

A COMMON FIELD OF VISION: MUNICIPAL LIABILITY FOR STATE LAW ENFORCEMENT AND PRINCIPLES OF FEDERALISM IN SECTION 1983 ACTIONS

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I. INTRODUCTION.....	967
II. THE EVOLUTION OF MUNICIPAL LIABILITY FOR CONSTITUTIONAL TORTS	971
III. DIVISION IN THE CIRCUITS AND SCHOLARLY OPINION.....	978
A. <i>The Circuit Split</i>	978
B. <i>Scholarly Debate</i>	984
IV. CONCEPTS OF FEDERALISM WEIGH IN FAVOR OF A NO-LIABILITY RULE	986
V. CONCLUSION.....	997

I. INTRODUCTION

Section 1983 provides legal and equitable relief for citizens whose constitutional rights have been deprived by state actors.¹ The statute has also been interpreted to provide money damages against municipalities that, through the enforcement of municipal policies, inflict constitutional harm.² This Comment addresses the question of whether municipalities may be held liable for enforcing state laws. It argues that municipalities should not be held liable for damages flowing from the enforcement of state laws because such liability undermines principles of federalism. The Supreme Court should resolve the federal circuit split on this issue by extending Eleventh Amendment immunity to municipalities when they act as state law

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¹ 42 U.S.C. § 1983 (2000).

² The terms “municipalities” and “local governments” are used interchangeably in this Comment. Cities, counties, towns, and the like are encompassed by these terms. The duties and prerogatives given to different forms of regional government vary by state, but such distinctions are not pertinent to the question I address here. For an example of a typical apportionment of regional governance within a state, see Jared Eigerman, *California Counties: Second-Rate Localities or Ready-Made Regional Governments?*, 26 HASTINGS CONST. L.Q. 621, 627–33 (1999).

enforcers. Such an extension is consistent with the principles of federalism, remains true to the policies established in *Monell v. Department of Social Services of New York*,³ and eliminates the unfair and intractable situation municipalities now find themselves in with respect to enforcement of “constitutionally risky” state statutes.

Tracing a recent example helps to illuminate the issue. On April 6, 2002, New York City police officers arrested Carlos Vives for violating a state criminal harassment statute that prohibited communication of annoying or alarming materials through the mail.⁴ The charge was based on Vives’s transmission of inflammatory religious materials through the mail to Jane Hoffman, a candidate for Lieutenant Governor of New York.⁵ The district attorney ultimately dropped the charges, but Vives subsequently sued for false arrest under § 1983.⁶ The District Court for the Southern District of New York held that the harassment statute violated the First Amendment and enjoined its enforcement against Vives.⁷ Regarding the issue of municipal liability, the district court questioned whether the city had truly been “commanded” to enforce the statute.⁸ The court rejected the city’s argument that it could not be liable because it had been enforcing a state (rather than city) law, and held that the city’s policy of enforcing state law was one to which liability could attach.⁹ Thus, Carlos Vives was able

³ 436 U.S. 658 (1978).

⁴ *Vives v. City of New York*, 305 F. Supp. 2d 289, 293–95 (S.D.N.Y. 2003). The statute at issue was New York Penal Law section 240.30, which states: “A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she . . . [c]ommunicates . . . [by] mail . . . [or] causes a communication to be initiated . . . [by] mail . . . in a manner likely to cause annoyance or alarm.” N.Y. PENAL LAW § 240.30(1)(a)–(b) (McKinney 2005).

⁵ *Vives*, 305 F. Supp. 2d at 294.

⁶ *Id.* at 295.

⁷ *Id.* at 302, 304. Prior to the district court’s ruling in *Vives*, the statute had been questioned but never invalidated. *See, e.g.*, *Schlager v. Phillips*, 985 F. Supp. 419 (S.D.N.Y. 1997); *People v. Goldstein*, 763 N.Y.S.2d 390, 394 (App. Div. 2003) (declaring that section 240.30(1) did not violate defendant’s First Amendment rights); *People v. Mangano*, 746 N.Y.S.2d 741, 742 (App. Div. 2002) (ruling that section 240.30(1) was not unconstitutional on its face); *People v. Henderson*, 677 N.Y.S.2d 669 (Just. Ct. 1998) (holding that section 240.30(1) was not unconstitutional as applied to defendant who mailed profane letter to elected official at his residence). The district court’s ruling in *Vives* was later reversed by the Second Circuit as to its determination of unconstitutionality and its finding that the individual officers in question should not receive qualified immunity. *See Vives v. City of New York*, 405 F.3d 115, 118 (2d Cir. 2004) (“[W]e hold that [individual] defendants did not have fair notice of section 240.30(1)’s purported unconstitutionality and that the District Court erred in denying Detectives Li and Lu qualified immunity on that ground.”).

⁸ *Vives v. City of New York*, 02 Civ. 6646 (SAS), 2004 U.S. Dist. LEXIS 25911, at *4–5 (S.D.N.Y. Dec. 22, 2004); Tom Perrotta, *Statute Later Held Invalid Leaves City Facing Liability*, N.Y.L.J., Mar. 29, 2004, at 1.

⁹ *Vives*, 2004 U.S. Dist. LEXIS 25911, at *9.

to collect money damages directly from the city for its enforcement of (what it believed to be) a valid state law.¹⁰

Vives is a paradigm case for the issue this Comment seeks to address. As with most criminal laws in the United States, the statute in this case, New York Penal Law section 240.30, was passed by the New York legislature,¹¹ signed into law by the governor,¹² and upheld by state courts.¹³ Yet despite the state's creation and promulgation of the statute, the Eleventh Amendment shields the state from monetary liability for rights violations arising from the statute.¹⁴ The Eleventh Amendment prohibits federal courts from hearing "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State,"¹⁵ and has been interpreted to prohibit all suits against unconsenting states in federal court.¹⁶ States are further shielded from liability for civil rights infractions by the Supreme Court's holding that states are not "persons" within the meaning of § 1983.¹⁷ Although plaintiffs may sue state officials notwithstanding the Eleventh Amendment, such suits only allow for prospective injunctive relief, not monetary damages.¹⁸

Accordingly, plaintiffs like Carlos Vives, precluded from collecting from the state—the source of the offending law—file suit instead against the municipalities that enforced the law against them. In *Monell v. Department of Social Services of New York*, the Supreme Court held that municipalities that subject individuals to constitutional deprivations through

¹⁰ *Id.* at *10. In conversations with Leticia Santiago and Caryn Rosencrantz, attorneys in the New York City Law Department's Special Federal Litigation Division, I was informed that Vives was awarded several thousand dollars. Interview with Leticia Santiago and Caryn Rosencrantz, Attorneys, New York City Law Dep't, in New York City, N.Y. (May 26, 2005).

¹¹ "By article III, section 1 of the State Constitution the People vested the legislative power in the Senate and the Assembly. This includes the power to define and declare crimes and public offenses. . . . It is the sovereign power of a state, to maintain social order, by laws for the due punishment of crimes." *People v. Grant*, 242 A.D. 310, 311 (N.Y. App. Div. 1934) (denying a delegation of legislative authority to prescribe criminal punishments). "The declaration of the crime and prescription of the penalty for the violation rest in the ultimate discretion of the Legislature." *Id.* at 310.

¹² "[The governor] shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed." N.Y. CONST. art. IV, § 3.

¹³ See *supra* note 7 (discussing case law history).

¹⁴ U.S. CONST. amend. XI.

¹⁵ *Id.*

¹⁶ See *Hans v. Louisiana*, 134 U.S. 1 (1889); see also Sharmila Roy, *Suits Against States: What to Know About the 11th Amendment*, 41 ARIZ. ATT'Y 18, 18 (2004) ("[I]n *Hans v. Louisiana*, the Court held that there was no distinction between federal question and diversity cases where suits against states were concerned. . . . [T]he Court held that even though the language of the amendment did not prohibit a suit against a state by one of its own citizens, it would be a startling result and an 'absurdity on its face' if the state could be sued by one of its own citizens in federal court while citizens of other states or foreign subjects were prohibited from maintaining such suits.").

¹⁷ *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

¹⁸ See *Ex Parte Young*, 209 U.S. 123 (1908).

the implementation of unconstitutional “polic[ies]” or “custom[s]” are liable in damages under § 1983.¹⁹ But *Monell* did not reach the question of whether local enforcement of state laws entailed liability. In such situations, like that in *Vives*, local governments protest that they do not have any “policy” to which liability can attach, as required by *Monell*.²⁰ As mere arms of the state, defendant local governments claim, they are duty-bound to enforce state law, and thus cannot be held to have implemented a municipal “policy” as understood in *Monell*.

The Supreme Court has yet to address the issue of whether enforcement of state law creates municipal liability. This has left lower courts in a conundrum regarding municipal liability for the enforcement of state law, and, as discussed in Part III, there is a split in the federal courts on the issue. Some courts, like the Southern District of New York in *Vives*, have ruled that municipalities are liable for constitutional torts committed while enforcing state statutes.²¹ Others, notably the Seventh Circuit, have ruled such liability inconsistent with the policies of § 1983.²² Finally, a few courts have taken a third approach, assessing liability where they find that municipalities were authorized, but not commanded, to enforce state laws. Scholars have arrayed themselves on each side of the debate, arguing predominantly about how normative tort theories of fault, loss-spreading, deterrence, and corrective justice should inform the debate.

In this Comment, I argue that municipalities should not be held liable for the enforcement of state law. However, my analysis focuses on a reason not fully explored in the existing literature: how the concept of federalism weighs in favor of a no-liability rule. Principles of federalism, reinvigorated by the Supreme Court in the last quarter century, counsel in favor of extending Eleventh Amendment sovereign immunity to municipalities when they enforce state laws. Eleventh Amendment protection for municipal enforcement of state laws would afford state laws the presumption of constitutionality to which they are entitled, and prevent federal courts from manipulating municipal coffers to surreptitiously undermine state legislative prerogatives.

To address this issue, Part II will explore the background of § 1983 and the evolution of municipal liability for constitutional torts. Part III examines the circuit split on the issue of municipal liability for enforcement of state law, as well as the various scholarly arguments on each side of the debate. Finally, Part IV argues that the doctrines of sovereign immunity and

¹⁹ 436 U.S. 658, 691 (1978).

