 436 U.S. at 663.

184. 445 U.S. 622 (1980).

that the qualified immunity of its officials did not extend to the municipality itself<sup>185</sup> because there was no common law immunity for municipalities.<sup>186</sup>

However, *Monell* created a quasi-immunity by declining to allow respondeat superior liability, limiting liability to more direct municipal action.<sup>187</sup> Justice Brennan's painstaking analysis of § 1983's legislative history noted that Congress rejected the Sherman Amendment, which would have made municipalities liable "for damage done to the person or property of its inhabitants by *private* persons 'riotously and tumultuously assembled.'"<sup>188</sup> That led the Court to conclude that Congress implicitly forbade respondeat superior liability for much the same reasons.<sup>189</sup> Yet that conclusion is at least highly questionable.

Rejection of the Sherman Amendment rested on Congress's unwillingness to impose peacekeeping duties on municipalities because municipalities did not commonly have police forces.<sup>190</sup> In Congress's view, municipalities had no duty to control the Ku Klux Klan or other mobs.<sup>191</sup> On the other hand, municipalities are principals to their agents and principals have a duty to control their own agents;<sup>192</sup> making municipalities liable under § 1983 for their agents' official misconduct would not have imposed any new duty. Professor Achtenberg views Congress's failure to enact the Sherman Amendment not as rejecting respondeat superior, but rather as affirming the concepts that underlie the

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185. *Id.* at 638–50. Dean Chemerinsky thinks that "[t]he Court's reasoning in *Owen* is open to criticism." ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 8.5.3, at 523 (5th ed. 2007). Perhaps so, but its holding remains the law because the Court has not overruled it.

186. *Owen*, 445 U.S. at 638. On the other hand, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court ruled that § 1983 did not expose municipalities to punitive damages because municipalities were not liable for those damages at common law. *Id.* at 259–71.

187. *Monell*, 436 U.S. at 694–95 ("We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

188. *Id.* at 664 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 749 (1871)).

189. See CHEMERINSKY, *supra* note 185, at 510; 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).

190. See *Monell*, 436 U.S. at 670 n.21.

191. See *id.*

192. See RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b, at 141 (2006) (explaining that a principal is liable for an agent's torts within the scope of their employment only if the principal has the right to control the agent's actions).

doctrine.<sup>193</sup> Nonetheless, *Monell* ruled the other way, and there has been no retreat from that holding.<sup>194</sup>

In one way, the Court has strengthened that part of *Monell*. *Pembaur v. City of Cincinnati*<sup>195</sup> held that decisions of municipal officials with “final authority to establish municipal policy with respect to the action ordered” qualified as municipal action.<sup>196</sup> More recently, *Board of County Commissioners v. Brown*<sup>197</sup> effectively (though not explicitly) overruled *Pembaur*: the Court decided that it was not sufficient that the municipal agent was a policymaker and had made a single decision.<sup>198</sup> Instead, the majority ruled that if the official decision was not itself unconstitutional, the plaintiff in a § 1983 action had to “show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.”<sup>199</sup> As a result, it became far more difficult for the policymaker’s isolated decision to cast the municipality in liability, as it had in *Pembaur*.

Municipal immunity suffers from the same hierarchical difficulty as official immunities. To paraphrase Justice Brandeis, Congress has no power to declare exemptions from the supremacy of the Constitution under Article VI, and no clause in the Constitution confers such a power on the federal courts.<sup>200</sup> Congress also lacks the power to declare either that a constitutional provision is more or less inclusive than the Supreme Court says it is,<sup>201</sup> or to overturn judicial constitutional decisions by statute.<sup>202</sup> Although the Court ruled almost two centuries ago that the Bill of Rights did not apply to non-federal officials or entities,<sup>203</sup> by now, almost all the provisions of the Bill of Rights, incorporated through the Fourteenth

193. See Achtenberg, *supra* note 189, at 2196–97. He observes that *Monell* used a twentieth-century lens to analyze a statute enacted against the backdrop of a nineteenth-century understanding of respondeat superior. See *id.* at 2198 (“[H]owever arcane or illogical the legal unity concept may have seemed to members of the Court in 1978 when *Monell* was written, it was a familiar legal truism to members of Congress in 1871 when § 1983 was enacted.”); *id.* at 2199 (“[T]he *Monell* Court, writing more than one hundred years later, anachronistically discounted control as a justification for employer liability.”).

194. Several Justices have suggested reconsidering *Monell* for exactly the reasons that Professor Achtenberg points out. See Achtenberg, *supra* note 189, at 2196; see also *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 430–37 (1997) (Breyer, J., dissenting).

