

Repairing Our System of Constitutional Accountability:

Reflections on the 150th Anniversary of Section 1983

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I. Introduction

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

Our system of constitutional accountability is badly in need of repair and has been for far too long. There is much work to be done to ensure that our justice system, in fact, dispenses justice and holds state and local governments and their agents accountable for trampling on constitutional rights, destroying innocent lives, and inflicting wanton violence.

One hundred and fifty years ago, Congress passed Section 1983 to enforce the Fourteenth Amendment and ensure that individuals could go to federal court to redress constitutional violations by state and local governments and officials and obtain justice. Written in sweeping terms, Section 1983 provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”¹

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¹ 42 U.S.C. § 1983.

Enacted in 1871 against the backdrop of horrific state and Ku Klux Klan violence aimed at undoing Reconstruction and a criminal justice system that systematically devalued Black life, Section 1983 gave those victimized by official abuse of power a critical tool to hold state and local governments and their officials accountable in a court of law. It aimed to stop state actors and others from killing, brutalizing, and terrorizing Black people with impunity. Section 1983 sought to “carry into execution the guarantees of the Constitution in favor of personal security and personal rights,” reflecting that, in our constitutional system, “judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free government.”²

In the text of Section 1983, Congress demanded government accountability, seeking to put an end to the denial of fundamental rights and subjugation of those seeking to enjoy the promise of freedom after centuries of chattel slavery. Indeed, Congress modeled Section 1983 on the Civil Rights Act of 1866, a statute that refused to provide any official immunities because that would “place[] officials above the law.”³

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

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

In recent years, there has been an outpouring of writing chronicling how the Supreme Court invented the doctrine of qualified immunity and employed it to shield police officers and other state officials from suit for all but the most egregious constitutional violations. As these critics on and off the bench—including we at CAC—have argued, qualified immunity leaves a gaping hole in Section 1983, has no moorings in our constitutional or common law system of government accountability, and frustrates the congressional objective to make the Fourteenth Amendment’s guarantees that safeguard the individual from oppression at the hands of state authorities a reality.⁴

² Cong. Globe, 42nd Cong., 1st Sess. 374, 578 (1871).

³ Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).

⁴ See *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari) (concluding that “[t]here likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe”); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Court’s “one-sided approach to qualified immunity” because it “transforms the doctrine into an absolute shield for law enforcement officers”). For scholarly critiques, see William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 47 (2018) (arguing that the “modern doctrine of qualified immunity is inconsistent with conventional principles of law applicable to federal statutes”); Joanna

Indeed, qualified immunity is anything but qualified—it approaches a near-absolute immunity from suit. Qualified immunity requires dismissal of a suit unless the state or local officer violated clearly established constitutional rights, a standard that has no basis in the text of Section 1983 or any common law backdrop, and ignores the fact that at time Section 1983 was passed virtually no aspect of the Fourteenth Amendment was clearly established in the courts. The clearly established law standard is not self-defining—it could simply be a form of fair notice—but the Supreme Court and the lower courts have construed it to be an almost insurmountable bar to suit. In practice, unless the plaintiff can point to a prior precedent with practically identical facts, courts insist that the law is not clearly established. This allows officers to evade accountability and ignores the fact that officers are not taught or expected to keep up with the latest legal rulings.⁵

But qualified immunity is only one part of the story. The problems go deeper.⁶

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

As sweeping as qualified immunity has become, the Supreme Court has held that for some government actors, most notably prosecutors, qualified immunity is not protective enough.⁷ Instead, in the Court's view, prosecutors when acting as advocates must be shielded by *absolute* immunity, even though that effectively negates the remedy Congress sought to create in enacting Section 1983. Prosecutorial abuse of power was a grave concern at the time of the framing of the Fourteenth Amendment, and no court had recognized prosecutorial immunity from suit when the statute was enacted in 1871. Nevertheless, the Supreme Court created it out of whole cloth. Like qualified immunity, the absolute immunity accorded prosecutors has no basis in the text or history of Section 1983 and undermines the rule of law. It means that a prosecutor can withhold exculpatory evidence from a defendant in violation of settled legal precedents with impunity. Even if prosecutors commit flagrant constitutional violations, absolute immunity gives them a get-out-of-court free pass.

C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1800 (2018) (arguing that “multiple aspects” of qualified immunity doctrine “hamper the development of constitutional law and may send the message that officers can disregard the law without consequence”); David H. Gans, “*We Do Not Want To Be Hunted*”: *The Right To Be Secure And Our Constitutional Story of Race and Policing*, 11 Colum. J. Race & L. 239, 330 (2021) (arguing that the “Court’s invention of qualified immunity was made possible by its studious blindness to the Fourteenth Amendment and its history”).

⁵ Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. Chi. L. Rev. 605, 677 (2021) (“[A]mong the most pernicious aspects of the doctrine—its requirement that plaintiffs identify cases in which courts have held unconstitutional nearly identical conduct—is based on a misunderstanding of the role court decisions play in law enforcement policies and trainings, and officers’ decisions on the street.”).

⁶ Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 Notre Dame L. Rev. 2093, 2107 (2018) (stressing “the importance of thinking about the synergistic way that immunity doctrines operate to proverbially close the courthouse door”).

⁷ *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutor absolutely immune from suit for initiating and maintaining a criminal prosecution); *Burns v. Reed*, 500 U.S. 478 (1991) (prosecutor absolutely immune for participation in a probable-cause hearing); *Kalina v. Fletcher*, 522 U.S. 118 (1997) (prosecutor absolutely immune for improperly preparing and filing charging documents); *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (lead prosecutor absolutely immune for failure to train and supervise subordinates in disclosure of exculpatory impeachment evidence).