²⁰ *Id.*

²¹ See *Evers v. Custer County*, 745 F.2d 1196, 1203 (9th Cir. 1984); *Vives v. City of New York*, 02 Civ. 6646 (SAS), 2004 U.S. Dist. LEXIS 25911, at *9–10 (S.D.N.Y. Dec. 22, 2004); *Davis v. City of Camden*, 657 F. Supp. 396, 402–04 (D.N.J. 1987).

²² See *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468 (7th Cir. 2001); *Bethesda Lutheran Homes & Servs. Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998); *Surplus Store & Exch., Inc. v. City of Delphi*, 928 F.2d 788, 790–92 (7th Cir. 1991).

federalism weigh against municipal liability for enforcing state laws, and proposes a resolution in line with these principles.

II. THE EVOLUTION OF MUNICIPAL LIABILITY FOR CONSTITUTIONAL TORTS

Section 1983 is the main legal vehicle for deterring and compensating constitutional torts.²³ The statute provides plaintiffs a cause of action in law or equity against any “person,” acting “under color of any statute, ordinance, regulation, custom, or usage, of any State” who deprives the plaintiff of a federal right.²⁴ Originally enacted as a part of the Ku Klux Act of 1871, the statute was intended to address the dangerous conditions prevailing in post-Civil War Southern states.²⁵ Generally, the statute provided a means by which to enforce the Fourteenth Amendment.²⁶ It did this in three ways: first, it provided for the invalidation of state laws which by their very nature infringed constitutional rights; second, “it provided a remedy where state law was inadequate”;²⁷ and third, it “provid[ed] a federal remedy where the state remedy, though adequate in theory, was not available in practice.”²⁸ This Part traces the evolution of municipal liability under § 1983 and identi-

²³ The term “constitutional tort” was originally coined by Marshall Shapo, who said such a suit is “not quite a private tort, yet contains tort elements; it is not ‘constitutional law,’ but employs a constitutional test.” Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW U. L. REV. 277, 324 (1965).

²⁴ 42 U.S.C. § 1983 (2000). The relevant text reads:

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

Id.

²⁵ *Monroe v. Pape*, 365 U.S. 167, 172–73 (1961). The Act was partly inspired by a message delivered by President Ulysses Grant to Congress:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

Id.

²⁶ *Id.* at 171 (“[Section 1983’s] purpose is plain from the title of the legislation, ‘An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.’”).

²⁷ *Id.* at 173.

²⁸ *Id.* at 174.

fies the Supreme Court's periodic forays into the issue of municipal liability for the enforcement of state law.²⁹

The Supreme Court first considered § 1983 municipal liability in *Monroe v. Pape*.³⁰ In that case, the plaintiff alleged that thirteen Chicago police officers illegally searched his home and arrested him.³¹ The Court held that the individual officers could be held liable,³² but ruled that in light of § 1983's legislative history, municipalities were not "persons" amenable to suit under the statute.³³ The Court based this aspect of the decision largely on the legislative history of the Ku Klux Act. The Court noted that the House of Representatives, which had passed the statute, had rejected a proposed amendment that would have made municipalities strictly liable for violations of federal rights committed in its boundaries.³⁴ Notably, one objection to the municipal liability amendment raised in congressional debates and acknowledged in *Monroe* was that "Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law."³⁵ The *Monroe* Court refrained from reaching the various policy questions raised by the issue of municipal liability and instead rested its holding mainly on Congress's rejection of the strict liability amendment.³⁶

Seventeen years later, the Court changed course in *Monell v. Department of Social Services*.³⁷ In *Monell*, female employees of New York City brought suit against the city for injunctive relief and damages for unlawful forced maternity leave mandated by city regulations.³⁸ Invoking the immunity established by the Supreme Court in *Monroe*, the district court and Second Circuit found that any monetary relief against the city was barred.³⁹ The Supreme Court granted certiorari to decide "[w]hether local government officials and/or local independent school boards are 'persons' within the meaning of 42 U.S.C. § 1983."⁴⁰ It held, contrary to *Monroe*, "that

²⁹ As this Part shows, the Supreme Court has addressed issues tangential to the one I address, but has never definitively resolved the question.

³⁰ *Monroe*, 365 U.S. at 187–92.

³¹ *Id.* at 169.

³² *Monroe* was a truly revolutionary moment in constitutional tort law. Before *Monroe*, § 1983 was practically a dead letter as a method of rights vindication. Between 1871 and 1920, only 21 cases were decided under § 1983. THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS 65 (2004). For an analysis of the explosion of constitutional tort claims in the second half of the twentieth century, see Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987).

³³ *Monroe*, 365 U.S. at 191–92.

³⁴ *Id.* at 188–89.

³⁵ *Id.* at 190 (citing CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871)).

³⁶ *Id.* at 191.

³⁷ 436 U.S. 658 (1978).

³⁸ *Id.* at 660–61.

³⁹ *Id.* at 662.

⁴⁰ *Id.*

Congress *did* intend municipalities and local government units to be included among those ‘persons’ to whom § 1983 applies.”⁴¹ In its reconsideration, the Court focused on several factors. First, the Court reassessed the congressional debates surrounding the passage of the Ku Klux Act and concluded that nothing in those discussions directly contradicted a finding that municipalities were persons. The statute’s authors, Justice Brennan emphasized, understood “persons” to include municipalities.⁴² The Court further reasoned that “persons” should include municipalities because the statute was meant to provide a broad remedial tool for plaintiffs.⁴³ In regard to the Eleventh Amendment, the Court held that sovereign immunity only shielded states,⁴⁴ not municipalities, from liability.⁴⁵ Only those “local government units which are not considered part of the State for Eleventh Amendment purposes” would be open to liability in damages.⁴⁶

Although *Monell* vastly expanded § 1983 liability by opening municipalities to suit, the Court also placed several significant limits on such liability, the perimeters of which occupy the analysis of this Comment. Most broadly, the Court focused on municipal causation as a requirement for liability. Justice Brennan emphasized that the wording of the statute made clear that “Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature *caused* a constitutional tort.”⁴⁷ A municipality only *causes* a constitutional deprivation, the Court reasoned, if one of *its actual policies* inflicts harm. As the Court said, “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.”⁴⁸ In line with this municipal causation requirement, the Court also held that “a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents.”⁴⁹ In other words, respondeat superior liability would not be imposed on municipi-

⁴¹ *Id.* at 690.

⁴² *Id.* at 688–89 (noting that an Act of Congress that had been passed only months before the Ku Klux Act had understood municipalities to be included in the definition of “person”).

⁴³ “Moreover, since municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by § 1, and, further, since Congress intended § 1 to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1.” *Id.* at 685–86.

⁴⁴ Although, as George D. Brown has noted, “section 1983’s imposition of liability upon ‘every person’ could easily be read to include states.” George D. Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on City of Oklahoma City v. Tuttle and Pembaur v. City of Cincinnati—The “Official Policy” Cases*, 27 B.C. L. REV. 883, 883 (1986).

⁴⁵ The issue of states’ “personhood” under § 1983 was settled in *Quern v. Jordan*, 440 U.S. 332 (1979), which held that the Eleventh Amendment protected states from liability for money damages.

⁴⁶ *Monell*, 436 U.S. at 690 n.54.

⁴⁷ *Id.* at 691 (emphasis added).

⁴⁸ *Id.* at 694.

⁴⁹ *Id.*

palities because the city itself, rather than the city employee (who may be sued in his individual capacity),⁵⁰ must cause the deprivation for entity liability to attach.⁵¹ In *Monell*, New York City had promulgated an official written policy compelling pregnant women employees to take unpaid leaves of absence in violation of their constitutional rights.⁵² The city was thus liable in monetary damages.⁵³

The construction of § 1983 given in *Monell v. Department of Social Services* began a new era in constitutional civil litigation; it “[f]ocus[ed] new light” on § 1983 and “widened access to the federal courts.”⁵⁴ However, *Monell* left unresolved exactly what municipal decisions, actions, or practices, outside of a relatively straightforward *Monell*-type factual situation,⁵⁵ might be considered a “policy or custom” for purposes of liability.⁵⁶ As one scholar has noted, “[a]t a doctrinal level, the concept of official policy may well make sense, but in operation it is a quicksand of uncertainty.”⁵⁷

The Supreme Court has attempted to clarify the “policy or custom” requirement in several cases over the last three decades. In *Owen v. City of Independence*,⁵⁸ the Court considered whether a city could invoke the defense of a good faith belief in the constitutionality of a policy to avoid liability. *Owen* involved the termination of a city police chief under written

⁵⁰ Although outside the purview of this Comment, an accurate appraisal of any aspect of § 1983 litigation must account for qualified immunity, which protects government officers who could not have reasonably foreseen that their actions were unconstitutional. “[T]he qualified immunity test is simply the adaptation of the fair warning standard 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.” *United States v. Lanier*, 520 U.S. 259, 270–71 (1997). For a debate regarding the extent and importance of qualified immunity in § 1983 cases, see Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1510–11 (1999) (arguing that qualified immunity amounts to a “predisposed protection of government officials”); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 81 (1998) (suggesting that qualified immunity is an issue mainly with respect to a few narrowly defined rights).

⁵¹ *Monell*, 436 U.S. at 692.

⁵² *Id.* at 660–61.

⁵³ *Id.* at 702 (reversing lower court).

⁵⁴ *Id.* at 704 (Stevens, J., concurring).

⁵⁵ “[T]he Department of Social Services and the Board of Education in New York had a written, formal policy requiring pregnant employees to stop working at a certain time, even if it was not medically necessary.” Karen M. Blum, *Municipal Liability Under Section 1983*, 15 TOURO L. REV. 1535, 1535 (1999).

⁵⁶ See Brown, *supra* note 44, at 884 (“[I]t is not an exaggeration to say that no one knows what ‘official policy’ is.”); Barbara Kritchevsky, *A Return to Owen: Depersonalizing Section 1983 Municipal Liability Litigation*, 41 VILL. L. REV. 1381, 1397 (1996) (noting that *Monell* did not answer two critical questions: (1) who made policy, and (2) what policies entailed liability).

