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Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983

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REPAIRING OUR SYSTEM OF CONSTITUTIONAL ACCOUNTABILITY: REFLECTIONS ON THE 150TH ANNIVERSARY OF SECTION 1983

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INTRODUCTION

In the long fight for freedom and equality, the crucial first step of protecting rights must be quickly followed by a remedy for violation of those rights. Without accountability, protection of rights and liberty is little more than a paper promise.

One hundred and fifty years ago, Congress passed Section 1983 to enforce the Fourteenth Amendment and ensure that individuals could go to federal court to redress constitutional violations by state and local governments and officials and obtain justice. Enacted in 1871 against the backdrop of horrific state and Ku Klux Klan violence aimed at undoing Reconstruction and a criminal justice system that systematically devalued Black life,[1] Section 1983 gave those victimized by official abuse of power a critical tool to hold state and local governments and their officials accountable in a court of law. It aimed to stop state actors and others from killing, brutalizing, and terrorizing Black people with impunity. Section 1983 sought "to carry into execution the guarantees of the Constitution in favor of personal security and personal rights," reflecting that, in our constitutional system, "judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free Government."[2]

In the text of Section 1983, Congress demanded government accountability, seeking to put an end to the denial of fundamental rights and subjugation of those seeking to enjoy the promise of freedom after centuries of chattel slavery. What is less well known is that Congress explicitly rejected the idea that persons should be exempt from responsibility simply because they held a position of power. Congress modeled Section 1983 on the Civil Rights Act of 1866,[3] a statute that refused to provide any official immunities because that would "place[] officials above the law."[4] Congress viewed official immunities as akin to the idea "that the King can do no wrong."[5] This history has not received the attention it deserves.

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1 Donald H. Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 1013 (1983) (discussing passage of Section 1983 in 1871 against the backdrop of "substantial evidence of Klan violence[] and repeated familiar complaints concerning the widespread, systemic breakdown in the administration of southern justice").

2 CONG. GLOBE, 42d Cong., 1st Sess. 374, 578 (1871).

3 Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27; *see infra* text accompanying notes 32–36.

4 CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866).

5 *Id.*

The accountability Section 1983 sought to achieve has been squelched by the Supreme Court. The Supreme Court has converted a statute designed to open the courthouse doors to those aggrieved by official abuse of power into a statute that bolts the courthouse doors firmly shut, immunizing wrongdoers rather than holding them to account. The respect for enacted text the Supreme Court repeatedly preaches has been missing in action when it comes to Section 1983.

Rather than honoring the language chosen by Congress to enforce the Fourteenth Amendment, the modern Supreme Court has rewritten the law's text, inventing a host of complex and confusing judge-made doctrines that exalt the interests of public officials over the fundamental rights of the people they are supposed to protect. Despite the fact that Section 1983 explicitly gives individuals a right to sue government actors for violating the Constitution, the Supreme Court's modern Section 1983 jurisprudence is more concerned with protecting the police and other government officials from suit than in reining in the systemic violence, discrimination, and abuse of power visited all too often on the most marginalized in our society.

In recent years, there has been an outpouring of writing chronicling how the Supreme Court invented the doctrine of qualified immunity and employed it to shield police officers and other state officials from suit for all but the most egregious constitutional violations. As these critics have argued, qualified immunity leaves a gaping hole in Section 1983, has no moorings in our constitutional or common law systems of government accountability, and erodes the enforcement of constitutional rights.[6]

Indeed, qualified immunity is anything but qualified—it approaches a near-absolute immunity from suit. Qualified immunity requires dismissal of a suit unless the state or local officer violated clearly established constitutional rights, a standard that has no basis in the text of Section 1983 or any common law backdrop and ignores the fact that at the time Section 1983 was passed virtually no aspect of the Fourteenth Amendment was clearly established in the courts. The clearly established law standard is not self-defining—it could simply be a form of fair notice—but the Supreme Court has construed it to be an almost insurmountable bar to suit. In practice, unless the plaintiff can point to a prior precedent with practically identical facts, courts insist that the law

6 *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful*?, 106 CALIF. L. REV. 45, 55 (2018) (arguing that "there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment"); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018) (arguing that "multiple aspects" of qualified immunity doctrine "hamper the development of constitutional law and may send the message that officers can disregard the law without consequence"); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1440–60 (2019) (arguing that qualified immunity cannot be justified by structural constitutional principles of separation of powers and federalism).

is not clearly established. This allows officers to evade accountability and ignores the fact that officers are not taught or expected to keep up with the latest legal rulings.[7]

But qualified immunity is only one part of the story. The problems go deeper.[8] All too often, however, the scholarly literature fails to attend to the ways the Court's several immunity doctrines work hand-in-hand to undermine accountability across the board. This Article corrects this omission.

Qualified immunity is just one of four interlocking doctrines that, together, form a system of government unaccountability and squelch Section 1983's promise of accountability: qualified immunity, absolute immunity, strict limits on municipal liability, and the exclusion of states from Section 1983. By gutting Section 1983 in a myriad of ways, the Supreme Court has let state and local governments and their agents violate our most cherished constitutional rights with impunity and left those victimized by abuse of power without any remedy.

As sweeping as qualified immunity has become, the Supreme Court has held that for some government actors, most notably prosecutors, qualified immunity is not protective enough.[9] Instead, in the Court's view, prosecutors must be shielded by absolute immunity when acting as advocates, effectively negating the remedy Congress sought to create in enacting Section 1983. Prosecutorial abuse of power was a grave concern at the time of the framing of the Fourteenth Amendment, and no court had recognized prosecutorial immunity from suit when the statute was enacted in 1871. Nevertheless, the Supreme Court created it out of whole cloth. Like qualified immunity, the absolute immunity accorded prosecutors has no basis in the text or history of Section 1983 and undermines the rule of law.[10] It means that a prosecutor can withhold exculpatory evidence from a defendant in violation of settled legal precedents with impunity. Even if prosecutors commit flagrant constitutional violations, absolute immunity gives them a get-out-of-court free pass.

If individual officers cannot be sued because of judge-created immunities, what about the governmental entity responsible for the officer? That, too, is off-limits because, in another line of cases, the

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7 Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 677 (2021) ("[A]mong the most pernicious aspects of the doctrine—its requirement that plaintiffs identify cases in which courts have held unconstitutional nearly identical conduct—is based on a misunderstanding of the role court decisions play in law enforcement policies and trainings, and officers' decisions on the street.").

8 Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2107 (2018) (stressing "the importance of thinking about the synergistic way that immunity doctrines operate to proverbially close the courthouse door").

9 Imbler v. Pachtman, 424 U.S. 409 (1976).

10 *See infra* text accompanying notes 72–77.