If individual officers cannot be sued because of judge-created immunities, what about the governmental entity responsible for the officer? That, too, is off-limits because, in another line of cases, the Supreme Court has invented what one scholar has called local sovereign immunity.⁸ Employers in the private sector are liable for the legal wrongs committed by their employees, but the Supreme Court has refused to apply this longstanding principle of accountability to municipalities. Instead, local governments, with few exceptions, cannot be held liable for constitutional violations committed by their officers within the scope of their duties, even though it is the government entity that authorizes, supervises, equips, trains, and pays the officer who violated constitutional rights in carrying out their job. The Supreme Court has held that a city can only be held liable if a municipal “policy or custom” caused the constitutional deprivation,⁹ a limitation that appears nowhere in the text of Section 1983 and has no basis in the statute’s history. As Justice John Paul Stevens cogently observed, the policy or custom requirement, which has long confused bench and bar, is “judicial legislation of the most blatant kind.”¹⁰

The Supreme Court has erected even more barriers to suing states for constitutional wrongs, studiously ignoring how Reconstruction reshaped our federal system in order to check states that ran roughshod over individual rights. Even though the whole point of Section 1983 was to alter the balance of power between the states and the federal government and provide a federal forum when states and localities infringed the Constitution, the Supreme Court has refused to read Section 1983 to permit suits against the states, turning a blind eye to the statute’s obvious purpose of holding states accountable for constitutional violations.¹¹

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

The ball is now in Congress’s court. The Supreme Court has been willing to tinker around the edges,¹² but it has been unwilling to reconsider the badly flawed, judicially invented legal doctrines that have gutted Section 1983. Congress can and should sweep away these rotten legal doctrines that have eroded sacred rights and allowed lives to be taken with impunity.

This Issue Brief unfolds as follows. Part I takes a deep dive into the text and history of Section 1983, laying out how the Reconstruction Congress gave individuals a right to go to federal court to redress constitutional violations. The historical record shows that Congress provided a new federal cause of action to allow civil rights suits to be brought in federal court because far too often state and local

⁸ Fred O. Smith, Jr., *Local Sovereign Immunity*, 116 Colum. L. Rev. 409 (2016).

⁹ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690-95 (1978).

¹⁰ *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 842 (1985) (Stevens, J., dissenting).

¹¹ *Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989).

¹² See, e.g., *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (summarily reversing grant of qualified immunity where prison conditions were so egregious that “any reasonable officer should have realized that Taylor’s conditions of confinement offended the Constitution”).

institutions of power worked with the Ku Klux Klan or turned a blind eye toward their racist terror. Part II examines how the Supreme Court gutted Section 1983's promise of accountability and systemic change. As this review demonstrates, time and again the Supreme Court has engaged in rank judicial legislation to thwart justice, creating immunities out of whole cloth that cannot be justified by the text of Section 1983 or any pre-existing legal backdrop. A short conclusion follows.

II. The Text and History of Section 1983

The Fourteenth Amendment was the nation's response to abuses in the South in the wake of the end of chattel slavery, and an attempt to affirmatively guarantee the equality and protections African Americans needed to participate fully in American life and thrive on equal footing. In the aftermath of the Civil War but before passage of the Fourteenth Amendment, the South sought to strip Black Americans of nearly every aspect of freedom, enact new laws to criminalize Black life, and subject Black people to a new form of slavery.¹³ In response to these abuses, the Fourteenth Amendment sought to guarantee true freedom and equality. It sought to vindicate the simple and fundamental demands of Black Americans newly freed from bondage that “now we are free we do not want to be hunted,” and we want to be “treated like human[] beings.”¹⁴ The Fourteenth Amendment wrote into our national charter the idea that Black lives matter, seeking to put an end to indiscriminate state-sanctioned violence against African Americans. It promised bodily integrity and human dignity to all regardless of the color of their skin.¹⁵

That promise turned out to be insufficient. In 1871, several years after the Amendment's ratification, Southern intransigence continued, with states “permit[ing] the rights of citizens to be systematically trampled upon.”¹⁶ The primary impetus for the passage of legislation to enforce the Fourteenth Amendment was a reign of terror by the Ku Klux Klan winked at or abetted by state and local governments. As Representative David Lowe observed, “[w]hile murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.”¹⁷ The breakdown of the law reached virtually every actor and every part of the state system of civil and criminal justice. As Representative Aaron Perry explained:

Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices

¹³ See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 199-202 (1988).

¹⁴ Letter from Mississippi Freedpeople to the Governor of Mississippi (Dec. 3, 1865), reprinted in *Freedom: A Documentary History of Emancipation, 1861-1867, Ser. 3: Vol. 1: Land and Labor, 1865*, at 857 (Steven Hahn et al. eds., 2017).

¹⁵ See generally Gans, *supra* note 4.

¹⁶ Cong. Globe, 42d Cong., 1st Sess. 375 (1871).

¹⁷ *Id.* at 374.

. . . [A]ll the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection.¹⁸

As a result, the Thirteenth and Fourteenth Amendments—what one member of Congress called the “liberty amendments”—were “already a practical nullity where these klans operate.”¹⁹

How did Section 1983’s cause of action against state and local government officials become part of a civil rights statute aimed at checking the Klan’s reign of terror? The answer is simple: Congress sought to hold state actors accountable for violating constitutional rights because, throughout the South, state officials, often acting in league with the Ku Klux Klan, were murdering and terrorizing Black people. The Klan, Michigan Congressman Austin Blair observed, “are powerful enough to defy the State authorities. In many instances they *are* the State authorities.”²⁰ Members of Congress described state officials issuing baseless warrants to arrest Black citizens,²¹ as well as wanton violence by white police officers in which “men were shot down like dogs in the very portals of the temple of justice without provocation.”²² Brutal police violence continued unchecked against those seeking to enjoy the Fourteenth Amendment’s promise of real freedom.