⁵⁷ See Brown, *supra* note 44, at 884.

⁵⁸ 445 U.S. 622 (1980).

city procedures.⁵⁹ The plaintiff police chief asserted that the proceedings had violated his substantive and procedural due process rights.⁶⁰ The Court of Appeals held that the plaintiff's rights had been violated but that all defendants, including the municipality, were entitled to qualified immunity because the procedures had been followed in good faith—the defendants did not know that the challenged regulations were unconstitutional.⁶¹ The Supreme Court reversed, ruling that a municipality may not assert a good faith defense for § 1983 liability.⁶² Though it may have been impossible for city officials to divine the procedures' unconstitutionality in advance of the Court's ruling, the city policy nevertheless caused the plaintiff's injury, and, accordingly, the city was liable.

Owen relied on two principal justifications for its holding. First, the Court emphasized the compensatory purpose of § 1983. The Court expressed concern that if municipalities, like the officers they employed, could make a good faith defense, plaintiffs would be left without a remedy. Justice Brennan wrote:

A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . . . Yet owing to the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense.⁶³

The Court's second justification was deterrence. Imposing liability even where the municipality acted in good faith would "create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights,"⁶⁴ and might "encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."⁶⁵ Thus, *Owen* established that a good faith belief in the constitutionality of a policy, in this case written city regulations, could not shelter a municipality from liability.

In *City of Oklahoma City v. Tuttle*,⁶⁶ the Supreme Court took another step toward defining "policy." *Tuttle* involved the fatal shooting of a man by a police officer who had been employed by the city for ten months.⁶⁷ The widow of the decedent sued on the theory that the city had a de facto

⁵⁹ *Id.* at 622–32.

⁶⁰ *Id.*

⁶¹ *Id.* at 634.

⁶² *Id.* at 650.

⁶³ *Id.* at 651 (citations omitted).

⁶⁴ *Id.* at 651–52.

⁶⁵ *Id.* at 652.

⁶⁶ 471 U.S. 808 (1985).

⁶⁷ *Id.* at 810–11.

policy of inadequately training its employees.⁶⁸ Justice Rehnquist wrote for a four-justice plurality that a single incident of wrongdoing was insufficient to establish a “policy.”⁶⁹ He distinguished the case from *Monell* by noting that

[t]o establish the constitutional violation in *Monell* no evidence was needed other than a statement of the policy by the municipal corporation, and its exercise; but the type of “policy” upon which respondent relies, and its causal relation to the alleged constitutional violation, are not susceptible to such easy proof.⁷⁰

The word “policy,” Justice Rehnquist wrote, referred to “a course of action consciously chosen from among various alternatives.”⁷¹ It was extremely unlikely, Rehnquist posited, that any municipality would choose a policy of inadequate training.⁷² To be a policy within the meaning of *Monell*, an affirmative link between the chosen policy and constitutional violation must exist, something the plaintiff had not demonstrated.⁷³ Justice Brennan concurred in the judgment. Although he agreed there was insufficient evidence of an unconstitutional “policy” in the case, he lamented that the majority’s “single act insufficiency” rule could deny a just remedy to chronologically early victims of an unconstitutional policy.⁷⁴

Pembaur v. City of Cincinnati,⁷⁵ decided a year later, vindicated Justice Brennan’s view. Writing for the plurality, Justice Brennan declared a single act sufficient grounds for municipal liability if the government actor “possesses final authority to establish municipal policy with respect to the action ordered”⁷⁶ and where state and local law vested the decisionmaker with “responsibility for establishing final government policy with respect to the subject matter in question.”⁷⁷

⁶⁸ *Id.* at 811–12.

⁶⁹ *Id.* at 821.

⁷⁰ *Id.* at 822–23.

⁷¹ *Id.* at 823, 823 n.6 (referring to *Webster’s Ninth New Collegiate Dictionary*, which defines “policy” as “a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions”).

⁷² *Id.* at 823 (noting that “inadequate training” could only be a policy if evidence proved that “inadequacies resulted from a conscious choice”).

⁷³ *Id.*

⁷⁴ Justice Brennan reasoned that a § 1983

cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims; by exposing a municipal defendant to liability on the occurrence of the first incident, it is hoped that future incidents will not occur.

Id. at 832 (Brennan, J., concurring).

⁷⁵ 475 U.S. 469 (1986).

⁷⁶ *Id.* at 481.

⁷⁷ *Id.* at 483 & n.12.

The rubric for determining whether an official is vested with policy-making responsibility emerged in *City of St. Louis v. Praprotnik*.⁷⁸ There, Justice O'Connor, writing for another plurality, stated that status as a policymaker turned on two factors: first, whether the actor has final, unreviewable authority in the area in question; and second, whether state law vests the official with responsibility in the given area.⁷⁹ Regarding the second requirement, the plurality expressed confidence that state law "will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of local government's business."⁸⁰

The second prong of *Praprotnik*'s analysis is especially significant to this Comment's analysis. The plurality predicated policymaking status, and thus liability, on a formal legal analysis of state and local power structures determined by a judge rather than a factual analysis determined by a jury.⁸¹ In so finding, the Court made a considered step in the direction of formalism. If municipal liability lawsuits focused on proving a municipality's power structure as a matter of fact, juries could get bogged down in a miasma of evidence, including everything from broad department mission statements to interpersonal office conversations. As Justice O'Connor noted, "[m]unicipalities cannot be expected to predict how courts or juries will assess their 'actual power structures.'"⁸² Rather, in the interest of predictability and "consistent adjudication,"⁸³ the *Praprotnik* majority fixed the liability standard on formal legal responsibility—a question for the judge that would presumably help many cases avoid trial.⁸⁴

Beyond these cases, there has been little further clarification of the definition of "policy." To summarize the rules that evolved in these decisions: Municipalities are "persons" liable under § 1983 when their policies or customs cause the deprivation of an individual's constitutional rights, whether or not those policies are followed in good faith. Those policies or

⁷⁸ 485 U.S. 112 (1988).

⁷⁹ *Id.* at 124.

⁸⁰ *Id.* at 125. For a criticism of the "contrived" nature of determining policymaking authority by assessing state law, see Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 662, 664–65.

⁸¹ *Praprotnik*, 485 U.S. at 124.

⁸² *Id.* at 124 n.1.

⁸³ *Id.* at 125 n.2 (criticizing the approach suggested in Justice Stevens's dissent). The rule that state law determines whether an official has policymaking authority finally found the backing of a majority three years later in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989). As the Court said there, "the identification of those officials whose decisions represent the official policy of the local government unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury." *Id.* at 737.

⁸⁴ This formal legal analysis does not disproportionately favor either defendants or plaintiffs. It benefits defendants to have a predictable ex ante standard for who will be considered a policymaker, but it also helps plaintiffs to have an ascertainable responsible party in municipal government. For both parties, costly discovery is avoided by making the issue a question of law which can be disposed of before discovery.

customs may be written rules, widespread customs, or even single decisions made by those with final policymaking authority under state law.

III. DIVISION IN THE CIRCUITS AND SCHOLARLY OPINION

This Comment addresses whether enforcement of state law should be grounds for municipal liability. The following section outlines three different rules that have emerged from the federal circuit courts regarding municipal liability for the enforcement of state law. The three approaches may be summarized as: (1) municipalities are liable for enforcing state law, (2) municipalities are not liable for enforcing state law, and (3) municipalities are liable when they act in accordance with state laws that merely authorize municipal conduct, but are not liable when acting under state laws that command municipal action.⁸⁵ This Part also briefly summarizes the major scholarly arguments arrayed on each side of the debate.

A. *The Circuit Split*

1. *Courts Assessing Liability.*—The first approach, that of assessing damages against municipalities for enforcement of state laws, has been followed most notably by the Ninth Circuit. In *Evers v. County of Custer*,⁸⁶ the plaintiff sued the county after the county declared a private road crossing plaintiff's property to be a "public thoroughfare."⁸⁷ The county made the declaration pursuant to two Idaho state statutes: the first mandated that roads be declared public after five years of public use and maintenance;⁸⁸ the second required county commissioners to announce and record the newly public roads.⁸⁹ The county argued that it was immune from monetary liability because it had merely implemented state laws.⁹⁰

A unanimous Ninth Circuit was unconvinced. The *Evers* court echoed the Supreme Court's reasoning in *Owen*, which had denied municipalities a good faith defense. The Ninth Circuit directly analogized the good faith of the *Evers* officials in enforcing state law to the good faith of the *Owen* officials in enforcing municipal policy.⁹¹ Like *Owen*, the court cited two sub-

⁸⁵ These categories should be conceptually distinguished from a case where constitutional state laws are carried out in an unconstitutional manner. See, e.g., *Rossi v. Town of Pelham*, 35 F. Supp. 2d 58, 77 (D.N.H. 1997) (holding a municipality liable for enforcing a state statute in an unconstitutional manner, and distinguishing that holding from a *Surplus Store* factual situation in which mere enforcement of the law was at issue).

⁸⁶ 745 F.2d 1196 (9th Cir. 1984).

⁸⁷ *Id.* at 1198–99.

⁸⁸ *Id.* at 1200 n.3 (citing IDAHO CODE ANN. § 40-103 (1977) (“[A]ll roads used as [highways] for a period of five (5) years, provided [they] shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways.”)).

⁸⁹ *Id.* at 1198 n.1 (citing IDAHO CODE ANN. § 40-501).

⁹⁰ *Id.* at 1203.

⁹¹ *Id.*

stantive considerations for the conclusion that municipal enforcement of state law could entail municipal liability: first, the court declared that “[t]he central aim of [§ 1983] was to provide protection to those persons wronged by the ‘misuse of power possessed by virtue of state law.’”⁹² If municipalities were immunized, that protection would fail, since the plaintiff would be unable to collect from the state (due to sovereign immunity),⁹³ and unable to collect from the individual officers (due to qualified immunity). Second, the court quoted *Owen* for the proposition that liability for “all of [the municipality’s] injurious conduct, whether committed in good faith or not” would “create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights.”⁹⁴ Notably, however, whereas *Owen* involved written city procedures and thus liability incentivized nonenforcement of municipal policies, liability in *Evers* incentivized nonenforcement of state statutes.