Supreme Court has invented what has been called local sovereign immunity.[11] Employers in the private sector are liable for the legal wrongs committed by their employees, but the Supreme Court has refused to apply this longstanding principle of accountability to municipalities. Instead, local governments, with few exceptions, cannot be held liable for constitutional violations committed by their officers within the scope of their duties, even though it is the government entity that authorizes, supervises, equips, trains, and pays the officer who violated constitutional rights in carrying out their job. The Supreme Court has held that a city can only be held liable if a municipal "policy or custom" caused the constitutional deprivation,[12] a limitation that appears nowhere in the text of Section 1983 and has no basis in the statute's history. As Justice John Paul Stevens cogently observed, the policy or custom requirement is "judicial legislation of the most blatant kind."[13]

The Supreme Court has erected even more barriers to suing states for constitutional wrongs, studiously ignoring how Reconstruction reshaped our federal system in order to check states that ran roughshod over individual rights. Even though the whole point of Section 1983 was to alter the balance of power between the states and the federal government and provide a federal forum when states and localities infringed the Constitution, the Supreme Court has refused to read Section 1983 to permit suits against the states, turning a blind eye to the statute's obvious purpose of holding states accountable for constitutional violations.[14]

This stark pattern illustrates just how far the Supreme Court has been willing to bend the law to prevent holding the police, prosecutors, and other state and local officials accountable when they abuse their power. For far too long, the Supreme Court has stood firmly in the way of efforts to hold state and local governments accountable for even flagrant violations of constitutional rights, gutting Section 1983's promise and undermining the rights Section 1983 was enacted to protect. By making any remedy virtually impossible to obtain, the Court has given the police and other government actors an even freer hand to violate fundamental rights. As a result, the cycle of police violence and prosecutorial abuse of power continues unchecked.

The ball is now in Congress's court. The Supreme Court has been unwilling to reconsider the badly flawed, judicially invented legal doctrines that have gutted Section 1983. Indeed, during the Supreme Court's current term, the Justices, without receiving full briefing and

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11 Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409 (2016).

12 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–95 (1978).

13 City of Okla. City v. Tuttle, 471 U.S. 808, 842 (1985) (Stevens, J., dissenting).

14 Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989).

holding oral argument, significantly expanded the reach of qualified immunity and suggested that police officers cannot be sued for using excessive force unless there is a prior Supreme Court precedent with nearly identical facts.[15] The six-three conservative majority is raising the bar to accountability sky high. Lawmakers in Congress can and should do what the Court will not—sweep away these rotten legal doctrines that have eroded sacred rights and allowed lives to be taken with impunity.

This Article unfolds as follows. Part I analyzes the text and history of Section 1983, laying out how the Reconstruction Congress gave individuals a right to go to federal court to redress constitutional violations by state and local actors. The historical record shows that Congress provided a new federal cause of action to allow civil rights suits to be brought in federal court because far too often state and local institutions of power worked with the Ku Klux Klan or turned a blind eye toward their racist terror. Part II examines how the Supreme Court gutted Section 1983's promise of accountability and systemic change. As this review demonstrates, time and again the Supreme Court has engaged in rank judicial legislation to thwart justice, creating immunities out of whole cloth that cannot be justified by the text of Section 1983 or any pre-existing legal backdrop. A short conclusion follows.

I. THE TEXT AND HISTORY OF SECTION 1983

The Fourteenth Amendment was the nation's response to abuses in the South in the wake of the end of chattel slavery and an attempt to affirmatively guarantee the equality and protections that Black Americans needed to participate fully in American life and thrive on equal footing. In the aftermath of the Civil War, the South sought to strip Black Americans of nearly every aspect of freedom, enact new laws to criminalize Black life, and subject Black people to a new form of slavery.[16] In response to these abuses, the Fourteenth Amendment sought to guarantee true freedom and equality. It sought to vindicate the fundamental demands of Black Americans newly freed from bondage,

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15 Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8 (2021) (per curiam) (summarily reversing the denial of qualified immunity because "[n]either Cortesluna nor the Court of Appeals identified any Supreme Court case that addresses facts like the ones at issue here"); City of Tahlequah v. Bond, 142 S. Ct. 9, 12 (2021) (per curiam) (summarily reversing denial of qualified immunity where "[n]either the panel majority nor the respondent has identified a single precedent finding a Fourth Amendment violation under similar circumstances").

16 *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 199–202 (1988).

who insisted that "now we are free we do not want to be hunted."[17] The Fourteenth Amendment wrote into our national charter the idea that Black lives matter, seeking to put an end to indiscriminate state-sanctioned violence against African-Americans. It promised bodily integrity and human dignity to all regardless of the color of their skin.[18]

That promise turned out to be insufficient. In 1871, several years after the Amendment's ratification, Southern intransigence continued, with states "permit[ting] the rights of citizens to be systematically trampled upon."[19] The primary impetus for the passage of legislation to enforce the Fourteenth Amendment was a reign of terror by the Ku Klux Klan that was winked at or abetted by state and local governments. As Representative David Lowe observed:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.[20]

The breakdown of the law reached virtually every actor and every part of the state system of civil and criminal justice. As Representative Aaron Perry explained:

> Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. . . . [A]ll the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection.[21]

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17 Letter from Mississippi Freedpeople to the Governor of Mississippi (Dec. 3, 1865), *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, SER. 3: VOL. 1: LAND AND LABOR, 1865, at 857 (Steven Hahn et al. eds., 2017).

18 David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 290 (2021) ("The Fourteenth Amendment struck at centuries of history that permitted Black bodies to be violated indiscriminately, and instead promised personal security to all.").

19 CONG. GLOBE, 42d Cong., 1st Sess. 375 (1871).

20 *Id.* at 374.

21 *Id.* at app. 78; *id.* at 394 ("[T]he courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?"); *id.* at 459 ("The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress.").

As a result, the Thirteenth and Fourteenth Amendments—what one member of Congress called the "liberty amendments"—were "already a practical nullity where these klans operate."[22]

How did Section 1983's cause of action against state and local governments and their officials become part of a civil rights statute aimed at checking the Klan's reign of terror? The answer is simple: Congress sought to hold state actors accountable for violating constitutional rights because, throughout the South, state officials, often acting in league with the Ku Klux Klan, were murdering and terrorizing Black people. The Klan, Michigan Congressman Austin Blair observed, "are powerful enough to defy the State authorities. In many instances they are the State authorities."[23] Members of Congress described state officials issuing baseless warrants to arrest Black citizens,[24] as well as wanton violence by white police officers in which "men were shot down like dogs in the very portals of the temple of justice without provocation."[25] Brutal police violence continued unchecked against those seeking to enjoy the Fourteenth Amendment's promise of real freedom.

The systematic denial of fundamental rights merited a remedy. The 1871 legislation—known as the Civil Rights Act of 1871—included a number of provisions aimed at stopping the Klan's terrorism, including establishing civil and criminal liability against conspiracies to deprive individuals of their fundamental rights and authorizing the use of martial law and suspension of habeas corpus to check the lawless violence that plagued the nation. The least controversial, though most enduring, part of the Act—Section 1, now known as Section 1983—opened the door of the federal courts to suits against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[26]

Section 1983's plain import was to "throw[] open the doors of the United States courts to those whose rights under the Constitution are

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22 *Id.* at 438–39.

23 *Id.* at app. 72; *id.* at app. 271 ("In many cases the local officers are in sympathy with the marauders, and in others they are themselves members of their organization; and so, for all the many hundred acts of violence and outrage committed by these bands, not a single man has been brought to punishment, and the evil is growing and spreading every hour."); *id.* at app. 108 ("The sheriffs in Alamance and some other counties are in the order; the judges can do nothing; the juries are in the way; we can make no convictions."); *id.* at app. 183 ("State authorities are in complicity with the criminals, aiding and abetting their lawless violence and of course refusing to call for assistance from the General Government . . . .").

24 *Id.* at 321.

25 *Id.* at app. 185.