The systematic denial of fundamental rights merited a remedy. The 1871 legislation—known as the Civil Rights Act of 1871 or the Ku Klux Klan Act of 1871—included a number of provisions aimed at stopping the Klan’s terrorism, including establishing civil and criminal liability against conspiracies to deprive individuals of their fundamental rights and authorizing the use of martial law and suspension of habeas corpus to check the lawless violence that plagued the nation.²³ The least controversial, though most enduring, part of the Act—Section 1, now known as Section 1983—opened the door of the federal courts to suits against “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or

¹⁸ *Id.* at app. 78; *id.* at 394 (“[T]he courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?”); *id.* at 459 (“The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress.”).

¹⁹ *Id.* at 439.

²⁰ *Id.* at app. 72 (emphasis added); *id.* at app. 271 (“In many cases the local officers are in sympathy with the marauders, and in others they are themselves members of the organization; and so, for all the many hundred acts of violence and outrage committed by these bands, not a single man has been brought to punishment, and the evil is growing and spreading every hour.”); *id.* at app. 108 (“The sheriffs in Alamance and some other counties are in the order; the judges can do nothing; the juries are in the way; we can make no convictions.”); *id.* at 182 (“State authorities are in complicity with the criminals, aiding and abetting their lawless violence and of course refusing to call for assistance from the General Government . . .”); *see also* Foner, *supra* note 13, at 434 (“Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or refused to take action against it.”).

²¹ Cong. Globe, 42d Cong., 1st Sess. 321 (1871) (describing how, following a “meeting of the citizens . . . to protest against the[] outrages,” “warrants were issued [at the Klan’s instigation] for the arrest of peaceable and well-disposed negroes upon the charge of ‘using seditious language’”).

²² *Id.* at app. 185.

²³ Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 Va. L. Rev. 959, 982 (1987) (“[T]he sections of the Civil Rights Act of 1871 offered a massively intrusive set of remedies to deal with what President Grant and the supporters of the legislation regarded as a national crisis only marginally less threatening than the war itself.”).

other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”²⁴

Section 1983’s plain import was to “throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired,” affording an “injured party redress in the United States courts against any person violating his rights as a citizen under claim or color of State authority.”²⁵ The sweeping language Congress employed—holding liable all persons acting under color of state law—had ancient roots in the law: since the thirteenth century, the legal term of art of “color of office” or “color of law” meant abuse of legal authority.²⁶ Section 1983 sought to reach both law on the books and law in action, targeting both formal legal enactments and the persistent and widespread customary practices that threatened constitutional freedoms.²⁷ It sought to prevent and deter constitutional violations and to promote systemic change by holding governments and their agents accountable in a court of law to those they victimized.²⁸ And the legislators who enacted Section 1983 understood that it would be interpreted broadly to promote its goal of redressing government abuse of power: “This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. . . . As has been again and again decided by your own Supreme Court of the United States, . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes.”²⁹

The text of Section 1983 does not provide for any governmental immunities. This was a conscious choice. The members of the 42nd Congress insisted that “whoever interferes with the rights and immunities granted to the citizen by the Constitution of the United States, though it may be done under State law or State regulation, shall not be exempt from responsibility to the party injured when he brings suit for redress either at law or in equity.”³⁰ Indeed, Section 1983 was modeled on Section 2

²⁴ 42 U.S.C. § 1983.

²⁵ Cong. Globe, 42d Cong., 1st Sess. 376 (1871); *id.* at app. 313; *see also id.* at 459 (“[T]he court of justice is the first instrument to be used in aid of the [F]ourteenth [A]mendment. . . . [T]he courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention the complaints of those who are denied redress elsewhere.”).

²⁶ Steven L. Winter, *The Meaning of “Under Color of” Law*, 91 Mich. L. Rev. 323, 327 (1992) (“[T]he central idea conveyed by the phrase had remained remarkably constant for six centuries: *Under color of law* referred to official action *without* authority of law, in the nineteenth as in the thirteenth century.”); David Achtenberg, *A “Milder Measure of Villainy”: The Unknown History of 42 U.S.C. § 1983 and the Meaning of “Under Color of” Law*, 1999 Utah L. Rev. 1, 60 (arguing that for members of the 42nd Congress “‘under color of’ law meant ‘under pretense of law’”); *United States v. Classic*, 313 U.S. 299, 326 (1941) (“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.”); *Monroe v. Pape*, 365 U.S. 167, 172-87 (1961) (reaffirming *Classic*’s definition of “under color of” law).

²⁷ Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. Rev. 17, 20 (2000) (“The architects of the original Ku Klux Klan Act used the term ‘custom’ to refer to the nefarious unwritten codes of conduct pursuant to which local officials terrorized freedmen and Republicans, and failed to enforce Reconstruction era laws against dissenters.”).

²⁸ *See Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (explaining that Section 1983 “was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations”); Gilles, *supra* note 29, at 22 (arguing that “judicial determinations” of government liability under Section 1983 “may induce local governments to focus attention and resources upon the very cultures and practices that drive constitutional violations” and thereby “reduc[e] future violations on an institutional scale”).

²⁹ Cong. Globe, 42d Cong., 1st Sess. app. 68 (1871).