Other courts have assessed liability for state law enforcement in line with the Ninth Circuit’s approach. In *Davis v. City of Camden*,⁹⁵ the plaintiff challenged the City of Camden’s practice of strip-searching all new jail inmates in compliance with a mandatory New Jersey law.⁹⁶ The District Court of New Jersey held these searches unconstitutional.⁹⁷ Because qualified immunity shielded the individual officials,⁹⁸ the plaintiff’s monetary recovery depended on whether the county could be held liable for enforcing the state mandate. The court held that “a municipality should be held liable under § 1983 when it officially adopts a policy that subsequently is declared unconstitutional, notwithstanding the fact that the policy was mandated by state law.”⁹⁹ The court denied that, in so holding, it was imposing respondeat superior liability. Rather, it maintained that the municipality had a “policy” of enforcing state law; the court noted that the Camden County Sheriff’s Office acknowledged that it approved the enforcement of state law. The court denied that *Monell*’s municipal policy requirement differentiated between “policies” created by municipalities and states, claiming that the authors of § 1983 had likely regarded all municipal action as the “carrying out [of] state mandated policies.”¹⁰⁰

⁹² *Id.* at 1204 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

⁹³ See *infra* notes 163–176 and accompanying text (discussing sovereign immunity).

⁹⁴ *Evers*, 745 F.2d at 1204 (quoting *Owen v. City of Independence*, 445 U.S. 622, 650–52 (1979)).

⁹⁵ 657 F. Supp. 396 (D.N.J. 1987).

⁹⁶ *Id.* at 398. The pertinent statute stated: “All newly admitted inmates shall be thoroughly searched. Each newly admitted inmate shall be strip searched for weapons and contraband.” *Id.* at 398 n.2 (quoting N.J. STAT. ANN. § 10A:31-3.12(2) (1979)).

⁹⁷ *Id.* at 401.

⁹⁸ *Id.* at 401–02.

⁹⁹ *Id.* at 402.

¹⁰⁰ *Id.* (citing Eric Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 226 (1979) (“[I]f the forty-second Congress had thought it inappropriate that cities be held liable for carrying

The *Davis* court's analysis was commendable for its frank appreciation of the difficulty it was creating for municipalities. The court admitted that no "fault" could be imputed to the local government, but nonetheless justified its holding by noting that, "[f]aced with a choice between depriving victims of constitutional violations of recovery and imposing liability without any real fault on local governments, the *Owen* court, in view of the remedial purpose of § 1983, chose the latter course."¹⁰¹ It acknowledged the "predicament" in which it placed municipalities by forcing local governments to choose between potential liability for enforcing state law and dereliction of duty in refusing enforcement, but observed that such concerns had not prevented the imposition of liability in other circumstances.¹⁰² Responding to the criticism that municipal officials effectively had no choice but to implement the strip search policy, the court stated boldly, "these officials have such a choice Municipal officials cannot blindly implement state laws; they are required to independently assess the constitutionality of state laws" ¹⁰³ Finally, *Davis* rejected the state mandate/authorization distinction. Defending its imposition of liability for obedience to a state command, the court said: "[T]he fact that state law mandates that a municipality implement a particular policy does not render the municipality's affirmative adoption of that policy any less of a municipal policy than when state law merely authorizes the municipality's action, or when state law is silent."¹⁰⁴ By acknowledging the difficulty of the situation, but nevertheless asserting liability, *Davis v. City of Camden* distinguishes itself as a bold—and admirably transparent—decision imposing liability on local governments for state law enforcement.

2. *Courts Denying Liability*.—Two Seventh Circuit decisions have championed a rule of no liability for municipal enforcement of state law. In *Surplus Store & Exchange, Inc. v. City of Delphi*,¹⁰⁵ a city police officer seized several allegedly stolen rings from a pawn shop and released them to their purported owner.¹⁰⁶ The pawn shop brought suit against the municipality, claiming that the absence of a hearing regarding the disposition of the rings violated its procedural due process rights.¹⁰⁷ The store alleged that the city police officer took the rings under the color of three state statutes that collectively authorized police to seize unlawfully obtained items and

out state mandated policies, it would not have permitted suits against cities at all, for that Congress regarded everything a city did as merely implementing such policies.")).

¹⁰¹ *Id.* at 403.

¹⁰² *Id.* at 403–04 (citing *EEOC v. County of Allegheny*, 705 F.2d 679 (3d Cir. 1983) (imposing liability on county for age discrimination under the Age Discrimination in Employment Act despite challenged policy being mandated by state law)).

¹⁰³ *Id.* at 404.

¹⁰⁴ *Id.*

¹⁰⁵ 928 F.2d 788 (7th Cir. 1991).

¹⁰⁶ *Id.* at 789.

¹⁰⁷ *Id.*

return them to their owners.¹⁰⁸ The pawn shop then “attempt[ed] to make the conceptual leap from these Indiana statutes to Delphi city policy by arguing that Delphi has a ‘policy’ of enforcing state statutes.”¹⁰⁹ The court roundly rejected the argument. Judge Bauer stated:

It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the “policy” of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a “policy” simply cannot be sufficient to ground liability against a municipality.¹¹⁰

The court made its rejection of the plaintiff’s argument even more explicit in a footnote. Addressing the argument that all cities can be charged with “adopting” as a matter of policy all state laws that they do not ignore, the court stated:

This argument would render meaningless the entire body of precedent from the Supreme Court and this court that requires culpability on the part of a municipality and/or its policymakers before the municipality can be held liable under § 1983, and would allow municipalities to be nothing more than convenient receptacles of liability for violations caused entirely by state actors—here, the Indiana legislature.¹¹¹

Surplus Store is also notable because the Seventh Circuit did not distinguish between state statutes that *authorized* police conduct and those that *mandated* it. The Indiana statutes at issue in the case used permissive language, stating that law enforcement “may” return the property in question to the owner before trial if certain procedural requirements were met.¹¹² But the fact that the City of Delphi *elected* to return the rings as the statute *allowed*, not commanded, did not inform the court’s decision. The court ruled that the state’s authorization of this municipal conduct was enough to remove “policy-culpability” from the county.¹¹³

Another Seventh Circuit case denying liability, *Bethesda Lutheran Homes & Services v. Lean*,¹¹⁴ involved a claim by mentally retarded patients of a Wisconsin medical facility that a Wisconsin county had unconstitutionally abridged their federal right to travel by denying them Wisconsin residency and concomitant Medicaid benefits.¹¹⁵ The county claimed that this denial of residency was mandated by Wisconsin law.¹¹⁶ Judge Richard

¹⁰⁸ *Id.* (citing IND. CODE ANN. §§ 35-33-5-5, -43-4-4(h), -43-4-5 (West 1986)).

¹⁰⁹ *Id.* at 791.

¹¹⁰ *Id.* at 791–92.

¹¹¹ *Id.* at 791 n.4.

¹¹² IND. CODE ANN. §§ 35-33-5-5(b), -43-4-4(h).

¹¹³ *Cf.* discussion *infra* Part III.A.3.

¹¹⁴ 154 F.3d 716 (7th Cir. 1998).

¹¹⁵ *Id.* at 718–19.

¹¹⁶ *Id.* at 718.

Posner, writing for the court, denied money damages to the plaintiffs and admonished that “[w]hen the municipality is acting under compulsion of state or federal law, it is the policy contained in that state or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury.”¹¹⁷ Judge Posner noted the circuit split, and proclaimed that the rule of the Seventh Circuit was firmly in line with the Supreme Court’s rejection of respondeat superior liability for local entities.¹¹⁸ Like the *Davis* Court (which had come out the other way), the Seventh Circuit addressed the “rock and a hard place” dilemma faced by municipalities. *Bethesda* defended the no-liability rule as having “the virtue of minimizing the occasions in which federal constitutional law, enforced through section 1983, puts local government at war with state government.”¹¹⁹ The essence of the opinion was that municipalities had no choice but to enforce state law, and since a policy was “a deliberate choice to follow a course of action . . . made from among various alternatives,” municipal liability could not attach.¹²⁰

The Fifth Circuit has developed a no-liability rule as well. In *Familias Unidas v. Briscoe*,¹²¹ the court ruled that a county was not liable for enforcement of a Texas education statute that compelled plaintiffs to disclose the names of those in their organization who were boycotting public schools.¹²² Likewise, in *Bigford v. Taylor*,¹²³ the court held that municipal liability for state law enforcement failed because, in order for liability to attach, the policymaker in question (unlike the city official in the case) “must have ‘the authority to define objectives and choose the means of achieving them.’”¹²⁴ Thus, in *Bigford*, where a county magistrate denied a hearing pursuant to a Texas law that was later ruled unconstitutional, the county could not be held liable.¹²⁵

3. *Cases Distinguishing Authorization and Command.*—Some courts have held that municipalities may be liable when they take action in areas where state law has authorized though not commanded a course of conduct. In these cases, although a state law may have expressly allowed (and thus

¹¹⁷ *Id.*

¹¹⁸ *Id.* (stating that the court’s holding was “rooted in the principle (firmly established though often criticized . . .) that a municipality is not vicariously liable under 42 U.S.C. § 1983 for the torts of its employees”).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 719 (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)).

¹²¹ 619 F.2d 391 (5th Cir. 1980).

¹²² *Id.* at 394, 404 (“[The judge’s] duty in implementing section 4.28, much like that of a county sheriff in enforcing a state law, may more fairly be characterized as the effectuation of the policy of the State of Texas embodied in that statute, for which the citizens of a particular county should not bear singular responsibility.”).

¹²³ 834 F.2d 1213 (5th Cir. 1988).

¹²⁴ *Id.* at 1221 (quoting *Rhode v. Denson*, 776 F.2d 107, 109 (5th Cir. 1985)).

¹²⁵ *Id.* at 1223.

approved) an action by a local entity, if the local entity was not under strict compulsion to perform the act, it may be held liable for it.