195. 475 U.S. 469 (1986).

196. *Id.* at 481.

197. 520 U.S. 397 (1997).

198. *Id.* at 404.

199. *Id.*

200. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Justice Brandeis was addressing the legitimacy of the federal courts creating common law in areas in which Congress lacked legislative authority. The argument applies by analogy but with even greater force here because of (supposed) constitutional supremacy.

201. See *City of Boerne v. Flores*, 521 U.S. 507, 519–20, 527–29 (1997).

202. The Supreme Court made the latter unmistakably clear in *Dickerson v. United States*, 530 U.S. 428 (2000), holding that Congress’s attempt to overrule *Miranda*—by passing a law purporting to make voluntariness the only standard for a confession’s admissibility, see Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, § 701(a), 82 Stat. 197, 210 (codified at 18 U.S.C. § 3501(a) (2006))—was unavailing and effectively unconstitutional, see *Dickerson*, 530 U.S. at 441–44.

203. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247–48, 250–52 (1833).

Amendment's Due Process Clause, do apply to state and local governments and officials.<sup>204</sup> The Supremacy Clause prevents any state or local government from opting out of the commands of those provisions.

#### CONCLUSION

The Supremacy Clause binds the Court every bit as much as it binds Congress, the President, the states, their localities and their officials. If a municipality violates constitutional rights, no branch of state or federal government has the power to excuse that violation. Only two legitimate possibilities exist to allow the government, its officials, and municipalities to avoid liability. First, the Supreme Court can declare that the constitutional right itself is not broad enough to reach the municipal conduct. Second, Congress and the states can invoke the constitutional amendment procedure of Article V.

With regard to the first possibility, the Court has declined to interpret the constitutional rights narrowly in any of the immunity cases, whether dealing with official or municipal immunities.<sup>205</sup> In fact, its veneration of common law immunity doctrines shows no signs of abating, and in the past decade, the Court has radically moved away from interpreting the constitutional rights themselves. In 2001, *Saucier v. Katz*<sup>206</sup> directed the federal courts in qualified immunity cases to consider whether “the facts alleged show that the officer’s conduct violated a constitutional right” before considering whether the constitutional right asserted was well enough established to avoid the qualified immunity defense.<sup>207</sup> The Court explained why that sequence was important:

In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law’s elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.<sup>208</sup>

Thus, after *Saucier*, accretion of individual constitutional rights might still occur. Then, in 2009, *Pearson v. Callahan*<sup>209</sup> made *Saucier*’s mandated sequence of inquiry optional.<sup>210</sup> Late in its 2010 Term, the Court further strengthened officials’ insulation from constitutional obligation. In

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204. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 10.2, 11.6, at 396–99, 462–67 (7th ed. 2004).

205. See *supra* notes 134–59 and accompanying text.

206. 533 U.S. 194 (2001).

207. *Id.* at 201.

208. *Id.*

209. 555 U.S. 223 (2009).

210. *Id.* at 236.



*Camreta v. Greene*,<sup>211</sup> the Ninth Circuit had found that the defendant officials had committed a Fourth Amendment violation but that “qualified immunity shielded the officials from monetary liability because the constitutional right at issue was not clearly established under existing law.”<sup>212</sup> The Circuit therefore affirmed the district court’s grant of summary judgment to the officials.<sup>213</sup> Despite their victory, the officials sought and received Supreme Court review,<sup>214</sup> after which the Court “vacate[d] the part of the Ninth Circuit’s opinion that addressed [the Fourth Amendment] issue, and remand[ed] for further proceedings consistent with this opinion.”<sup>215</sup>

*Camreta*, by reviewing and vacating part of an *opinion*<sup>216</sup> at the behest of the prevailing party below, appears to be the death blow to the *Saucier* sequence and to the prospect of “the law’s elaboration from case to case” that only a decade ago seemed so important to the Court.<sup>217</sup> Furthermore, six justices in both *Camreta* and *al-Kidd*,<sup>218</sup> another immunity case decided in the 2010 Term, expressed their preference for deciding issues on immunity grounds rather than the Constitution.<sup>219</sup> If the Court has

211. 131 S. Ct. 2020 (2011).

212. *Id.* at 2026.

213. *Id.* at 2027.

214. That the Court allowed itself to review the case raises myriad issues relating to standing, mootness, and advisory opinions, as the Justices’ opinions discussed. Fortunately, all of those issues are beyond the scope of this Article.