³⁰ *Id.* at app. 310.

of the Civil Rights of 1866, which created a federal criminal remedy that could not be overcome by a claim of immunity. In debates preceding the enactment of the Civil Rights Act of 1866, legislators repeatedly rejected the notion that persons acting under color of law should be entitled to immunity because of their status as officers of the government. This, Senator Lyman Trumbull urged, was “akin to the maxim of the English law that the King can do no wrong.”³¹ Senator Trumbull argued that such a claim of immunity improperly “places officials above the law.”³² Section 1983 incorporated this identical remedial framework. As its proponents urged, the 1866 Act provides “a criminal proceeding in identically the same case as this one provides a civil remedy.”³³ Section 1983 was “carrying out the principles of the civil rights bill” that state officers could not violate constitutional rights with impunity.³⁴ Section 1983, like the 1866 Act, did not provide any immunities because Congress did not wish to “place[] officials above the law.”³⁵

That the Act provided a broad remedy for constitutional violations by state officials unqualified by any immunities was understood by both proponents and opponents of Section 1983. In “the language of the bill,” Democratic Senator Allen Thurman stressed, “there is no limitation whatsoever upon the terms that are employed, [] they are as comprehensive as can be used.”³⁶ Seizing on Section 1983’s broad sweep, congressional opponents complained that the provision allowed suit against state legislators, state judges, and all manner of executive officials and permitted them to be “dragged to the bar of a distant and unfriendly court, and there placed in the pillory of vexatious, expensive, and protracted litigation, and heavy damages and amercements.”³⁷ The new federal cause of action, they insisted, would disturb the federal-state balance because “contests among citizens under this provision will be numerous” and every state official whether “great or small, will enter upon and pursue the call of official duty with the sword of Damocles suspended over him by a silken thread.”³⁸ Indeed, as Senator Thurman bemoaned, state judges had already faced federal criminal charges for violating the Civil Rights Act of 1866.³⁹

Opponents of the 1871 legislation asked “where is the clause that exempts” state legislators and other government officials from the new federal cause of action Section 1983 created.⁴⁰ These pleas were met with a stony silence. The members of the 42nd Congress refused to write into the law any exception to the cause of action Section 1983 afforded to ensure respect for constitutional rights and state

³¹ Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).

³² *Id.*; *id.* at 1267 (“[I]f a . . . sheriff . . . should take part in enforcing any State law making distinctions among the citizens of the State on account of race or color, he shall be deemed guilty of a misdemeanor and punished with fine and imprisonment under this bill.”).

³³ Cong. Globe, 42d Cong., 1st sess. app. 68 (1871); *id.* at 461 (explaining that Section 1983 “gives a civil remedy parallel to the penal provision based upon the first section of the civil right act”).

³⁴ *Id.* at 568.

³⁵ Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).

³⁶ Cong. Globe, 42d Cong., 1st Sess. app. 217 (1871).

³⁷ *Id.* at 365; *id.* at 337 (suggesting that “police officer[s]” might be held sued in “distant and expensive tribunals” if they acted to disarm “a drunken negro or white man upon the streets with loaded pistol flourishing it” because “the right to bear arms is secured by the Constitution”).

³⁸ *Id.* at 429, 366.

³⁹ *Id.* at app. 217.

⁴⁰ *Id.*

accountability.⁴¹ Pervasive state violence and the complete breakdown of justice in the South demanded a bold new set of remedies to vindicate fundamental rights and prevent the subjugation of Black citizens. Section 1983 sought to hold state lawbreakers to account, not permit them to violate fundamental rights with impunity.

III. How the Supreme Court Gutted Section 1983's Promise of Accountability

The Supreme Court has not respected the text and history of Section 1983, despite the statute's clarity. Instead, it has effectively rewritten the statute, inventing an array of immunities designed to make it easier for government officials to avoid accountability. The Court has treated Section 1983's sparse but plain text as an open invitation to engage in judicial policymaking, rewriting the statute in a host of ways, virtually all designed to close the courthouse doors to those who have been victimized by government abuse of power and negate any deterrent for ending conditions and practices that result in systemic abuses. To be sure, courts sometimes have to fill gaps in a statutory scheme, but doing so requires a sensitivity to the statute's design and Congress's plan in passing it.⁴² That sensitivity is wholly lacking in the Court's judicially created immunity doctrines. Rather than acting to fulfill the statute's text, history, and purpose, the Court has created a patchwork quilt of doctrines that do violence to Section 1983's aim of ensuring official accountability. Part A looks at the Supreme Court's qualified and absolute immunity doctrines. Part B then turns to examine the judicially created limits on suits against local governments. Part C examines the exclusion of states from the scope of Section 1983.

A. The Invention of Qualified and Absolute Immunity

The text of Section 1983 is as clear as can be: it makes state officials acting under color of state law liable for constitutional violations and provides no immunities from suit. Rather than heeding this text, the Supreme Court has held that all state officials, in fact, must be accorded a broad immunity from suit. Most have qualified immunity, a sweeping form of immunity that permits holding an official liable only where "existing precedent" was so clear that the "constitutional question" was "beyond debate."⁴³ That means that much of the time, constitutional violations go unremedied, justice is denied, and the contours of constitutional rights may remain frozen in place, preventing rights from

⁴¹ Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 Ark. L. Rev. 741, 771 (1987) ("[T]he debates on both Section 1983 and its criminal law predecessor are replete with statements of the opponents of civil rights statutes that the legislation was overriding those immunities. Furthermore, nothing in the legislative history is said to assuage the fears of these opponents. Thus, Congress was not silent about immunities; it was only silent about *retaining* immunities." (emphasis in original)). There is some indication in the legislative record that the Congress that enacted Section 1983 did not expect that legislators could be sued for passing unconstitutional laws, see *infra* text accompanying note 67, but even here Congress refused to reduce that understanding into a written form.