Garner v. Memphis Police Department,¹²⁶ from the Sixth Circuit, is a paradigm case drawing the distinction between state command and authorization.¹²⁷ The case involved the killing of an unarmed fifteen-year-old boy suspected of burglary, who was shot by police while fleeing the crime scene.¹²⁸ The decedent's father sued the Memphis Police Department for carrying out its policy of using deadly force to apprehend felons, alleging that this policy violated his son's Fourth, Eighth, and Fourteenth Amendment rights.¹²⁹ Memphis had devised the police's deadly force policy in reliance on a Tennessee statute which stated that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist[sic], the officer may use all the necessary means to effect the arrest."¹³⁰ The city argued that it "had no choice but to follow this statute,"¹³¹ but the Sixth Circuit disagreed. The statute in question used permissive language: it prevented Memphis from adopting a less restrictive deadly force policy, but did not compel the city to adopt the deadly force policy that resulted in the boy's death.¹³² Therefore, Memphis's selection of an unconstitutional policy from a range of potential policies resulted in liability.

The Eleventh Circuit employed a similar rationale in *McKusick v. City of Melbourne*.¹³³ In *McKusick*, the Eleventh Circuit reviewed the enforcement of a state court injunction that authorized police to arrest protestors in a "buffer zone" around an abortion clinic.¹³⁴ Under that authorization, local law enforcement arrested all protestors within the buffer zone, including the plaintiff.¹³⁵ The court noted that by the terms of the injunction the city could have elected to make no arrests, or only to arrest those protesters they believed to be associated with parties specifically named in the injunction.¹³⁶ The court ruled that "the development and implementation of an

¹²⁶ 8 F.3d 358 (6th Cir. 1993).

¹²⁷ This case arose from the same set of facts as *Tennessee v. Garner*, 471 U.S. 1 (1984). In *Garner*, the Supreme Court held a Tennessee statute unconstitutional insofar as it authorized the use of deadly force against a nondangerous fleeing suspect. The Supreme Court remanded the case to the Sixth Circuit to determine whether Memphis's election to act under the Tennessee law led to liability for the city.

¹²⁸ *Garner*, 8 F.3d at 360.

¹²⁹ *Id.* at 361.

¹³⁰ *Id.* at 364 (quoting TENN. CODE ANN. § 40-7-108 (1990)).

¹³¹ *Id.*

¹³² *Id.*

¹³³ 96 F.3d 478 (11th Cir. 1996).

¹³⁴ *Id.* at 480. The enforcement portion of the injunction read, in pertinent part, "Law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction." *Id.* at 483; see also Blum, *supra* note 55, at 1536.

¹³⁵ *McKusick*, 96 F.3d at 481.

¹³⁶ *Id.* at 483-84.

administrative enforcement procedure, going beyond the terms of the injunction itself . . . amount[s] to a cognizable policy choice.”¹³⁷ Police officers who chose to maximize enforcement under the injunction thus opened the city to liability, even though such conduct was explicitly authorized by a state court. Even where city officials acted under the authority of a written court directive, municipal reliance on state authorization was deemed irrelevant to the city’s monetary liability.

B. Scholarly Debate

To fully develop the issue of whether municipalities should be liable for the enforcement of unconstitutional state laws, it is useful briefly to summarize the various scholarly arguments which have been made on each side of the debate. Not surprisingly, there has been little academic output on the rather narrow issue of § 1983 and municipal liability for state law enforcement. In one article that tackles the issue directly, Professor Mark Brown argues that municipalities should be held liable for state law enforcement, mainly because he believes fault is an erroneous touchstone for liability.¹³⁸ To support his view, Brown makes a number of assertions. He argues that overdeterrence of law enforcement flowing from liability is socially desirable.¹³⁹ He also argues that opposition to liability based on issues of reliance and fairness to defendants matter little when applied to government entities as opposed to individuals.¹⁴⁰ Nor, he posits, is corrective justice offended by municipal liability.¹⁴¹ In regard to financial consequences, Brown’s article points out that there is little evidence that allowing damages for state law enforcement would result in municipal financial distress,¹⁴² or that concern for municipal treasuries would lead courts to dilute federal rights.¹⁴³

Aside from Professor Brown’s article, debate of the issues involved in liability for state law enforcement has taken a more general form and has coalesced around normative tort principles involved in municipal liability. As Professor John Jeffries has noted, “strict, respondeat superior liability for all constitutional violations” is “overwhelmingly popular with academics.”¹⁴⁴ Indeed, scholars have widely criticized *Monell’s* rejection of re-

¹³⁷ *Id.* at 484.

¹³⁸ Brown, *supra* note 50; see also Karen Blum, *Local Government Liability for the Enforcement of State Law: “The Devil Made Me Do It!”*, 41 MUN. LAW. 7 (2000).

¹³⁹ Brown, *supra* note 50, at 1522–23.

¹⁴⁰ *Id.* at 1527 (“Reliance and fairness are at their lowest ebb when government liability is at stake.”).

¹⁴¹ *Id.* at 1529.

¹⁴² *Id.* at 1530.

¹⁴³ *Id.* at 1539 (“While . . . abstract concern that constitutional law may bend under the weight of damages liability is justified, the experiment would do little harm in practice.”). Brown also briefly addresses concerns of federalism, which I shall discuss in the next Part. *Id.* at 1530–33.

¹⁴⁴ Jeffries, *supra* note 50, at 82.

spondeat superior liability for municipalities,¹⁴⁵ arguing that such liability, which would extend to municipal employees and municipal governments enforcing state laws, would have several benefits. First, it would allow compensation of all plaintiffs injured by a city actor, in line with the “broad remedial purpose” of the statute.¹⁴⁶ Injured parties would no longer be forced to jump through legal hoops to prove the existence of “policies” by showing an official’s deliberate choices and unreviewable authority. Rather, quite simply, if a city employee injured a citizen by acting unconstitutionally in the scope of his employment (whether based on city policy, state law, or mere incompetence), the city would be liable and the plaintiff would be granted relief. Furthermore, supporters argue, by compensating all victims of constitutional deprivations, society reaffirms the high value of individual rights—a worthy use of taxpayer dollars.¹⁴⁷ Second, respondeat superior liability would achieve the highest levels of deterrence for unconstitutional municipal conduct. As *Owen* suggested when it rejected a municipal good faith defense, greater risk of liability incentivizes cities to err on the side of protecting individual rights.¹⁴⁸ Finally, supporters of respondeat superior liability argue that the costs of unconstitutional municipal conduct should be spread to all local citizens, instead of being absorbed entirely by the injured individual who may be unable to show a municipal “policy” as articulated in *Monell*.

Scholars have support on the high court for respondeat superior municipal liability. Justice Stevens, since his concurrence in *Monell*,¹⁴⁹ has argued that respondeat superior liability was appropriate for municipalities. He has consistently argued that the history and purpose of § 1983 lead to the conclusion that “Congress intended that a governmental entity be liable for the constitutional deprivations committed by its agents in the course of their duties.”¹⁵⁰ If the Supreme Court were to allow respondeat superior liability for local governments, municipal governments could be held monetarily liable for the acts of their employees to enforce state law regardless of whether the acts were policies of the municipality.

Scholarly arguments against municipal liability for enforcement of state laws generally emphasize fault as the proper touchstone for money damages. Professor John Jeffries has championed this position, arguing

¹⁴⁵ See, e.g., Karen Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409, 412–14 & n.15 (1978) (arguing that Congress did not explicitly reject such liability); Brown, *supra* note 44, at 908; Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 259–63 & n.41 (1987).

¹⁴⁶ See, e.g., *Pembaur v. City of Cincinnati*, 475 U.S. 469, 489 (1986) (Stevens, J., dissenting).

¹⁴⁷ John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 90 (1989).

¹⁴⁸ *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1979).

¹⁴⁹ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 704–14 (1978) (Powell, J., concurring, joined by Stevens, J.).

¹⁵⁰ *Pembaur*, 475 U.S. at 489 (Stevens, J., concurring).

that the assumption that compensation is a sufficient reason to award damages may be “more problematic than has been supposed.”¹⁵¹ He argues that compensation for constitutional violations that occur in the course of municipal enforcement for state laws cannot be justified by notions of rights affirmation, distributive justice, or loss spreading,¹⁵² and that instead fault, with reference to the Aristotelian ideal of corrective justice, is the appropriate standard by which to apportion money damages.¹⁵³ According to Jeffries, through the lens of corrective justice, “tort law . . . expresses a single normative conception integrating defendant’s wrongdoing and plaintiff’s injury.”¹⁵⁴ The two cannot be disentangled, so the payment of damages should only occur when

[t]he government has achieved a wrongful gain (some more effective or less costly implementation of government policy) by inflicting a wrongful loss. . . . The point is not merely that the loss is offset . . . but that the loss is *rectified* by damages from the wrongdoer. . . . Both causation and wrongdoing are essential to this conception. Causation links victim to wrongdoer Without causation, plaintiff’s connection to defendant is undifferentiated and vastly overinclusive.¹⁵⁵

Finally, Jeffries notes that only when fault is present can deterrence of unconstitutional behavior occur—for only if there is knowledge of error can misconduct be avoided.¹⁵⁶

IV. CONCEPTS OF FEDERALISM WEIGH IN FAVOR OF A NO-LIABILITY RULE

This Part explores what I believe has been an insufficiently considered aspect of the debate: that is, how the structural concepts of federalism and sovereign immunity inform the issue of municipal liability for state law enforcement, and how they may be used to satisfactorily resolve the current circuit split on this aspect of § 1983 liability.

This issue is ripe for exploration. In the last quarter century, the Rehnquist Court reinvigorated—some might say revolutionized—the con-

¹⁵¹ Jeffries, *supra* note 147, at 83 (“The assumption of compensation as a universal desideratum of the law governing official misconduct seems to me misguided.”).

¹⁵² *Id.* at 90–93.

¹⁵³ *Id.* at 93–103. The idea of corrective justice is that for every wrong committed, the wrongdoer gains and the wronged person loses. Corrective justice aims to restore wrong-doer (“winner”) and wronged (“loser”) to their former position. For a discussion of the role of corrective justice in modern legal theory and law, see Christopher Arnold, *Corrective Justice*, 90 ETHICS 180 (1980); Richard Posner, *The Concept of Corrective Justice*, 10 J. LEGAL STUD. 187 (1981).