26 42 U.S.C. § 1983.

denied or impaired," affording "an injured party redress in the United States courts against any person violating his rights as a citizen under claim or color of State authority."[27] The sweeping language Congress employed—holding liable all persons acting under color of state law—had ancient roots in the law: since the thirteenth century, the legal term of art of "color of office" or "color of law" meant abuse of legal authority.[28] Section 1983 targeted both formal legal enactments and the persistent and widespread customary practices that threatened constitutional freedoms. It aimed to remedy violation of constitutionally guaranteed rights, whether it resulted from official state action or state-sanctioned private vigilantism.[29] It sought to prevent and deter constitutional violations and to promote systemic change by holding governments and their agents accountable in a court of law to those they victimized. And the legislators who enacted Section 1983 understood that it would be interpreted broadly to promote its goal of redressing government abuse of power: "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed."[30]

The text of Section 1983 does not provide for any governmental immunities. This was a conscious choice. The members of the 42nd Congress insisted that "whoever interferes" with constitutionally guaranteed rights, "though it may be done under State law or State regulation, shall not be exempt from responsibility to the party injured when he brings suit for redress either at law or in equity."[31] Indeed, Section 1983 was modeled on Section 2 of the Civil Rights of 1866,

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27 CONG. GLOBE, 42d Cong., 1st Sess. 376 (1871); *id.* at app. 313; *see also id.* at 459 ("[T]he court of justice is the first instrument to be used in aid of the [F]ourteenth [A]mendment . . . . [T]he courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention the complaints of those who are denied redress elsewhere.").

28 Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 326–27 (1992) ("[T]he central idea conveyed by the phrase had remained remarkably constant for six centuries: *Under color of law* referred to official action *without* authority of law, in the nineteenth as in the thirteenth century."); David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1, 59–60 (1999) (arguing that for members of the 42nd Congress "'under color of" law meant 'under pretense of' law").

29 Because of the broad sweep of the term "under color of law," and the statute's historical goal of combatting Klan violence, Section 1983 may prove to be particularly important to redress a new form of legal vigilantism—the "trend in state legislatures to use private rights of action to penalize and suppress highly personal and often constitutionally protected activities—not only abortions but also LGBT rights and even the rights of teachers and students to discuss race in the classroom." Jon D. Michaels & David L. Noll, Vigilante Federalism 3 (Sept. 2, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915944 [https://perma.cc/Y3ZX-A3H5].

30 CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871).

31 *Id.* at app. 310.

which created a federal criminal remedy that could not be overcome by a claim of immunity. In debates preceding the enactment of the Civil Rights Act of 1866, legislators repeatedly rejected the notion that persons acting under color of law should be entitled to immunity because of their status as officers of the government. This, Senator Lyman Trumbull urged, was "akin to the maxim of the English law that the King can do no wrong."[32] Senator Trumbull argued that such a claim of immunity improperly "places officials above the law."[33] Section 1983 incorporated this identical remedial framework. As its proponents urged, the 1866 Act "provides a criminal proceeding in identically the same case as this one provides a civil remedy."[34] Section 1983 was "carrying out the principles of the civil rights bill" that state officers could not violate constitutional rights with impunity.[35] Section 1983, like the 1866 Act, did not provide any immunities because Congress refused to "place[] officials above the law."[36]

That the Act provided a broad remedy for constitutional violations by state and local officials unqualified by any immunities was understood by both proponents and opponents of Section 1983. In "the language of the bill," Senator Allen Thurman stressed, "there is no limitation whatsoever upon the terms that are employed, . . . they are as comprehensive as can be used."[37] Seizing on Section 1983's broad sweep, congressional opponents complained that the provision allowed suit against all manner of state actors and permitted them to be "dragged to the bar of a distant and unfriendly court, and there placed in the pillory of vexatious, expensive, and protracted litigation, and heavy damages and amercements."[38] The new federal cause of action, they insisted, would disturb the federal-state balance because "contests among citizens under this provision will be numerous" and every state official whether "great or small, will enter upon and pursue the call of official duty with the sword of Damocles suspended over him by a silken thread."[39] Indeed, as

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32 CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866).

33 *Id.*; *id.* at 1267 ("[I]f a . . . sheriff . . . should take part in enforcing any State law making distinctions among the citizens of the State on account of race or color, he shall be deemed guilty of a misdemeanor and punished with fine and imprisonment under this bill.").

34 CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871); *id.* at 461 (explaining that Section 1983 "gives a civil remedy parallel to the penal provision based upon the first section of the civil rights act").

35 *Id.* at 568.

36 CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866).

37 CONG. GLOBE, 42d Cong., 1st Sess. app. 217 (1871).

38 *Id.* at 365; *id.* at 337 (suggesting that "police officer[s]" might be sued "in distant and expensive tribunals" if they acted to disarm "a drunken negro or white man upon the streets with loaded pistol flourishing it . . . because the right to bear arms is secured by the Constitution").

39 *Id.* at 429, 366.

Senator Thurman bemoaned, state judges had already faced federal criminal charges for violating the Civil Rights Act of 1866.[40]

Opponents of the 1871 legislation asked "where is the clause that exempts" state legislators and other government officials from the new federal cause of action Section 1983 created.[41] These pleas were met with a stony silence. The members of the 42nd Congress refused to write into the law any exception to the cause of action Section 1983 afforded to ensure respect for constitutional rights and state accountability.[42] Pervasive state violence and the complete breakdown of justice in the South demanded a bold new set of remedies to vindicate fundamental rights and prevent the subjugation of Black citizens. Section 1983 sought to hold state lawbreakers to account, not permit them to violate fundamental rights with impunity.

II. HOW THE SUPREME COURT GUTTED SECTION 1983'S PROMISE OF ACCOUNTABILITY

The Supreme Court has not respected the text and history of Section 1983, despite the statute's clarity. Instead, it has effectively rewritten the statute, inventing an array of immunities designed to make it easier for government officials to avoid accountability. The Court has treated Section 1983's sparse but plain text as an open invitation to engage in judicial policymaking, rewriting the statute in a host of ways, virtually all designed to close the courthouse doors to those who have been victimized by government abuse of power and negate any deterrent for ending conditions and practices that result in systemic abuses. To be sure, courts sometimes have to fill gaps in a statutory scheme, but doing so requires a sensitivity to the statute's design and Congress's plan in passing it. That sensitivity is wholly lacking in the Court's judicially created immunity doctrines. Rather than acting to fulfill the statute's text, history, and purpose, the Court has created a patchwork quilt of doctrines that do violence to Section 1983's aim of ensuring official accountability. Section A looks at the Supreme Court's qualified and absolute immunity doctrines. Section B then turns to examine the judicially created limits on suits against local governments. Section C examines the exclusion of states from the scope of Section 1983.

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40 *Id.* at app. 217.

41 *Id.*

42 Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 771 (1987) ("Congress was not silent about immunities; it was only silent about *retaining* immunities.").

A. *The Invention of Qualified and Absolute Immunity*

The text of Section 1983 is as clear as can be: it makes state officials acting under color of state law liable for constitutional violations and provides no immunities from suit. Rather than heeding this text, the Supreme Court has held that all state officials, in fact, must be accorded a broad immunity from suit. Most have qualified immunity, a sweeping form of immunity that permits holding an official liable only where "existing precedent" was so clear that the "constitutional question" was "beyond debate."[43] That means that much of the time, constitutional violations go unremedied, justice is denied, and the contours of constitutional rights may remain frozen in place, preventing rights from ever becoming established in the first place.[44] Other government actors, including legislators, judges, prosecutors, and police witnesses have absolute immunity,[45] reflecting the Supreme Court's view that any judicial inquiry "would disserve the broader public interest."[46] In these contexts, as Justice Thurgood Marshall put it, "the mere inquiry into good faith is deemed so undesirable that we must simply acquiesce in the possibility that government officials will maliciously deprive citizens of their rights."[47] Through these doctrines, the Court has thwarted official accountability across the board and sanctioned the abuse of power the Fourteenth Amendment was designed to prevent.