⁴² Cf. *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017) (in selecting accrual rule "courts must closely attend to the values and purposes of the constitutional right at issue").

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

ever becoming established in the first place.⁴⁴ Other government actors, including legislators, judges, prosecutors, and police witnesses have absolute immunity,⁴⁵ reflecting the Supreme Court’s view that any judicial inquiry “would disserve the broader public interest.”⁴⁶ In these contexts, as Justice Thurgood Marshall put it, “the mere inquiry into good faith is deemed so undesirable that we must simply acquiesce in the possibility that government officials will maliciously deprive citizens of their rights.”⁴⁷ Through these doctrines, the Court has thwarted official accountability across the board and sanctioned the abuse of power the Fourteenth Amendment was designed to prevent.

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

In creating these sweeping governmental immunities, the Court has insisted that Section 1983 does not mean what it says and that its rulings simply recognize Congress’s failure to displace well-recognized tort immunities existing in 1871. As the Court has said on many occasions, “[c]ertain immunities were so well established in 1871, when [Section] 1983 was enacted, that ‘we presume that Congress would have specifically so provided had it wished to abolish’ them.”⁵⁰ This is wrong for three different reasons.

First, the Court’s move to treat Section 1983 as a tort statute misses what is at the statute’s core: ensuring constitutional accountability.⁵¹ Congress enacted Section 1983 not to provide a remedy for torts—a body of law mostly designed to order private relations between individuals—but for violations of the Fourteenth Amendment’s guarantees of fundamental rights and equality, many of which had no obvious tort analogy.⁵² As Rep. Aaron Beatty stressed during the debates over Section 1983, “[a]ll the injuries, denials, and privations,” which demand a federal remedy, “are injuries, denials, and privations

⁴⁴ See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 66 (2017) (observing that when courts grant qualified immunity without ruling on the merits of the underlying claim, the doctrine creates a “catch-22” that “lead[s] to constitutional uncertainty and stagnation, making it more difficult for plaintiffs to prevail on constitutional claims and offering little guidance to government officials about the scope of constitutional rights”).

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

⁴⁶ See *Imbler*, 424 U.S. at 427.

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

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

⁴⁹ Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 939 (2014) (“Given that law enforcement officers in my study only rarely . . . contributed to settlements or judgments . . . qualified immunity can no longer be justified as a means of protecting officers from the financial burdens of personal liability.”); Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 Geo. L.J. 65, 102 (1999) (“Given that government addresses the prospect of its employees incurring personal liability by consistently shouldering the costs of constitutional tort claims against them, that purpose no longer supports also applying qualified immunity to those same officials.”).

⁵⁰ *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967)).

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

⁵² *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012) (observing that Section 1983 is not a “federalized amalgamation of pre-existing common-law claims”).

of rights and immunities under the Constitution and laws of the United States. They are not injuries inflicted by mere individuals or upon ordinary rights of individuals.”⁵³ Congress was not concerned with the niceties of state tort law. A federal remedy—the likes of which had never existed previously—was necessary to redress the systematic violation of fundamental rights and utter breakdown of law and order. Congress was not trying to federalize tort law, but to ensure accountability when state officials participated in or condoned racial violence and trampled on fundamental constitutional rights to keep Black people in a state of second-class citizenship. In that context, it is highly unlikely that Congress would have wanted to relegate those victimized by official abuse of power to the remedies available under the common law tort system.⁵⁴ In the words of Justice John Marshall Harlan, “[i]t would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.”⁵⁵

Second, the historical record provides strong support for taking the authors of Section 1983 at their word. Congress sought to provide a framework to ensure constitutional accountability, not to allow constitutional rights to be violated with impunity. Section 1983 provided a mechanism that allowed government actors who actively participated in the Klan’s reign of terror or simply looked the other way to be brought to justice in the federal courts. Congress rejected the notion that government officials should be free to violate constitutional rights simply because of their official position. As the debates over Section 1983’s precursor illustrate, official immunities prevent enforcement of constitutional rights and undermine the rule of law because they “place[] officials above the law.”⁵⁶ The Supreme Court has simply ignored this history, paying no respect to the judgment Congress made in enacting Section 1983.

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

⁵³ Cong. Globe, 42d Cong., 1st Sess. app. 79 (1871).

⁵⁴ See David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. Rev. 497, 524 (1992) (“Unlike common law tort doctrine, § 1983 was specifically aimed at public officials. Immunities designed to minimize the extent to which common-law principles unintentionally impinged on official prerogatives would be peculiarly ill-suited to a statute which was primarily intended to prevent the abuse of those prerogatives.”); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 494 (1982) (observing that “historical immunities . . . did not develop in contexts involving clear assertions of unconstitutional action—they usually arose in cases involving state tort or contract law”).

⁵⁵ *Monroe*, 365 U.S. at 196 n.5 (Harlan, J., concurring).

⁵⁶ Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).

⁵⁷ As John Jeffries writes, “an injured party barred from suing the legislator who voted for an unconstitutional statute can sue the executive officer who enforces it. As nearly all legislative acts require executive implementation, there is almost always an executive officer to be sued.” John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 211 (2013).

flouted the Constitution, the remedy was an appeal, not a suit against the judge.⁵⁸ But in the mine run of cases, the legal backdrop to Section 1983 promised official accountability, not immunity.