¹⁵⁴ Jeffries, *supra* note 147, at 93–94.

¹⁵⁵ *Id.* at 94–95.

¹⁵⁶ *Id.* at 93–103.

cept of federalism.¹⁵⁷ In cases such as *Rizzo v. Goode*,¹⁵⁸ *United States v. Lopez*,¹⁵⁹ *United States v. Morrison*,¹⁶⁰ *New York v. United States*,¹⁶¹ and *Printz v. United States*,¹⁶² the Supreme Court has reaffirmed the states' role as independent sovereigns coequal with the federal government. The Court has scaled back congressional power and refused to allow the federal government to control states directly or intrude on their traditionally sovereign functions.

Particularly pertinent to this Comment has been the Court's attention to sovereign immunity. The Eleventh Amendment was passed in response to an early Supreme Court decision, *Chisholm v. Georgia*,¹⁶³ which allowed a South Carolinian to sue the state of Georgia for damages in federal court.¹⁶⁴ Framers of the amendment worried that *Chisholm's* rule would imperil the sovereign independence of the states. The text of the resulting amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."¹⁶⁵ Although the text of the amendment only prohibits federal suits against states by citizens of foreign states, the Court, in *Hans v. Louisiana*, interpreted the amendment to prohibit suits against states by their own citizens as well.¹⁶⁶ The Court reasoned that, consistent with the concept of sovereign immunity embodied in the Eleventh Amendment, "the sovereign cannot be sued in its own courts, or in any other, without its consent and permission."¹⁶⁷ As the Court elaborated more recently, "the

¹⁵⁷ PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 511–46, 565–606 (4th ed. 2000). The "revolution" probably began in the Burger Court, however. See Brown, *supra* note 44, at 885 (identifying "deferential federalism as a hallmark of the Burger Court").

¹⁵⁸ 423 U.S. 362 (1976) (invoking principles of federalism in warning against federal judicial interference in state executive actions).

¹⁵⁹ 514 U.S. 549 (1995) (invalidating federal Gun-Free School Zones Act of 1990 for lack of an enumerated federal power to legislate in this area).

¹⁶⁰ 529 U.S. 598 (2000) (holding that neither the Commerce Clause nor Section Five of the Fourteenth Amendment gave Congress the authority to enact the civil remedy provision of the Violence Against Women Act).

¹⁶¹ 505 U.S. 144 (1992) (holding that Congress may not compel state legislatures to enact federal regulations).

¹⁶² 521 U.S. 898 (1997) (ruling that the federal government cannot force state executives to administer federal laws).

¹⁶³ 2 U.S. (2 Dall.) 419 (1793).

¹⁶⁴ CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 36 (2004). *Chisholm* applied Article III, Section 2 of the Constitution, which extended federal jurisdiction to "Controversies . . . between a State and Citizens of another State." U.S. CONST. art. III, § 2.

¹⁶⁵ U.S. CONST. amend. XI.

¹⁶⁶ *Hans v. Louisiana*, 134 U.S. 1 (1890).

¹⁶⁷ *Id.* at 17 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1858)).

Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."¹⁶⁸

The Rehnquist Court has strongly reaffirmed the doctrine of sovereign immunity. In the landmark case of *Seminole Tribe v. Florida*,¹⁶⁹ the Supreme Court overruled its prior holding that Congress could statutorily abrogate state immunity from suit in federal court.¹⁷⁰ *Seminole Tribe* ruled that congressional abrogation of state immunity, even if Congress believed such remedy "necessary and proper" to the success of the statute, impermissibly undermined state independence and dignity.¹⁷¹ The Court further strengthened sovereign immunity in *Federal Maritime Commission v. South Carolina State Ports Authority*¹⁷² and *Alden v. Maine*¹⁷³ by ruling that states could not be brought as unconsenting defendants in federal administrative proceedings or in their own state courts through Congress's exercise of Article I legislative powers. This series of decisions recognized that "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint"¹⁷⁴ and that it accords states "the dignity that is consistent with their status as sovereign entities."¹⁷⁵ The doctrine of sovereign immunity can be simply stated as the idea that "it [is] an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts."¹⁷⁶

The reaffirmation of federalism and one of its principles, sovereign immunity, informs the issue of municipal liability for state law enforcement because of the close relationship between constitutional rights, city law enforcement, and state sovereignty. As Laurence Tribe put it, "[t]he Eleventh Amendment lies at the center of the tension between state sovereign immunity and the desire to have in place mechanisms for the effective vindication of federal rights."¹⁷⁷ The Supreme Court has specifically recognized states' sovereign immunity from § 1983 suits for money damages. A year after *Monell*, in *Quern v. Jordan*, the Court stated, "[W]e are simply unwilling to believe, . . . that Congress intended by the general language of section 1983 to override the traditional sovereign immunity of the States."¹⁷⁸ In *Will v.*

¹⁶⁸ Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002). For a criticism of the Court's Eleventh Amendment doctrine, see FRIED, *supra* note 164, at 35–39 (suggesting that this doctrine should be overruled "because it is exceedingly complicated, because it achieves its purpose in an oddly indirect and incomplete way, and finally because it seems . . . so seriously mistaken—both historically and doctrinally").

¹⁶⁹ 517 U.S. 44 (1996).

¹⁷⁰ See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

¹⁷¹ *Seminole Tribe*, 517 U.S. at 72.

¹⁷² 535 U.S. 743, 753 (2002).

¹⁷³ 527 U.S. 706 (1999).

¹⁷⁴ *Fed. Mar. Comm'n*, 535 U.S. at 751.

¹⁷⁵ *Id.* at 760.

¹⁷⁶ *Id.*

¹⁷⁷ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 173 (2d ed. 1988).

¹⁷⁸ 440 U.S. 332, 341 (1979).

Michigan Department of State Police, the court resolved that the term “person” as used in § 1983 did not include states.¹⁷⁹ However, the Court has thus far declined to extend immunity to local governments when enforcing state law. As I will explain shortly, withholding sovereign immunity from municipalities when they enforce state law is error. When municipalities enforce state law they are, for both practical and legal purposes, the state.¹⁸⁰

States are the primary creators and promulgators of law within their jurisdictions. Especially in the arena of criminal law, from which most § 1983 actions arise,¹⁸¹ state law is the traditional governing force.¹⁸² Enforcement of those state laws, however, is particularly local and municipal in nature. As William Stuntz has observed, the “huge majority of law enforcement officers work for local governments and enforce state laws.”¹⁸³ In 2000, state law enforcement agencies nationwide spent \$9.79 billion dollars on police protection, while local police spent \$48.22 billion.¹⁸⁴ States account for only 31 of the 362 law enforcement officials employed per 100,000 people nationwide.¹⁸⁵ And while local police and sheriffs employ over 850,000 people,¹⁸⁶ state law enforcement employs only 87,000 people.¹⁸⁷ Without local government, state law would have little force or effect.

Cities essentially act *as the state* when enforcing state law. This description of the situation is drawn not merely from personnel and funding allocations; there is a long tradition in American law recognizing cities as agents of the states. Almost a century ago, the Supreme Court stated in *Hunter v. City of Pittsburgh* that local governments do not have political wills of their own, but “are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the

¹⁷⁹ 491 U.S. 58 (1989). The Eleventh Amendment only applies in federal courts, although Congress may not use its Article I powers to subject states to suit in state courts either. *See Alden v. Maine*, 527 U.S. 706 (1999).

¹⁸⁰ As George D. Brown has noted, “principles of federalism work to the municipalities’ benefit.” *See Brown, supra* note 44, at 891.

¹⁸¹ Aside from prisoner litigation, § 1983 suits arise primarily from criminal matters because the constitutional rights for which the statute provides remedy are usually (though not always) infringed in the course of a criminal arrest or prosecution, e.g., an unreasonable search or arrest by police. *See U.S. CONST. amend. IV.*

¹⁸² *See Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) (“Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.”).

¹⁸³ William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2181 (2002) (citing Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, 2 CRIM. JUST. 81, 82 (2000), available at http://www.ojp.usdoj.gov/nij/criminal_justice2000/vol2_2000.html).

¹⁸⁴ Bureau of Justice Statistics, U.S. Dep’t of Justice, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2003, at 4 tbl.1.3 (2005), available at <http://www.albany.edu/sourcebook/index.html>.

¹⁸⁵ *Id.* at 43 tbl.1.28, 46 tbl.1.31.

¹⁸⁶ *Id.* at 44 tbl.1.29, 45 tbl.1.30.

¹⁸⁷ *Id.* at 46 tbl.1.31.

State as may be entrusted to them.”¹⁸⁸ States have plenary legislative power, with “full authority to provide for the organization and allocation of power to local government units,”¹⁸⁹ and may, at their will, provide powers to municipalities or retract them without the consent of municipal citizens or even against their will.¹⁹⁰ The *Hunter* Doctrine, as this idea is known, remains the rule regarding the constitutional status of municipalities, and has been repeatedly reaffirmed by the Supreme Court.¹⁹¹ A recent New York case, *City of New York v. State of New York*,¹⁹² reaffirmed the doctrine’s modern significance. New York City attempted to sue the state for providing what the city characterized as a constitutionally inadequate level of education funding. The New York Court of Appeals sided with the State, stating that “[m]unicipal corporate bodies . . . are merely subdivisions of the State, created by the State for the convenient carrying out of the State’s governmental powers and responsibilities as its agents.”¹⁹³ Cities and other local governments are, in the eyes of the law, completely subservient to their creator states.

Accordingly, local governments do not have standing to challenge state legislation affecting them.¹⁹⁴ As the District Court of Rhode Island stated, in a case applying the *Hunter* Doctrine, “[i]t is legion in constitutional law that the standing of a creature of a state to sue the state that created it is severely limited.”¹⁹⁵ More specifically, the court pointed out that “municipal corporations have regularly been denied standing in the federal courts to attack state legislation as violative of the federal Constitution, on the ground that they have no rights against the state of which they are a creature.”¹⁹⁶ The *New York* court dismissed the municipality’s suit because the city lacked standing to sue the state.¹⁹⁷ The New York Court of Appeals determined that “municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental ca-

¹⁸⁸ 207 U.S. 161, 178 (1907).