Even worse, these doctrines are completely gratuitous. The Court's immunity doctrines are driven by the fear that "personal monetary liability . . . will unduly inhibit officials in the discharge of their duties."[48] But this chilling effect does not in fact exist because of widespread indemnification practices.[49]

In creating these sweeping governmental immunities, the Court has insisted that Section 1983 does not mean what it says and that its rulings simply recognize Congress's failure to displace well-recognized tort immunities existing in 1871. As the Court has repeatedly said, "[c]ertain immunities were so well established in 1871, when [Section] 1983 was enacted, that 'we presume that Congress would have specifically so

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43 Ashcroft v. Al-Kidd, 563 U.S. 731, 741 (2011).

44 *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 65–66 (2017).

45 *See* Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators); Pierson v. Ray, 386 U.S. 547 (1967) (judges); Imbler v. Pachtman, 424 U.S. 409, 424–29 (1976) (prosecutors); Briscoe v. LaHue, 460 U.S. 325 (1983) (police witnesses).

46 *Imbler*, 424 U.S. at 427.

47 *Briscoe*, 460 U.S. at 368 (Marshall, J., dissenting).

48 Anderson v. Creighton, 483 U.S. 635, 638 (1987).

49 Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 939 (2014).

provided had it wished to abolish' them."[50] This is wrong for three different reasons.

First, the Court's move to treat Section 1983 as a tort statute misses what is at the statute's core: ensuring constitutional accountability.[51] Congress enacted Section 1983 not to provide a remedy for torts—a body of law mostly designed to order private relations between individuals—but for violations of the Fourteenth Amendment's guarantees of fundamental rights and equality, many of which had no obvious tort analogy. As Representative Aaron Perry stressed during the debates over Section 1983, "[a]ll the injuries, denials, and privations," which demand a federal remedy, "are injuries, denials, and privations of rights and immunities under the Constitution and laws of the United States. They are not injuries inflicted by mere individuals or upon ordinary rights of individuals."[52] Congress was not concerned with the niceties of state tort law. A federal remedy—the likes of which had never existed previously—was necessary to redress the systematic violation of fundamental rights and utter breakdown of law and order. Congress was not trying to federalize tort law, but to ensure accountability when state officials participated in or condoned racial violence and trampled on fundamental constitutional rights to keep Black people in a state of second-class citizenship. In that context, it is highly unlikely that Congress would have wanted to relegate those victimized by official abuse of power to the remedies available under the common law tort system.[53] In the words of Justice John Marshall Harlan, "[i]t would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection."[54]

Second, the historical record provides strong support for taking the authors of Section 1983 at their word. Congress sought to provide a

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50 Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) (quoting *Pierson*, 386 U.S. at 554–55).

51 Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1750 (1989) (arguing that "treating § 1983 as a tort statute marginalizes the important constitution[al] interests it seeks to protect").

52 CONG. GLOBE, 42d Cong., 1st Sess. app. 79 (1871).

53 *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 524 (1992) (arguing that "[i]mmunities designed to minimize the extent to which common-law principles unintentionally impinged on official prerogatives would be peculiarly ill-suited to a statute which was primarily intended to prevent the abuse of those prerogatives"); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 494 (1982) (observing that "historical immunities . . . did not develop in contexts involving clear assertions of unconstitutional action—they usually arose in cases involving state tort or contract law").

54 Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring), *overruled in part on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

framework to ensure constitutional accountability, not to allow constitutional rights to be violated with impunity. Section 1983 provided a mechanism that allowed government actors who actively participated in the Klan's reign of terror or simply looked the other way to be brought to justice in the federal courts. Congress rejected the notion that government officials should be free to violate constitutional rights simply because of their official position. As the debates over Section 1983's precursor illustrate, official immunities prevent enforcement of constitutional rights and undermine the rule of law because they "place[] officials above the law."[55] The Supreme Court has simply ignored this history, paying no respect to the judgment Congress made in enacting Section 1983.

Third, the Court's official immunity doctrines ignore that Congress wrote Section 1983 against a legal backdrop that recognized the rule-of-law values served by holding government officials accountable for abuse of power. In 1871, government actors were generally strictly liable for violating the legal rights of individuals, even when what was at issue was a common law tort, not a constitutional violation. There were of course some exceptions to this general rule. If a legislature passed a law that violated legal rights, an individual could sue the officials who enforced the law, not those who wrote it.[56] If a judge flouted the Constitution, the remedy was an appeal, not a suit against the judge.[57] But in the mine run of cases, the legal backdrop to Section 1983 promised official accountability, not immunity.

Officials were frequently indemnified by the government for their unlawful acts[58]—much as they are today—but they were not given a free pass to trample on individual rights.[59] What Chief Justice John Marshall had written in *Marbury v. Madison* was still the law:

> If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the

55 CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866).

56 John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 211 (2013).

57 *Id.* at 212. At the time of the passage of Section 1983, courts recognized judicial immunity as well as a quasi-judicial immunity. *See* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. ONLINE (forthcoming 2021), https://ssrn.com/abstract=3746068 [https://perma.cc/9KNB-9JCV] (arguing that quasi-judicial immunity bears little resemblance to the modern doctrine of qualified immunity).

58 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, 1906–07 (2010).

59 *See* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851); Merriam v. Mitchell, 13 Me. 439 (1836); Shanley v. Wells, 71 Ill. 78 (1873).

> ordinary mode of proceeding, and being compelled to obey the judgment of the law.[60]

Marbury did not involve a suit for damages but courts applied the principles it spelled out to hold government actors strictly liable for violating constitutional limits.[61] In other words, at the time of the enactment of Section 1983, officials who violated constitutional limits—whether well-intentioned or not—lacked immunity from suit.[62]

Thus, qualified immunity, quite simply, is a judicial invention that cannot be squared with the text and history of Section 1983, prevents enforcement of the Fourteenth Amendment, turns principles of constitutional accountability on their head, and finds no support in the common law. Even worse, the doctrine is gratuitous because individual officers are virtually always indemnified by the government. A proper Section 1983 jurisprudence would require the Supreme Court to jettison qualified immunity.

The Supreme Court's absolute immunity doctrine makes this state of affairs even worse, condoning even the most flagrant violation of constitutional rights. On its face, absolute immunity seems nothing less than a judicial repeal of Section 1983. How can a statute that gives individuals the right to sue for violations of constitutional rights be construed to mean that certain officials can never be sued for violating the Constitution? There is much to be said for Justice William O. Douglas's view that "'every person' . . . mean[s] every person" and therefore the text does not license the "creation" of "judicial exception[s]" that permit government actors to maliciously flout the Constitution.[63] But in certain narrow settings, absolute immunities can be appropriate.