Officials were frequently indemnified by the government for their unlawful acts⁵⁹—much as they are today—but they were not given a free pass to trample on individual rights.⁶⁰ What Chief Justice John Marshall had written in *Marbury v. Madison* was still the law: “If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law.”⁶¹ *Marbury* did not involve a suit for damages but courts applied the principles it spelled out to hold government actors strictly liable for violating constitutional limits.⁶² In other words, at the time of the enactment of Section 1983, officials who violated constitutional limits—whether well-intentioned or not—lacked immunity from suit.⁶³

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

The Supreme Court’s absolute immunity doctrine makes this state of affairs even worse, condoning even the most flagrant violation of constitutional rights.

On its face, absolute immunity seems nothing less than a judicial repeal of Section 1983. How can a statute that gives individuals the right to sue for violations of constitutional rights be construed to mean that certain officials can never be sued for violating the Constitution? There is much to be said for Justice William O. Douglas’s view that “every person’ . . . mean[s] every person” and therefore the text does not license the “creation” of “judicial exception[s]” that permits government actors to

⁵⁸ *Id.* at 212 (arguing that “absolute judicial immunity” is justified “by the existence of an alternative remedy” of “appeal”). The Supreme Court recognized judicial immunity at the time of the passage of Section 1983, see *Randall v. Brigham*, 74 U.S. 523, 536 (1868) (holding that judges “are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly”). The common law also recognized a quasi-judicial immunity that applied to certain officers who were akin to judges. See William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 *Stan. L. Rev. Online* (forthcoming 2021), <https://ssrn.com/abstract=3746068> (arguing that quasi-judicial immunity bears little resemblance to the modern doctrine of qualified immunity).

⁵⁹ James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 *N.Y.U. L. Rev.* 1862, 1906-07 (2010); see, e.g. *Tracy v. Swartwout*, 35 U.S. 80, 98-99 (1836) (“Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship.”).

⁶⁰ See, e.g. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851); *Merriam v. Mitchell*, 13 Me. 439 (1836); *Shanley v. Wells*, 71 Ill. 78 (1873).

⁶¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

⁶² Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 *N.Y.U. L. Rev.* 132, 155 (2012) (arguing that government officials received “immunity for acting within the appropriate bounds of discretion, strict liability for acting outside of the authority enumerated by the Constitution”).

⁶³ James Pfander, *Zones of Discretion at Common Law*, 116 *Nw. U. L. Rev. Online* 148, 165-67 (2021), <https://ssrn.com/abstract=3746475>.

maliciously flout the Constitution.⁶⁴ But in certain narrow settings, absolute immunities can be appropriate.

There is at least some evidence that the Congress that enacted Section 1983 did not understand the text to permit suits against legislators for passing unconstitutional state laws. In the debates over the Civil Rights Act of 1866, the precursor to Section 1983, Senator Lyman Trumbull suggested that state legislators would not be liable for enacting unconstitutional laws. Under the Act, Trumbull argued, the “person who, under the color of the law, does the act, not the men who made the law” may be held liable.⁶⁵ Under this view, legislators cannot be sued under Section 1983 for passing an unconstitutional law, but those who are responsible for enforcing those enactments can.

Judicial immunity is harder to reconcile with the text and history of Section 1983 as originally enacted. As Justice Douglas observed in his dissent in *Pierson v. Ray*, “every member of Congress who spoke to the issue assumed that the words of the statute meant what they said and that judges would be liable.”⁶⁶ State judges, like other institutions of power, were all too often either active or passive participants in the Klan’s reign of terror.⁶⁷ In its modern form, however, Section 1983’s text implicitly recognizes judicial immunity. In 1996, Congress overrode the Supreme Court’s decision in *Pulliam v. Allen*,⁶⁸ which held that state judges could be sued for injunctive relief for actions taken in their judicial capacity, rejecting the argument that absolute judicial immunity prevented such a suit. Congress provided that “in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”⁶⁹ Given that Congress has recognized a form of judicial immunity in the context of equitable actions—where usually there are no immunities of any kind—scaling back judicial immunity in the context of damages actions is probably a bridge too far.

Both legislative and judicial immunity cohere with the rule of law because they leave alternative remedies available.⁷⁰ But the judicially created doctrine of absolute immunity, however, sweeps far more broadly, making it impossible for those victimized by abuse of government power to obtain any redress in a number of circumstances.

The most troubling aspect of the doctrine is absolute prosecutorial immunity, which allows prosecutors to violate clearly established constitutional rights with impunity when acting as advocates. Civil suits, where available, are an essential means of deterring prosecutorial misconduct. Judicial review of

⁶⁴ *Pierson*, 386 U.S. at 559 (Douglas, J., dissenting).

⁶⁵ Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).

⁶⁶ *Pierson*, 386 U.S. at 561 (Douglas, J., dissenting).

⁶⁷ Nichol, *supra* note 23, at 976 (arguing that “many of the framers of section 1983 considered state judges to be active and energetic participants in a pervasive effort to deprive a substantial segment of the southern populace of fundamental human liberties”).

⁶⁸ 466 U.S. 522 (1984).

⁶⁹ 42 U.S.C. § 1983.