¹⁸⁹ DAWN CLARK NETSCH ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 41 (5th ed. 2000). (“The doctrine of plenary state legislative power means that the state legislature possesses full authority to provide for the organization and allocation of power to local government units.”).

¹⁹⁰ *Hunter*, 207 U.S. at 178–79.

¹⁹¹ NETSCH, *supra* note 189, at 45. Several cases have reiterated the *Hunter* Doctrine. See *Williams v. Mayor & City Council*, 289 U.S. 36 (1933) (Cardozo, J.) (recognizing that local governments may not assert privileges or immunities against the state, their creator); *Trenton v. New Jersey*, 262 U.S. 182 (1923) (holding that municipalities possess no right of self-government and are merely divisions of the state, which can allocate or withdraw powers as it sees fit).

¹⁹² 655 N.E.2d 649 (N.Y. 1995).

¹⁹³ *Id.* at 651.

¹⁹⁴ 1-12 ANTIEAU ON LOCAL GOVERNMENT LAW § 12.06, n.1. (2d ed. 2005) [hereinafter ANTIEAU].

¹⁹⁵ *Town of Charlestown v. United States*, 696 F. Supp. 800, 806 (D.R.I. 1988).

¹⁹⁶ *Id.* (quoting HENRY MELVIN HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 182 (2d ed. 1973)).

¹⁹⁷ *City of New York*, 655 N.E.2d at 651.

capacity or as representatives of their inhabitants.”¹⁹⁸ This lack of capacity is “a necessary outgrowth of separation of powers doctrine: it expresses the extreme reluctance of courts to intrude in the political relationships between the Legislature, the State and its governmental subdivisions.”¹⁹⁹

The *Hunter* Doctrine and rules of standing thus combine to give cities little effective recourse if the state passes an unconstitutional law.²⁰⁰ Local governments are state agents, existing only by the will of the state, and they have virtually no ability to challenge state laws.²⁰¹ Nor is nonenforcement of state law a legally cognizable municipal choice.²⁰² These practical and doctrinal points lead to the conclusion that local governments in effect *act as the state* when enforcing state law.²⁰³

I have now outlined the three major doctrines in play in the jurisprudence addressing municipal enforcement of state laws: first, the doctrine of the *Monell* policy requirement; second, sovereign immunity and federalism; and third, the doctrine of municipalities as subordinate arms of the state. A major problem in the cases and literature addressing the issue of municipal state law enforcement is the failure of authors to reconcile these three inextricably linked areas of law. I propose a way to bring these doctrines into one reconciled field of vision: When a municipality enforces state law—as the de facto community legal presence and a doctrinal arm of the state—the municipality *is* the state and should be immune under the Eleventh Amendment.²⁰⁴ Such a resolution to the issue has several doctrinal virtues.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 654.

²⁰⁰ There are a few federal courts which have taken a different view. For example, *Branson School District RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), held that *Hunter* cases “stand only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights.” 161 F.3d at 628; *cf.* *Burbank-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998) (upholding the per se rule against political subdivisions of the state challenging state laws). However, local governments can sue for injunctive relief. NETSCH, *supra* note 189, at 46.

²⁰¹ *Charlestown*, 696 F. Supp. at 806–08 (discussing history of doctrine denying municipal standing to challenge state laws).

²⁰² Our legal system relies on the fact that executives will execute the law.

²⁰³ For similar analysis, see *Gottfried v. Medical Planning Services, Inc.*, 280 F.3d 684, 693 (6th Cir. 2002) (holding that a sheriff who had no discretionary authority as to enforcement of state court injunction acted as an “arm of state”); *Lui v. Commission on Adult Entertainment Establishments*, 213 F.R.D. 166, 174 (D. Del. 2003) (“[T]he County acts only as an agency of the State in exercising its zoning authority.”), *aff’d in part and rev’d in part*, 369 F.3d 319 (3d Cir. 2004).

²⁰⁴ An alternative resolution might be to declare that enforcement of state law is not a “policy” as defined in *Monell*. However, state law enforcement *is*, quite rightly, a policy of local governments. My solution of extending Eleventh Amendment immunity to municipalities when they enforce state law avoids verbal disingenuousness while still immunizing state law enforcement by local governments. Municipalities that act under state authorization (as opposed to state command) should not receive immunization from damages liability under the Eleventh Amendment. These local governments have themselves selected a policy from a range of possibilities, as required for liability by *City of Oklahoma*

First, it comports with principles of federalism and sovereign immunity; second, it is consistent with the language and goals of *Monell*; and third, it allows cities to maintain their rightful status as agents of states.

The first major benefit of extending Eleventh Amendment immunity to municipalities when they enforce state laws is that such an extension comports with principles of federalism.²⁰⁵ To illustrate why, it is useful to examine the practical consequences of allowing municipal liability for state law enforcement. When a state law is declared unconstitutional—let us call the law “statute *A*”—the city will cease enforcing statute *A*. Lawsuits against the municipality for its previous enforcement of the statute may arise as well, as the invalidation will have made litigation easier and plaintiffs’ success more likely.²⁰⁶ However, the invalidation of statute *A* will not only end enforcement of statute *A*. Rather than risk adverse judgments for enforcing state laws, prudent municipalities will direct officials to cease enforcing any statutes or regulations similar to statute *A*, notwithstanding the fact that municipalities’ legal subordination to states commands obedience to still-valid state law.²⁰⁷ Thus, if statutes *B* and *C* are similar to, but still constitutionally distinguishable from, unconstitutional statute *A*, they may go unenforced despite their continuing validity. Monetary liability for enforcing state laws that are unconstitutional will therefore chill enforcement of those state laws that municipal legal departments believe *may be* ruled unconstitutional in the future. In order to protect municipal coffers, a nebula of nonenforcement will expand around any law declared unconstitutional. A geographic patchwork of state law enforcement will thus develop, corresponding to various city legal departments’ degree of risk aversion and financial ability to make possible payouts. While a particularly wealthy or “risk-friendly” city may only stop enforcement of statutes *A*, *B*, and *C*, a cash-strapped municipality may extend nullification further, to statutes *D*, *E*, and *F* as well. This will occur, as Mark Brown says, because “if local

City v. Tuttle, 471 U.S. 808, 823 (1985). The municipality’s choice, and not the legislature’s directive, is at fault for the violation. Concerns of federalism are absent here, as enforcement of state law is not being chilled.

²⁰⁵ “Those who adhere to a federalistic approach seek to limit municipal liability while not precluding it. Behind their emphasis on *Monell*’s rejection of respondeat superior liability lie broader principles of federalism and a desire to harmonize section 1983 with those principles.” Brown, *supra* note 44, at 906.

²⁰⁶ See, e.g., *Vives v. City of New York*, 305 F. Supp.2d 289, 293–95 (S.D.N.Y. 2003); *supra* notes 4–12 and accompanying text.

²⁰⁷ I witnessed this phenomenon personally during her employment at the New York City Law Department in the Special Federal Litigation Division in the summer of 2004. When the district court invalidated section 240.30(1) of New York Penal Law, see text accompanying notes 4–12, city attorneys immediately alerted the police department to cease enforcement of the statute. City attorneys subsequently engaged in a review of New York statutes to ascertain whether other penal laws should go unenforced due to the court’s reasoning in *Vives*.

government risks liability, it might choose not to enforce state law because of the tendency of risk-averse government officials to choose inaction.²⁰⁸

However financially wise nonenforcement may be for city officials, this situation—in which municipalities exercise a de facto constitutional veto over state legislation—clearly violates the presumption of constitutionality to which state legislation is entitled in our federal system.²⁰⁹ Allowing federal courts to award money damages against municipalities for the enforcement of state law interferes with a state's right to administer its laws via its municipal subdivisions without federal interference.²¹⁰ Federal court decisions awarding monetary damages against cities interpose a federal liability wedge between states and cities that will chill state law enforcement generally. Interfering thus in intrastate law enforcement mechanisms impermissibly infringes on state independence and self-governance. The Eleventh Amendment, which the Supreme Court has interpreted as a principal guardian of state sovereignty from federal encroachment, is the natural mechanism from which states and municipalities should seek relief for this predicament. Because municipalities act as arms of the state when they enforce state law, and because states are entitled to sovereign immunity from suit in federal court, municipalities should also enjoy sovereign immunity when enforcing state law. If the basis of sovereign immunity in our federal system is that each state is a sovereign entity, and that “it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,”²¹¹ municipalities should be able to refuse consent to suit when they act as the sovereign state. Allowing plaintiffs to challenge state law without state consent by suing municipalities (the state's subdivisions) violates our notions of federalism.

Proponents of municipal liability for state law enforcement characterize municipal inaction under the threat of liability as desirable.²¹² They reason that municipal liability for torts committed in the course of enforcing state laws would deter unconstitutional or constitutionally risky conduct by cities—exactly as municipal liability generally is intended to do. In *Owen*, for example, Justice Brennan encouraged municipalities to create mechanisms for assessing the constitutionality of local regulations, so that municipalities might henceforth err on the side of protecting individual

²⁰⁸ Brown, *supra* note 44, at 1522. Brown asserts that three factors exacerbate this inaction: “civil service protections that encourage government workers to avoid risks, government self-selection that saturates the civil service with under-achievers, and the political costs of higher taxes that accompany proactive government.” *Id.* at 1522–23.

²⁰⁹ State legislation is “presumed to be valid.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

²¹⁰ “The Supreme Court has indicated that state regulation of units of local government will not be restrained by anything in the federal Constitution.” 1-12 ANTIEAU, *supra* note 194, § 12.06 n.2.

²¹¹ *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans v. Louisiana*, 134 U.S. 1, 33 (1890)).