There is at least some evidence that the Congress that enacted Section 1983 did not understand the text to permit suits against legislators for passing unconstitutional state laws. In the debates over the Civil Rights Act of 1866, the precursor to Section 1983, Senator Lyman Trumbull suggested that state legislators would not be liable for enacting unconstitutional laws. Under the Act, Trumbull argued, "[t]he person who, under the color of the law, does the act, not the men who made the

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

61 Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 155 (2012) (arguing that government officials received "immunity for acting within the appropriate bounds of discretion, strict liability for acting outside of the authority enumerated by the Constitution").

62 James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148, 165–67 (2021).

63 Pierson v. Ray, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting).

law" may be held liable.[64] Under this view, legislators cannot be sued for passing an unconstitutional law, but those who are responsible for enforcing those enactments can.

Judicial immunity is harder to reconcile with the text and history of Section 1983 as originally enacted. As Justice Douglas observed in his dissent in *Pierson v. Ray*, "every member of Congress who spoke to the issue assumed that the words of the statute meant what they said and that judges would be liable."[65] State judges, like other institutions of power, were all too often either active or passive participants in the Klan's reign of terror.[66] In its modern form, however, Section 1983's text implicitly recognizes judicial immunity. In 1996, Congress overrode the Supreme Court's decision in *Pulliam v. Allen*,[67] which held that state judges could be sued for injunctive relief for actions taken in their judicial capacity, rejecting the argument that absolute judicial immunity prevented such a suit. Congress provided "that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."[68] Given that Congress has recognized a form of judicial immunity in the context of equitable actions—where usually there are no immunities of any kind—scaling back judicial immunity in the context of damages actions is probably a bridge too far.

Both legislative and judicial immunity cohere with the rule of law because they leave alternative remedies available.[69] But the judicially created doctrine of absolute immunity, however, sweeps far more broadly, making it impossible for those victimized by abuse of government power to obtain any redress in a number of circumstances.

The most troubling aspect of the doctrine is absolute prosecutorial immunity, which allows prosecutors to violate clearly established

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64 CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866).

65 *Pierson*, 386 U.S. at 561 (Douglas, J., dissenting).

66 Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 976 (1987) (arguing "that many of the framers of section 1983 considered state judges to be active and energetic participants in a pervasive effort to deprive a substantial segment of the southern populace of fundamental human liberties").

67 466 U.S. 522 (1984).

68 Federal Courts Improvement Act of 1996, Pub. L. 104-317, § 309, 110 Stat. 3847, 3853.

69 Jeffries, *supra* note 56, at 213–14 (arguing that "absolute legislative and judicial immunity are deviations from the norm; they should be construed grudgingly, in close adherence to the rationales that are thought to justify total abrogation of the constitutional tort remedy"). As Jeffries argues, for legislators, "this means that absolute immunity should be confined to decisions of general applicability that must be enforced by executive officers, who can themselves be sued for violating constitutional rights." *Id.* at 214. For judges, Jeffries argues that judicial immunity should only apply when there is in fact a "corrective process" to ensure "a functioning system for the enforcement of constitutional rights." *Id.* at 214, 217.

constitutional rights with impunity when acting as advocates.[70] Civil suits, where available, are an essential means of deterring prosecutorial misconduct. Judicial review of criminal convictions rarely provides any deterrence because courts are often loath to overturn criminal convictions simply because a prosecutor committed misconduct.[71] Because of absolute immunity, individuals have no remedy when prosecutors abuse the awesome power they possess. It does not matter how flagrant the constitutional violation. Absolute immunity forecloses all accountability.

The fiction that Section 1983 did not disturb common-law immunities does not provide justification for absolute prosecutorial immunity. Prosecutorial immunity was unknown in the law in 1871. Indeed, nineteenth century courts refused to exempt prosecuting attorneys from liability for malicious prosecution because that would "authoriz[e] those who are the most capable of mischief to commit the grossest wrong."[72] As Margaret Johns has shown, "the common law on the eve of passage of [Section] 1983" recognized "the well-established tort of malicious prosecution" and provided "no immunity defense to insulate the prosecutor from liability if the elements of the cause of action were proven."[73] As Johns recounts, "there was not a single decision affording prosecutors any kind of immunity defense from liability for malicious prosecution."[74] The first American case to recognize prosecutorial immunity was in 1896, a quarter of a century after the passage of Section 1983.[75] And prosecutorial misconduct was one of the abuses of power that led to the Fourteenth Amendment.[76] Absolute

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70 Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutor absolutely immune from suit for initiating and maintaining a criminal prosecution); Burns v. Reed, 500 U.S. 478 (1991) (prosecutor absolutely immune for participation in a probable-cause hearing); Kalina v. Fletcher, 522 U.S. 118 (1997) (prosecutor absolutely immune for improperly preparing and filing charging documents); Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (lead prosecutor absolutely immune for failure to train and supervise subordinates in disclosure of exculpatory impeachment evidence).

71 Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 517 (2011) (citing studies to show that judicial review is "entirely inadequate" because "even when prosecutorial misconduct is found . . . the offense is found to be harmless in most of those cases, so the conviction stands").

72 Burnap v. Marsh, 13 Ill. 535, 538 (1852).

73 Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 114 (2005).

74 *Id.*

75 *Burns*, 500 U.S. at 499 (Scalia, J., concurring in part and dissenting in part); Johns, *supra* note 71, at 526 ("[T]he doctrine of absolute prosecutorial immunity was unheard of for another twenty-five years, until a state court in Indiana adopted it in *Griffith v. Slinkard*. Even after *Griffith*, the common law regarding absolute prosecutorial immunity was not settled for decades.").

76 REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 39-30, at xviii (1866) ("In some localities prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere as soon

prosecutorial immunity prevents enforcement of the Fourteenth Amendment and has no foundation in the common law at the time of the passage of Section 1983.[77]

Despite all this, the Supreme Court in 1976 held that prosecutors cannot be sued for violating an individual's constitutional rights when performing actions "intimately associated with the judicial phase of the criminal process."[78] What justifies giving prosecutors absolute immunity in this setting? According to the Supreme Court, "[i]f a prosecutor had only a qualified immunity, the threat of s[ection] 1983 suits would undermine performance of his duties."[79] This is the same line of argument that, according to the Court, justifies giving police officers and other officials qualified immunity. So why should prosecutors have free rein to violate even settled constitutional rights with impunity? The Court has struggled to produce a coherent answer. It has recognized that where prosecutors are merely investigating crime, there is no good reason for giving them anything more than qualified immunity.[80] But where the prosecutor is acting as an advocate, the Court has said, anything less than absolute immunity "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[81]

This allows prosecutors to "strike" not only "hard blows," but "foul ones" as well.[82] By giving prosecutors absolute immunity, the Supreme Court has given prosecutors a free pass to violate constitutional rights, undermined the integrity of our criminal justice system, and ruined the lives of those wrongly accused of crime. Our justice system cannot, in fact, dispense justice if prosecutors cannot be held accountable when they flagrantly violate constitutional rights, such as by presenting false testimony, coercing witnesses, or hiding exculpatory evidence.

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as the United States troops are removed."); CONG. GLOBE, 39th Cong., 1st Sess. 1526 (1866) (insisting on protection of former Union soldiers "from malicious persecution instituted and carried on in the several States by those . . . who have taken every opportunity to assail, annoy, and trouble the soldiers of the Federal Army").

77 *Burns*, 500 U.S. at 505 (Scalia, J., concurring in part and dissenting in part) (observing that *Imbler* relied "upon a common-law tradition of prosecutorial immunity that developed much later than 1871, and was not even a logical extrapolation from then-established immunities").