215. *Id.* at 2036. Of course, the only thing consistent with the Court’s opinion was the summary judgment for the defendant officials, which the Ninth Circuit had affirmed in the first place. *See id.* at 2027.

216. As Justice Kennedy’s dissent pointed out, the Court has said before that it sits to review judgments, not opinions. *Id.* at 2037 (Kennedy, J., dissenting) (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam)). Justice Kennedy also quoted from *Herb v. Pitcairn*, 324 U.S. 117 (1945):

“[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.”

*Camreta*, 131 S. Ct. at 2037–38 (Kennedy, J., dissenting) (quoting *Pitcairn*, 324 U.S. at 125–26). It is difficult to see how the *Camreta* decision is anything but advisory. *See supra* note 215 and accompanying text.

217. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

218. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011). The *al-Kidd* case involved a *Bivens* action against former Attorney General John Ashcroft, alleging that he authorized federal officials to misuse the Material Witness Statute and arrest suspected terrorists without probable cause. *See id.* at 2079. The Ninth Circuit decided that the complaint alleged a Fourth Amendment violation and that neither qualified nor absolute prosecutorial immunity was available because the constitutional violation was clearly established. *Id.* A majority of the Supreme Court reversed both the determination that the allegations constituted a constitutional violation and the ruling that the violation was clearly established. *See id.* at 2080, 2085.

219. *See id.* at 2087 (Ginsburg, J., concurring) (“objecting to the Court’s disposition of *al-Kidd*’s Fourth Amendment claim on the merits . . . [because] that claim involves novel and trying questions that will ‘have no effect on the outcome of th[is] case’” (alteration in original) (quoting *Pearson v. Callahan*, 555 U.S. 223, 236–37 (2009))); *id.* at 2089–90 (Sotomayor, J., concurring) (same); *Camreta*, 131 S. Ct. at 2036 (Scalia, J., concurring) (expressing a willingness “to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity . . . in an

completely abandoned *Saucier*, it is easy to see how individual constitutional rights may diminish if the Court contracts the previously understood scope of a constitutional provision to avoid an official's liability. It is hard to see how the Court's rejection of *Saucier* will allow more expansive understandings of constitutional rights.<sup>220</sup>

Since the Court has not used the immunity cases to narrow its interpretation of the underlying constitutional rights,<sup>221</sup> the only legitimate way to limit their scope is by constitutional amendment. Sub-constitutional immunity doctrines for governments and their officials violate constitutional supremacy. If the Constitution declares a right or a limitation, only another constitutional provision can alter it or set it aside. Congress could not legislate an end to Prohibition; it took another amendment.<sup>222</sup> The Court asks the wrong question when it considers whether Congress intended to set aside what the Court characterizes as unquestioned common law immunities. Even if § 1983 did indicate its congressional support for such immunities, it would be irrelevant. The rights come from the Constitution; neither the common law nor a mere statute can overrule or modify constitutional provisions.

That is why all of the Court-created immunities to constitutional claims are structurally illegitimate. The Constitution provides two immunities, which we must respect or undo through amendment. The Speech and Debate Clause<sup>223</sup> immunizes federal legislators, and the Eleventh Amendment<sup>224</sup> confers some sort of immunity on the states against being made defendants at the suit of individuals in a federal forum.<sup>225</sup> No other immunity finds mention. Why not?

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appropriate case"); *id.* at 2043 (Kennedy, J., dissenting) (noting, with Justice Thomas, that "[i]f today's decision proves to be more than an isolated anomaly, the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect").

220. *Camreta* seems to eliminate the possibility of any accretion of constitutional rights happening in civil suits. The only possibility for expansion lies in defense of criminal actions, yet this may be extraordinarily difficult. At issue in *Camreta* was a warrantless interview with a child at her school by a state child protective services worker and a deputy sheriff. They sought evidence of abuse by the child's father. *See Camreta*, 131 S. Ct. at 2027. The state charged the father with abuse but was unable to obtain a conviction. *Id.* If the state had sought to introduce evidence from the interview against the father in the criminal proceeding, he would have lacked standing to object on Fourth Amendment grounds. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 104–05 (1980) (holding that defendant must show he personally possessed "a legitimate expectation of privacy in" the searched item); *Rakas v. Illinois*, 439 U.S. 128, 133–34, 139–40 (1977) ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed.").

221. *See supra* notes 135–59, 205–15 and accompanying text.

222. *See* U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

223. *Id.* art. I, § 6, cl. 1.

224. *Id.* amend. XI.