²¹² See Brown, *supra* note 44, at 1522–25.

rights.²¹³ However, in *Owen*, the defendant city itself had created the offending regulations, which is distinguishable from the situation where a city is forced by the threat of liability to assess the constitutionality of *state* statutes—in the latter case, the city does not police itself, but rather thwarts the sovereign will of the state. Deterrence of valid state laws by the threat of liability should be more appropriately characterized as overdeterrence, or “deterrence of socially desirable conduct.”²¹⁴ Extending Eleventh Amendment immunity to municipalities for state law enforcement would end the deterrence of valid law enforcement efforts and the nullification of state law that would result from municipal liability for state law enforcement.

Critics may also point out that cities always have discretion to enforce the law—that many laws are *never* enforced by certain municipalities, so there is no injustice if some laws are “chilled” out of enforcement.²¹⁵ However, this argument fails to distinguish between municipal discretion in the normal course of law enforcement and *ex ante* chilling of specific laws. *Ex ante* chilling of state legislation impermissibly infringes on the state’s right to make laws and trust state executives (whether formally employed by the state or the city) to implement those policies.

A second advantage of extending Eleventh Amendment immunity to municipalities is that it is consistent with the principles laid out in *Monell*—assuring that the landmark case remains the general rubric for assessing municipal liability in § 1983 cases. *Monell* limited municipal liability for constitutional torts to situations where a municipal policy had caused harm.²¹⁶ As a number of courts have recognized, the *Monell* policy requirement may be interpreted to preclude municipal liability for enforcement of state law.²¹⁷ When a municipality enforces state law, it is implementing the state’s policy and not its own. As Judge Posner stated, “[a]n executive official who rather than making policy merely implements legislative policy acts merely as a delegate of the legislature, and his act is therefore not the act of the municipality for purposes of liability under section 1983.”²¹⁸ Extending sovereign immunity to local governments when they act under state policy would not interfere with *Monell*’s rule that local entities must be liable for enforcement of their own policies. The two ideas coexist in harmony.

²¹³ *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1979).

²¹⁴ Jeffries, *supra* note 50, at 73.

²¹⁵ For a thorough discussion of the role discretion plays in law enforcement, see GREGORY HOWARD WILLIAMS, *THE LAW AND POLITICS OF POLICE DISCRETION* (1985). Professor Ronald Allen has also dealt usefully with the implications of police discretion. See Ronald Allen, *The Police and Substantive Rulemaking: A Brief Rejoinder*, 125 1172 (1977); Ronald Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62 (1976).

²¹⁶ See *supra* text accompanying notes 47–50.

²¹⁷ See *supra* Part III.B.

²¹⁸ *Gernetzke v. Kenosha Unified Sch. Dist.*, 274 F.3d 464, 468 (7th Cir. 2001).

Further, *Monell's* policy requirement was intended to balance § 1983's remedial purpose with the principle that federal courts' power to assess damages must not be so broad as to unbalance governmental powers. As Michael Gerhardt noted, "[t]he [policy] requirement accommodates (1) federalists' preference that federal court supervision of municipal decisionmaking procedures and treasures should be limited and (2) nationalists' preferences to make municipalities accountable in federal court for their constitutional rights."²¹⁹ Extending Eleventh Amendment immunity to municipalities when they enforce state law immunizes them when they are neither culpable nor the cause of the constitutional violation; such an extension maintains *Monell's* balance of respect for municipal and state autonomy, while preserving a broad local government amenability to suit.

Third, and finally, extending Eleventh Amendment immunity to municipalities for their enforcement of state laws eliminates the dilemma in which cities would find themselves otherwise—forced to choose between ignoring the command of state law, which they are duty-bound to enforce, and enforcing the law and draining city coffers through the payment of damage suits. My proposal allows municipalities to faithfully carry out state laws without having to fear monetary damages from lawsuits.

This proposed resolution of the circuit split—extending Eleventh Amendment immunity to cities when enforcing state law—would have to overcome Supreme Court resistance, however. The high court has consistently refused to extend the Eleventh Amendment to municipalities.²²⁰ But, as Professor Steven Steinglass has commented, “[i]f the Court views state sovereign immunity as fundamental, though uncodified constitutional doctrine, one could imagine the Court revisiting cases that have limited the scope of the Eleventh Amendment in Section 1983 litigation.”²²¹ The Rehnquist Court, as mentioned, championed a federalist dual-sovereign view of the United States, and occasionally used language that explicitly recognizes the federalism issues raised by municipal liability. For example, in *Rizzo v. Goode*,²²² where plaintiffs sought injunctive relief against a municipality, Justice Rehnquist, speaking for the Court, “invoked principles of comity and federalism in cautioning against judicial interference with what it termed ‘state’ executive functions.”²²³

Further, in the 1997 case of *McMillian v. Monroe County*,²²⁴ the Court held that when an Alabama county sheriff was vested with power to enforce

²¹⁹ Michael Gerhardt, *Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 614 (1989).

²²⁰ See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 646 (1979); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

²²¹ Steven H. Steinglass, *Eleventh Amendment Federalism and State Sovereign Immunity Cases: Direct Effect on Section 1983?*, 16 *TOURO L. REV.* 769, 773 (2000).

²²² 423 U.S. 362 (1976).

²²³ See *Brown*, *supra* note 44.

²²⁴ 521 U.S. 781 (1997).

state law²²⁵ and inflicted constitutional injury in the course of such enforcement, he represented the state and was shielded from liability by the Eleventh Amendment.²²⁶ The Court focused its analysis on Alabama statutory law that apportioned various law enforcement duties, but noted that courts could stray from such formal legal analysis in blatant cases of officials attempting to “insulate counties and municipalities from *Monell* liability by change-the-label devices.”²²⁷ The Supreme Court’s recognition that the Eleventh Amendment shields a county official in his enforcement of state law indicates that the Court may also be willing to use the amendment to protect entities in a similar situation.²²⁸

The objection still remains that certain constitutionally injured plaintiffs—citizens like Carlos Vives, for example—will be left without a remedy if municipalities are not liable for state law enforcement. This objection is valid. Creating another zone of immunity will cause some additional wronged citizens to walk away empty-handed. But I maintain that when a municipality is merely carrying out state law, society’s interest in compensation is outweighed by other concerns. While under current § 1983 law, local governments may be the ultimate deep pocket, payment for a loss is justified only if there exists causation and fault on the part of the injuring party. Otherwise, “there is no reason to suppose that persons harmed by unconstitutional acts are especially deserving beneficiaries of redistribution of wealth.”²²⁹ States, not municipalities, are the “guilty” agents when municipalities enforce state law, so there is no reason why plaintiffs should be compensated by municipalities.²³⁰

²²⁵ *Id.* at 785–91.

²²⁶ *Id.* at 793. Karen Blum notes:

For § 1983 purposes, *McMillian* treats the status of sheriffs as a question of federal law, informed by state law, with classification of the sheriff as a state or local policymaker dependent, in part, upon the particular function performed by the sheriff in that case. If a sheriff is determined to be making policy for the state when engaged in the challenged conduct, the plaintiff cannot sue the sheriff in his official capacity, as that would be tantamount to a suit against the state, forbidden by both the Eleventh Amendment and the Supreme Court’s construction of § 1983.

Karen Blum, *Support Your Local Sheriff: Suing Sheriffs Under § 1983*, 34 STETSON L. REV. 623, 623–24 (2005).

²²⁷ *McMillian*, 521 U.S. at 805 (Ginsburg, J., dissenting) (describing the Court’s holding as limited to its facts).

²²⁸ For recent similar analysis, see *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003) (en banc), where a majority of the court coalesced around the narrow grounds that, with regard to the specific conduct at issue, the sheriff acted as a state, not county, official. *Cf. Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir. 2001) (holding that the sheriff acts for the county, and not the state, when administering the county’s policy with respect to the release of prisoners from the county jail); *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973 (7th Cir. 2000) (finding that sheriff did not act as a state official in overseeing a jail).

²²⁹ Jeffries, *supra* note 147, at 90.

²³⁰ Loss spreading as a justification for municipal liability for state law enforcement also fails on these grounds. Allocating losses to citizens of a municipality does not make sense if it is citizens of the state who are truly responsible.

Still, my proposed extension of Eleventh Amendment immunity to municipalities does not leave § 1983 plaintiffs without recourse. *Ex Parte Young* allows plaintiffs to seek prospective equitable relief against individual state officials (or, if the Court extends Eleventh Amendment immunity, municipal officials) who act unconstitutionally.²³¹ Thus, if an individual believes he has been wronged by an unconstitutional state law, he can avoid Eleventh Amendment immunity and still obtain relief by naming an official as a defendant and seeking prospective injunctive relief instead of damages.²³²

Extending Eleventh Amendment immunity to municipalities makes sense of the various lines of cases discussed here and strikes the appropriate balance between providing redress for constitutional wrongs and preserving state autonomy.

V. CONCLUSION

Despite the breadth of case law and depth of doctrine surrounding § 1983, the controversy this Comment addresses is a matter of statutory interpretation. That is, § 1983 cases are only inherently constitutional cases insofar as § 1983 is the vehicle by which to enforce constitutional rights. Section 1983 could theoretically be amended to only cover certain constitutional principles or exclude certain jurisdictions. Although, since *Monell*, the Supreme Court “has effectively established a special body of federal common law on the accountability of municipalities in federal court for constitutional violations,”²³³ Congress can amend § 1983 if it feels that the Court has ruled contrary to good public policy. For instance, if the Court inadvisably rules that municipalities are liable for state law enforcement, Congress could simply amend the statute to define “person” as including municipalities, except when the municipality is enforcing policies not of its devising.

Absent such congressional action, the best way for the Court to reconcile the three doctrines discussed in this Comment—the *Monell* policy requirement, sovereign immunity and federalism, and the “arm of the state” cases—is to extend Eleventh Amendment sovereign immunity to municipalities in their enforcement of state law. This resolution of the issue rec-

²³¹ 209 U.S. 123 (1908). As the Court said in that case,

the use of the name of the State to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of and one which does not affect, the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official . . . and he is in that case stripped of his official or representative character The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159–60.

²³² Gerhardt, *supra* note 219, at n.102; *see also* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Ex Parte Young*, 209 U.S. at 159–60.

²³³ Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 543 (1989).

onciles doctrines which have thus far been in tension, bringing the three lines of jurisprudence into an equitable and structurally sound common field of vision.