78 Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

79 *Id.* at 424–25.

80 Buckley v. Fitzsimmons, 509 U.S. 259, 276 (1993); *Burns*, 500 U.S. at 495.

81 *Imbler*, 424 U.S. at 427–28.

82 Berger v. United States, 295 U.S. 78, 88 (1935).

B. *Local Government Liability Under Section 1983*

When the government authorizes, supervises, equips, trains, and pays an officer who violated constitutional rights in carrying out his or her job, the governmental entity should be held liable in a court of law. To quote now-Judge Nina Pillard, "constitutional violations require state action, and thus the government that made an abuse of its official power possible should . . . be held accountable for that abuse."[83] Because so many constitutional violations are due to organizational conditions that permit official violence and the violation of fundamental rights to flourish, holding the governmental entity liable is a particularly valuable means of vindicating constitutional rights.[84] It signals that the government—not merely a rogue officer—is responsible for constitutional violations. And it creates an incentive for the government to properly train and supervise its employees and eliminate conditions that lead to a culture of disregard for constitutional rights and other systemic drivers of harm. For these reasons, holding the government accountable "is likely a better agent for spurring systemic changes that may lead to an overall reduction in violations."[85]

Under longstanding Supreme Court doctrine, however, this means of ensuring constitutional accountability is almost always off the table. The Supreme Court has rewritten Section 1983 to give local governments a form of sovereign immunity.[86] Just as the judicially created qualified and absolute immunity doctrines make it incredibly difficult to sue an individual officer, the so-called "policy and custom" requirement invented by the Supreme Court erects an incredibly high hurdle to suing a local governmental entity for constitutional violations committed by its officials. Like qualified and absolute immunity, this doctrinal limit on suits against local government has no basis in the text and history of

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83 Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 75 (1999).

84 *Id.* ("[O]nly if government as an institution is held legally responsible for constitutional violations will it feel pressure to institute prophylactic measures, whether by enhancing staffing, improving training, or restructuring procedures."); Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damages Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 457 (1978) ("Providing for suit directly against the employing department or unit of government . . . would enhance the prospects for deterrence by placing responsibility for the denial of constitutional rights on the entity with the capacity to take vigorous action to avoid recurrence.").

85 Smith, *supra* note 11, at 484; Fred O. Smith, Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121, 129 (2021) (arguing that "[a]ddressing the[] causes" of racial police violence "requires more than accountability for *individual* police officers").

86 Smith, *supra* note 11, at 416 (arguing that judicially created limits on suits against localities "share[] core ideological and methodological features with state sovereignty doctrines").

Section 1983. The Court simply invented this demanding test out of whole cloth.

Like qualified immunity, the limits on local governmental liability doctrine is gratuitous because widespread indemnification, in practice, means that the government pays when its agents violate constitutional rights.[87] Holding governments liable for constitutional violations committed by their officers aligns with the reality that, on the ground, governments assume responsibility for constitutional wrongs committed by their agents.

In *Monell v. Department of Social Services*, the Supreme Court held that a local government may only be held liable under Section 1983 "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" on the individual.[88] *Monell* did not require the Court to decide whether a local government could be sued for constitutional violations committed by its officials because the case challenged the constitutionality of an explicit city policy. The idea that an official policy was required for municipal liability had not been raised in the lower courts, much less briefed before the Supreme Court.[89] But the Court adopted it anyway, firmly rejecting the idea that local governments could be sued more broadly for constitutional violations committed by their officers. Since *Monell*, the judicially created "policy or custom" requirement has been repeatedly applied stringently to immunize local governments from liability.

The word "policy" does not appear anywhere in Section 1983, but the Court has seized on the supposed "policy requirement" to throw out of court suits seeking to hold local governments liable for police killings and other state violence,[90] suits to redress a prosecutor's office's deliberate indifference to its constitutional duty to disclose exculpatory evidence,[91] and suits alleging retaliation against government employees for engaging in freedom of speech protected by the First Amendment.[92] It has been decades since the Supreme Court has found that a municipal

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87 Schwartz, *supra* note 49, at 944 ("[M]unicipalities virtually always satisfy officers' settlements and judgments, amounting to de facto respondeat superior liability. Complex and taxing municipal liability standards are, therefore, virtually irrelevant in determining who writes the check.").

88 436 U.S. 658, 694 (1978).

89 City of Okla. City v. Tuttle, 471 U.S. 808, 842 (1985) (Stevens, J., dissenting) ("The commentary on *respondeat superior* in *Monell* was not responsive to any argument advanced by either party and was not even relevant to the Court's actual holding.").

90 *Id.* at 820–24 (plurality opinion); Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397 (1997).

91 Connick v. Thompson, 563 U.S. 51 (2011).

92 City of St. Louis v. Praprotnik, 485 U.S. 112 (1988).

policy caused a constitutional violation.[93] During that time, the Court has spilled much ink laboring to explain the so-called "policy requirement," spinning finer and finer distinctions to keep constitutional accountability out of reach.

If a city enacts an ordinance or a mayor takes action that violates constitutional rights, it is easy enough to say that the policy requirement has been satisfied. But outside these circumstances, the Supreme Court has adopted a very crabbed view of municipal responsibility for constitutional violations. The Court's cases take a formalistic approach that focuses on "the actions of those whom the law establishe[s] as the makers of municipal policy,"[94] ignoring that much municipal policy is not made in this fashion.[95] And when the policy in question is a failure to train subordinates about the need to respect constitutional guarantees, the Court has adopted complex rules that effectively doom such claims to failure, insisting that without "stringent culpability and causation requirements," claims based on training deficits "raise[] serious federalism concerns."[96] So what began as an inquiry into policy has morphed into one about culpability. Meanwhile the Supreme Court has never held a local government liable based on a municipal custom, even though, as Myriam Gilles has argued, "unwritten codes of conduct among rank-and-file officers" are "the most pervasive force causing the deprivation of constitutional rights on the local level."[97]

Monell restricts local government liability in a manner fundamentally inconsistent with Section 1983. The main abuses Section 1983 sought to remedy were not unconstitutional regulations adopted by policymakers, but the fact that state and local officials winked at or participated in Klan violence and refused to enforce laws that protected Black Americans from harm.[98] Rather than heeding the statute's text and history, the Court's doctrine prioritizes local autonomy over the statute's goal of ensuring constitutional accountability by remedying and deterring constitutional wrongs.

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93 *See* Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

94 *Praprotnik*, 485 U.S at 128.

95 Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1778–79 (1989).

96 Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 415 (1997); *Connick*, 563 U.S. at 61; City of Canton v. Harris, 489 U.S. 378, 392 (1989).

97 Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 50 (2000).

98 Robert J. Kaczorowski, *Reflections on* Monell*'s Analysis of the Legislative History of § 1983*, 31 URB. LAW. 407, 430 (1999) ("It was not racially discriminatory laws and policies that presented the greatest concern to Congress in 1871. Rather, it was the inaction of law enforcement officers, the complicity of public officials in criminal wrongdoing, and the failure of the states' civil and criminal justice systems to protect against and to redress rights violations that Congress was attempting to address.").