⁷⁰ Jeffries, *supra* note 57, at 213-14 (arguing that “absolute legislative and judicial immunity are deviations from the norm; they should be construed grudgingly, in close adherence to the rationales that are thought to justify total abrogation of the constitutional tort remedy”). As Jeffries argues, for legislators, “this means that absolute immunity should be confined to decisions of general applicability that must be enforced by executive officers, who can themselves be sued for violating constitutional rights.” *Id.* at 214. For judges, Jeffries argues that judicial immunity should only apply when there is in fact a “corrective process” to ensure “a functioning system for the enforcement of constitutional rights.” *Id.* at 214, 217.

criminal convictions rarely provides any deterrence because courts are often loath to overturn criminal convictions simply because a prosecutor committed misconduct.⁷¹ Because of absolute immunity, individuals wronged by prosecutors have no remedy when prosecutors abuse the awesome power they possess. It does not matter how flagrant the constitutional violation. Absolute immunity forecloses all accountability.

The fiction that Section 1983 did not disturb common-law immunities does not provide justification for absolute prosecutorial immunity. Prosecutorial immunity was unknown in the law in 1871. Indeed, nineteenth century courts refused to exempt prosecuting attorneys from liability for malicious prosecution because that would “authoriz[e] those who are the most capable of mischief to commit the grossest wrong.”⁷² As Margaret Johns has shown, a legislator “conscientiously researching the common law on the eve of passage of [Section] 1983 would have found the well-established tort of malicious prosecution, which had been upheld in an action against a public prosecutor for eliciting and using false testimony. Additionally, he would have found no immunity defense to insulate the prosecutor from liability if the elements of the cause of action were proven, for there was not a single decision affording prosecutors any kind of immunity defense from liability for malicious prosecution.”⁷³ The first American case to recognize prosecutorial immunity was in 1896, a quarter of a century after the passage of Section 1983.⁷⁴ And prosecutorial misconduct was one of the abuses of power that led to the Fourteenth Amendment.⁷⁵ Absolute prosecutorial immunity prevents

⁷¹ See, e.g., *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (explaining that prosecutor’s failure to disclose does not require granting relief “unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict”); *Darden v. Wainright*, 477 U.S. 168, 181 (1986) (holding that prosecutors’ comments not a basis for relief unless they “so infected the trial with unfairness as to make the resulting conviction a denial of due process” (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974))); *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (holding that the “touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor”).

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

⁷³ Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 114.

⁷⁴ See *Burns*, 500 U.S. at 499 (Scalia, J., concurring); *Kalina*, 522 U.S. at 132 (Scalia, J., concurring); Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 Fordham L. Rev. 509, 526 (2011) (“[T]he doctrine of absolute prosecutorial immunity was unheard of for another twenty-five years, until a state court in Indiana adopted it in *Griffith v. Slinkard*. Even after *Griffith*, the common law regarding absolute prosecutorial immunity was not settled for decades.”).

⁷⁵ *Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xviii (1866) (“In some localities prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere as soon as the United States troops are removed.”); Cong. Globe, 39th Cong., 1st Sess. 1526(1866) (insisting on protection former Union soldiers “from malicious persecution instituted and carried on in the several States by those . . . who have taken every opportunity to assail, annoy, and trouble the soldiers of the Federal Army”); *id.* at 1983 (“There are at this time . . . several thousand suits pending against loyal men who have committed no offense and done no act except in obedience to orders of superior officers.”); *id.* at 2054 (urging the need to find “some way of remedying this crying evil” and ensure that “these men who have been engaged in the defense of the country cannot be permitted to be persecuted in this sort of way”); David Achtenberg, *With Malice Toward Some: United States v. Kirby, Malicious Prosecution, and the Fourteenth Amendment*, 26 Rutgers L.J. 273, 342 (1995) (arguing that baseless and malicious “prosecutions were in the forefront of the minds of the Congressmen who proposed and enacted the [A]mendment”).

enforcement of the Fourteenth Amendment and had no foundation in the common law at the time of the passage of Section 1983.⁷⁶

Despite all this, the Supreme Court in 1976 held that prosecutors cannot be sued for violating an individual's constitutional rights when performing actions "intimately associated with the judicial phase of the criminal process."⁷⁷ What justifies giving prosecutors absolute immunity in this setting? According to the Supreme Court, "[i]f a prosecutor had only a qualified immunity, the threat of s[ection] 1983 suits would undermine performance of his duties. . . . The public trust of the prosecutor's office would suffer" and "his energy and attention would be diverted from the pressing duty of enforcing the criminal law."⁷⁸ This is the same line of argument that, according to the Court, justifies giving police officers and other officials qualified immunity. So why should prosecutors have free reign to violate even settled constitutional rights with impunity? The Court has struggled to produce a coherent answer. It has recognized that where prosecutors are merely investigating crime, there is no good reason for giving them anything more than the qualified immunity that generally shields police officers from suits.⁷⁹ But where the prosecutor is acting as an advocate, the Court has said, anything less than absolute immunity "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."⁸⁰

This allows prosecutors to "strike" not only "hard blows," but "foul ones" as well.⁸¹ By giving prosecutors absolute immunity, the Supreme Court has given prosecutors a free pass to violate constitutional rights, undermined the integrity of our criminal justice system, and ruined the lives of those wrongly accused of crime. Our justice system cannot, in fact, dispense justice if prosecutors cannot be held accountable when they flagrantly violate constitutional rights, such as by presenting false testimony, coercing witnesses, or hiding exculpatory evidence. As John Jeffries argues, "[t]he sense of absolute power engendered by absolute immunity is exactly the problem, and should be constrained wherever possible."⁸²

B. Local Government Liability Under Section 1983

When the government authorizes, supervises, equips, trains, and pays an officer who violated constitutional rights in carrying out his or her job, the governmental entity should be held liable in a court of law. To quote now-Judge Nina Pillard, "constitutional violations require state action, and thus

⁷⁶ Johns, *supra* note 74, at 510 ("[T]he notion that absolute immunity is historically justified is just plain wrong."); Jeffries, *supra* note 57, at 220 ("However ready one may be to assume that the Civil Rights Act of 1871 silently incorporated common-law immunities, absolute prosecutorial immunity cannot rest on that basis."); *Burns*, 500 U.S. at 505 (Scalia, J., concurring) (observing that *Imbler* based absolute immunity "upon a common-law tradition of prosecutorial immunity that developed much later than 1871, and was not even a logical extrapolation from then-established immunities").