225. It is not possible to simplify Eleventh Amendment law; one can only over-simplify it. It is not even possible to say whether the Eleventh Amendment concerns federal subject matter jurisdiction (not waivable) or a state immunity (waivable). The Supreme Court has attributed both aspects to it, and in *the same case*. *See, e.g., Edelman v. Jordan*, 415 U.S.

The Court views the immunity cases in a hypothetical vacuum because the Court considers them without reference to the historical context in which the individual rights came into existence. It tries to predict what might happen if it decides against the immunity the governmental defendant asserts. The colonists fought the revolution because of their pervasive feeling that the English government under George III denied them the rights of Englishmen.<sup>226</sup> They rebelled against arbitrary and unlawful government action against the colonies as entities and against the colonists as individuals.<sup>227</sup> They complained that the courts were beholden only to the King and disregarded legal injuries the colonists suffered.<sup>228</sup> After they finally formed a lasting national government in 1787, one of the first things they did was to add the Bill of Rights. Several states' ratification documents had urged swift drafting, presentation, and ratification of a bill of rights.<sup>229</sup>

Against that background, I must borrow Robert Bolt's language from his play about Sir Thomas More.<sup>230</sup> Is it probable that after so long a struggle against the Crown's denial of the rights of Englishmen, the people who created the new nation would have established governments not accountable for violations of fundamental individual rights? Is it probable that having urged the inclusion of the Bill of Rights in the Constitution, the people would have made those rights unenforceable against governments and officials who violated them? Is it probable that people who had suffered from a government that had refused to honor the established law of the land<sup>231</sup> would immediately adopt a Constitution that did not bind the government or its officials to respect the individual rights that the colonists had asserted for so long and had paid so dearly to secure?

As I wrote at the outset,<sup>232</sup> the Constitution has only two purposes: to create government and to restrain it. The Constitution cannot enforce itself; it depends on a government responsive to its philosophy and sensitive to its limitations. When the Court recognizes common law immunity doctrines, it

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651, 673–78 (1974) (discussing states' ability to waive their Eleventh Amendment protection (though not finding a waiver) while overturning the Court of Appeals' refusal to honor the state's invocation of the Eleventh Amendment for the first time at the appellate level). A full examination of this issue is beyond this Article's scope.

226. One need look no further than to the particulars that Thomas Jefferson recited. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

227. *See, e.g., id.* paras. 4–8.

228. *See id.* para. 11.

229. *See supra* note 169 and accompanying text.

230. *See* ROBERT BOLT, A MAN FOR ALL SEASONS act 2, at 156 (1962). The scene is More's trial. Richard Rich, a false friend whom More refused a recommendation for a position at court, *see id.* at 6–9, has just testified for the prosecution that More spoke to him while imprisoned and denied Parliament's power to declare King Henry VIII the head of the Anglican Church. *See id.* at 155–56. That was treason. More's reaction marks the turning point of the trial: "Is it probable—is it probable—that after so long a silence on this, the very point so urgently sought of me, I should open my mind to such a man as that?" *Id.* at 156 (emphasis added).

231. *See* THE DECLARATION OF INDEPENDENCE, para. 2 (referring to the king's "usurpations").

232. *See supra* text accompanying notes 17–18.

makes the Constitution less than the “supreme Law of the Land.”<sup>233</sup> It does not even pretend to do so on the basis of any law or principle that rises to a constitutional level.<sup>234</sup> Even more, it reduces the rights-declaring portions of the Constitution to not being law at all. If something is not enforceable, it is not a law. A right declared but unenforceable is not a right. If individuals’ rights are not enforceable against the governments and government officials who violate them, then to whom do they apply, and whom do they protect? The Court’s immunity doctrines read those rights out of the Constitution. They repudiate the rule of law.<sup>235</sup>

Justice Brandeis memorably cautioned about the signal importance of government obeying the Constitution:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.<sup>236</sup>

Justice Brandeis also reminded<sup>237</sup> us about Chief Justice Marshall’s famous admonition: “[W]e must never forget that it is a *constitution* we are expounding.”<sup>238</sup> By its repeated ventures into the sub-constitutional doctrines of official immunities, the Court has done precisely what the Chief Justice feared: it has forgotten.

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233. U.S. CONST. art. VI, § 2.

234. See *supra* notes 134–60 and accompanying text.

235. See, e.g., DICEY, *supra* note 50, at 202–03 (“[T]he ‘rule of law’ . . . excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of ordinary tribunals . . .”).

236. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); see also DWORKIN, *supra* note 10, at 205 (“If the Government does not take rights seriously, then it does not take law seriously either.”).

237. *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

238. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).