To justify the "policy or custom" requirement, the Court in *Monell* made two points. Looking to the language of the statute, it first suggested that Section 1983's causation "language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor."[99] But in 1871, it was well-established that municipalities were persons in the law,[100] and municipalities were regularly held liable for the wrongful acts of their employees in the course of their employment.[101] And where the government makes it possible for its employees to act in ways that violate fundamental constitutional rights, pays them, directs them, equips them, and gives them immense power to inflict harm, it is fair to say that the government has "caused" the individual "to be subjected" to the constitutional violation.[102] The fact that Section 1983 requires a causal nexus between the government action in question and the violation of constitutional rights hardly justifies holding localities unaccountable for constitutional violations committed by subordinate officers.

Monell spent little time focusing on the textual point. Instead, it relied principally upon Congress's rejection of the Sherman Amendment, a different part of the 1871 legislation that included Section 1983. It is dangerous for a court to interpret one section of a statute based on Congress's failure to enact a different provision, particularly when the provisions deal with distinct problems. But *Monell* insisted that the "policy or custom" requirement was necessary in light of the rejection of the Sherman Amendment.

The Sherman Amendment—named for its sponsor Ohio Senator John Sherman—sought to make municipalities shoulder the costs of injuries inflicted by Klan violence, requiring localities to "take the necessary steps to put down lawless violence" or face legal liability.[103] There were three versions of the Sherman Amendment. The first sought to make the inhabitants of a municipality strictly liable for injuries caused by Klan violence, whether or not they had taken any action to prevent the

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99 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978).

100 Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431 (defining the term "person" to include "bodies politic and corporate").

101 *See* City of Okla. City v. Tuttle, 471 U.S. 808, 836–37 & nn.8–9 (1985) (Stevens, J., dissenting) (collecting cases).

102 Schuck, *supra* note 95, at 1785 ("Municipalities are morally, causally, and functionally responsible for most officially inflicted injuries in precisely the same sense that private enterprises are; 'official policy' is but one source of that responsibility."); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 787 (1992) ("If local government officials and low-level employees could be reached precisely because they carried the badge of government authority, is it reasonable to suppose that the 1871 Congress intended to absolve the very governments who handed out the badges?").

103 CONG. GLOBE, 42d Cong., 1st Sess. 761 (1871).

injuries.[104] The second version—adopted by a Conference Committee after the House rejected the original Sherman Amendment—imposed strict liability on the municipalities rather than on local property owners.[105] Both versions of the Sherman Amendment were sweeping in their breadth: they imposed liability for injuries caused by "riotous[] and tumultuous[]" mob violence whether or not the inhabitants or the municipality was at fault.[106] Liability attached simply because legal offenses had occurred in the municipality.

The Sherman Amendment, as modified, passed the Senate, but was rejected by the House of Representatives. Opponents stressed two arguments. First, they argued that the Sherman Amendment would have created an unprecedented form of liability. The Amendment, they claimed, would have "create[d] a corporate liability for personal injury which no prudence or foresight could have prevented."[107] Even if the local government "performed its duty to the utmost," it could still be held liable.[108] A key part of the problem was that the Sherman Amendment would have made municipalities strictly liable for conduct by third parties they could not control. As Kentucky Senator John Stevenson asked, "[i]s it possible for any city . . . to foresee what the midnight incendiary may do, or what bad men may do upon the eve of the election, secretly and clandestinely in combination?"[109]

Second, opponents of the Sherman Amendment argued, based on then-binding Supreme Court precedent, that Congress lacked power under the Constitution to impose on localities a new legal obligation to keep the peace.[110] As Representative John Farnsworth declared, the Supreme Court has held that "Congress can impose no duty on a State officer. . . . Nor can Congress confer any power or impose any duty upon the county or city. Can we then impose on a county or other State municipality liability where we cannot require a duty? I think not."[111]

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104 *Id.* at 663.

105 *Id.* at 749.

106 *Id.* at 663, 749.

107 *Id.* at 762.

108 *Id.* at 771.

109 *Id.* at 762.

110 Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861); Collector v. Day, 78 U.S. (11 Wall.) 113 (1871). Ultimately, the Supreme Court held that these cases did not apply to legislation enforcing the Fourteenth Amendment because "the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment." *Ex parte* Virginia, 100 U.S. 339, 347–48 (1880). Given the explicit enforcement power in Section 5, the *Virginia* Court could "not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience." *Id.* at 348.

111 CONG. GLOBE, 42d Cong., 1st Sess. 799 (1871).

Ultimately, Congress adopted a much narrower provision, which imposed liability on any person who could have prevented Klan violence but failed to do so.[112]

Monell held that the rejection of the Sherman Amendment foreclosed holding local governments liable for constitutional violations committed by their officials under color of law. According to *Monell*, "creation of a federal law of respondeat superior would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional."[113] This is wrong.

First, Section 1983 did not impose a new legal duty akin to the one that opponents of the Sherman Amendment objected. Rather, Section 1983 provided a legal remedy for enforcing constitutional rights—rights that state and local governments were already under a constitutional duty to respect. Section 1983, hence, did not create any new rights or duties; it simply provided a cause of action to ensure that those victimized by abuse of power could go to federal court to hold government actors accountable for violating the Constitution.[114] *Monell* erred in suggesting that holding municipalities liable for constitutional violations committed by their officers raised any constitutional issue.

Second, the Sherman Amendment did not involve a form of respondeat superior liability, and nothing in the debate over the Sherman Amendment impugned municipal liability for legal wrongs committed by a city's employees. In 1871, respondeat superior municipal liability—the idea that governments could be held liable for legal wrongs committed by their agents within the scope of their employment—was well established in the law. As David Achtenberg has shown, this rule of governmental liability reflected four ideas which defined the rule and its limits: (1) the legal unity of employer and employee; (2) the employer's legal power to direct and control his employee; (3) the fact that the employer holds out his employees as "careful, competent, and well-intentioned"; and 4) the need to ensure that the benefits and liabilities of the employer-employee relationship were reciprocal.[115] The Sherman

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112 42 U.S.C. § 1986 (establishing a cause of action against "[e]very person who, having knowledge" of conspiracies to violate federal rights and "power to prevent or aid in preventing the commission of the same, neglects or refuses so to do").

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

114 Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 S. CT. REV. 249, 261 (1987) (arguing "that the constitutional objections to the Sherman [A]mendment have no bearing on whether a municipality may be liable under § 1983 on a *respondeat superior* theory" because "there was no constitutional impediment to holding [state] officers liable if they violated the Constitution while performing tasks delegated to them by the state").

115 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, 2196–2203 (2005).

Amendment proved so controversial because it departed so significantly from these precepts. It sought to hold localities liable for the conduct of third parties whom they could neither direct nor control, whether or not the local government had notice of impending violence or any means at their disposal to prevent it.[116] In short, the defeat of the Sherman Amendment was based on concerns about the form of liability it would have created, not about municipal liability writ large.

Monell has produced a tortured jurisprudence that undermines Section 1983's goal of constitutional accountability, prevents systemic reform, and mires courts in confusing inquiries. A rule with such deleterious consequences that, in the words of Justice Breyer, "requires so many such distinctions to maintain its legal life may not deserve such longevity."[117]

C. *The Exclusion of States from the Scope of Section 1983*

The limits on suing state governments for violating constitutional rights are even more stringent. The Supreme Court has held that states are not persons under Section 1983 and cannot be sued under any circumstances. This creates a nonsensical distinction in the law—municipalities can sometimes be sued, while states cannot—and stymies efforts to hold states accountable for flouting constitutional rights.

In *Will v. Michigan Department of State Police*,[118] the Supreme Court held "that a State is not a person within the meaning of [Section] 1983," reasoning that the statute's text reflected no design to alter the constitutional balance of power between states and the federal government.[119] It did not matter that the central purpose of Section 1983 was to enforce the Fourteenth Amendment and to provide a cause of action that allowed persons victimized by abuse of state power to seek redress. That fact, the majority said, "does not suggest that the State itself was a person that Congress intended to be subject to liability."[120] Thus, state entities can never be sued under Section 1983.

Will's construction of Section 1983 was powerfully shaped by the majority's view of the Eleventh Amendment as a guarantee of state

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116 *Id.* at 2196 (arguing the four rationales for respondeat superior "were powerful arguments in favor of holding employers (including municipal employers) liable for the torts of their employees and were equally powerful arguments against adopting the type of liability contemplated by the Sherman Amendment").

117 Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 435 (1997) (Breyer, J., dissenting).

118 491 U.S. 58 (1989).

119 *Id.* at 64–65.

120 *Id.* at 68.

sovereign immunity.[121] Justice William Brennan's dissent in *Will* aptly likened the Eleventh Amendment to a "guest who would not leave" and suggested that "the Eleventh Amendment lurks everywhere in today's decision and, in truth, determines its outcome."[122] *Will* turned a blind eye to the fact that the Fourteenth Amendment fundamentally altered our Constitution's federal structure and gave Congress broad enforcement powers to ensure states respected bedrock rights of liberty and equality, reshaping the very meaning of state sovereignty and federalism in the process.[123] As the Supreme Court observed just a few years after the enactment of Section 1983, "[t]he prohibitions of the Fourteenth Amendment are directed to the States . . . . It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty."[124] *Will* ignored how the Fourteenth Amendment redrew the federal-state balance to give Congress the power to hold states accountable for violating constitutional protections—authority Congress used to enact Section 1983.

The Congress that wrote Section 1983 did not legislate against a background principle of sovereign immunity.[125] As Katherine Mims Crocker has recently noted, "[a]s things stood when Congress transformed the relationship between the federal and state governments during Reconstruction, the Court had never said that citizens could not sue their own states on the basis of federal question jurisdiction in federal court."[126] In 1871, "there was no widespread and definitive belief that state sovereign immunity barred cases beyond the Amendment's textual ambit."[127] Eventually, in *Hans v. Louisiana*,[128] the Supreme Court of the *Plessy v. Ferguson* era would refashion the Eleventh Amendment into a general principle of state sovereign immunity and prevent federal courts from hearing suits by individuals against their home state to vindicate constitutional rights—a holding that has been sharply criticized as "rooted in a pre-Fourteenth Amendment view of the federal courts'

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121 *Id.* at 67 (declining "to adopt a reading of § 1983 that disregards" the Eleventh Amendment).

122 *Id.* at 71–72 (Brennan, J., dissenting).

123 Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1809 (2010) ("Increasing congressional power at the expense of the states was the whole point of the new constitutional structure that followed the Civil War.").

124 *Ex parte* Virginia, 100 U.S. 339, 346 (1880).

125 *See* Nichol, *supra* note 66, at 1009 ("[T]he framers of the statute were far more concerned with achieving constitutional compliance than with respecting traditional notions of state sovereignty.").

126 Katherine Mims Crocker, *Reconsidering Section 1983's Nonabrogation of Sovereign Immunity*, 73 FLA. L. REV. 523, 526 (2021).

127 *Id.* at 549.

128 134 U.S. 1 (1890).

role."[129] But, at the time of the enactment of Section 1983, the Eleventh Amendment did not stand for any sweeping principle of state sovereign immunity.[130] Thus, as a historical matter, there is no principled basis for severely limiting the reach of Section 1983—a statute passed not to confer immunity on states but to ensure they respected the Fourteenth Amendment's limits—out of respect for the sovereign immunity of states. Excluding states from the scope of Section 1983 undermines Section 1983's raison d'etre: to ensure states would be accountable for violating constitutionally guaranteed rights secured by the Fourteenth Amendment.

Will's reading of the statute also ignores that, at the time Section 1983 was framed, states were considered "bodies politic and corporate" and therefore were persons for purposes of federal law.[131] Legal dictionaries at the time explained that the term "body politic," "[w]hen applied to the government . . . signifies the *state*."[132] Supreme Court opinions of the era, too, recognized that "[e]very sovereign State is of necessity a body politic, or artific[i]al person."[133] Indeed, the members of Congress that enacted Section 1983 into law employed this very same usage.[134] The text of Section 1983 does not require excluding states from the reach of Section 1983.

The *Will* Court's sterile textual analysis not only ignored powerful evidence that states were persons under the law, but also turned a blind eye to the transformation Section 1983 wrought. Section 1983 sought to accomplish what no statute had previously contemplated: it opened the courthouse doors to individuals injured by unconstitutional abuses committed by states and state actors for the first time in history. As even its opponents conceded, the statute gave federal courts the power to redress constitutional violations committed by state and local

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129 Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana: *An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 2044 (2003).

130 *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821) (observing that "[w]e must ascribe the amendment . . . to some other cause than the dignity of a State"); Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 857–58 (1824) ("The amendment has its full effect, if the [C]onstitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens."); Crocker, *supra* note 126, at 548 ("[A]s of 1871, the only high-court decision analyzing a suit against a citizen's own state in light of the Eleventh Amendment had expressly held the provision's protections inapplicable.").

131 Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431; Crocker, *supra* note 126, at 563 ("[S]tates were often called 'bodies politic,' with or without reference to 'bodies corporate' or the like, between the mid-nineteenth and mid-twentieth centuries.").

132 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 185 (11th ed. 1862) (emphasis in original).

133 Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1851); Poindexter v. Greenhow, 114 U.S. 270, 288 (1885).

134 CONG. GLOBE, 42d Cong., 1st Sess. 661 (1871); *id.* at 696.

governments—"a jurisdiction that may be constitutionally conferred upon it . . . but that has never yet been conferred upon it" before that time.[135] To enforce the Fourteenth Amendment, Congress revolutionized the jurisdiction of the federal courts to make certain that the federal judiciary could perform the task of ensuring constitutional accountability by states and state actors. And the term "person" was easily broad enough to include state governments. *Will* simply ignored the vast ways in which the Reconstruction Congress altered the balance between the federal and state governments to enforce the Fourteenth Amendment's promises of freedom and equality.

CONCLUSION

The Supreme Court's Section 1983 jurisprudence turns principles of statutory and constitutional interpretation on their head. Rather than respecting the text enacted into law by Congress to enforce the Fourteenth Amendment, the Supreme Court has repeatedly rewritten it. It has superseded Section 1983's plain guarantee that individuals can sue governments and their agents for violating federal constitutional rights with a host of complex and often hard to understand doctrines that all too often provide immunity, not accountability. The result is a litany of doctrines that allow government officials to kill, act brutally, violate fundamental rights, and subordinate the most marginalized in our society, all too often with impunity.

But lawmakers in Congress can change this. Nearly two years after the killing of George Floyd ignited a renewed national focus on police brutality and the failures of justice, our nation's elected representatives have the opportunity and the responsibility to begin repairing our system of constitutional accountability and ensure that our most cherished constitutional guarantees do not merely exist on paper. The only way to fix the long line of immunity doctrines devised by the Court is to end them, and to ensure that those wronged by the government can seek justice in the courts.

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135 *Id.* at app. 216.