⁷⁷ *Imbler*, 424 U.S. at 430.

⁷⁸ *Id.* at 424, 425.

⁷⁹ See *Buckley*, 509 U.S. at 276 ("When the functions of prosecutors and detectives are the same, . . . the immunity that protects them is also the same."); *Burns*, 500 U.S. at 495 (observing that "it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice.").

⁸⁰ *Imbler*, 424 U.S. at 427-28.

⁸¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

⁸² Jeffries, *supra* note 57, at 231.

the government that made an abuse of its official power possible” should be “held accountable for that abuse.”⁸³ Because so many constitutional violations are due to organizational conditions that permit official violence and the violation of fundamental rights to flourish, holding the governmental entity liable is a particularly valuable means of vindicating constitutional rights.⁸⁴ It signals that the government—not merely a rogue officer—is responsible for constitutional violations. And it creates an incentive for the government to properly train and supervise its employees and eliminate conditions that lead to a culture of disregard for constitutional rights and other systemic drivers of harm.

Under longstanding Supreme Court doctrine, however, this means of ensuring constitutional accountability is almost always off the table. The Supreme Court has rewritten Section 1983 to give local governments a form of sovereign immunity.⁸⁵ Just as the judicially created qualified and absolute immunity doctrines make it incredibly difficult to sue an individual officer, the so-called “policy and custom” requirement invented by the Supreme Court erects an incredibly high hurdle to suing a local governmental entity for constitutional violations committed by its officials. Like qualified and absolute immunity, this doctrinal limit on suits against local government has no basis in the text and history of Section 1983. The Court simply invented this demanding test out of whole cloth. As Justice Stevens aptly observed, it is “judicial legislation of the most blatant kind.”⁸⁶

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

In *Monell v. Department of Social Services*, the Supreme Court held that “a local government may not be sued under [Section] 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under [Section] 1983.”⁸⁸ *Monell* did not require the Court to decide whether a local government could be sued for constitutional violations committed by its officials because the case challenged the constitutionality of an explicit city policy. The idea that an official policy was required for municipal liability had not been raised in the lower courts, much less briefed before the Supreme

⁸³ Pillard, *supra* note 49, at 75.

⁸⁴ Gilles, *supra* note 27, at 22 (urging the use of municipal liability to redress “the very cultures and practices that drive constitutional violations in modern law enforcement organizations, thus reducing future violations on an institutional scale”); Pillard, *supra* note 49, at 75 (observing that “individual government employees may lack the power or resources to bring their conduct into constitutional compliance, particularly where lack of training, ineffective systems, or inadequate resources are the problems” and suggesting that “only if government as an institution is held legally responsible for constitutional violations will it feel pressure to institute prophylactic measures, whether by enhancing staffing, improving training, or restructuring procedures”); Smith, *supra* note 8, at 484 (arguing that “entity liability is likely a better agent for spurring systemic changes that may lead to an overall reduction in violations”).

⁸⁵ Smith, *supra* note 8, at 416 (arguing that the judicially-created limits on suits against local governments “share[] core ideological and methodological features with state sovereignty doctrines”).

⁸⁶ *Tuttle*, 471 U.S. at 842 (Stevens, J., dissenting).

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

⁸⁸ *Monell*, 436 U.S. at 694.

Court.⁸⁹ But the Court proceeded to adopt it anyway, firmly rejecting the idea that local governments could be sued more broadly for constitutional violations committed by their officers. Since *Monell*, the judicially created “policy or custom” requirement has been repeatedly applied stringently to immunize local governments from liability.

The word “policy” does not appear anywhere in Section 1983, but the Court has seized on the supposed “policy requirement” to throw out of court suits seeking to hold local governments liable for police killings and other state violence,⁹⁰ suits to redress a prosecutor’s office’s deliberate indifference to its constitutional duty to disclose exculpatory evidence,⁹¹ and suits alleging retaliation against government employees for engaging in freedom of speech protected by the First Amendment.⁹² It has been decades since the Supreme Court has found that a municipal policy caused a constitutional violation.⁹³ During that time, the Court has spilled much ink laboring to explain the so-called “policy requirement,” spinning finer and finer distinctions to keep constitutional accountability out of reach. As Justice Breyer has charged, decades of efforts to clarify the policy requirement has resulted in a body of law that “is neither readily understandable nor easy to apply.”⁹⁴

If a city enacts an ordinance or a mayor takes action that violates constitutional rights, it is easy enough to say that the policy requirement has been satisfied. In these instances, the entity can be held liable, even if its policy does not violate clearly established law.⁹⁵ But outside these circumstances, the Supreme Court has adopted a very crabbed view of municipal responsibility for constitutional violations. The Court’s cases take a formalistic approach that focuses on “the actions of those whom the law establishe[s] as the makers of municipal policy,”⁹⁶ ignoring that much municipal policy is not made in this fashion.⁹⁷ And when the policy in question is a failure to train subordinates about the

⁸⁹ As Justice Stevens observed, “[t]he commentary on *respondeat superior* in *Monell* was not responsive to any argument advanced by either party and was not even relevant to the Court’s actual holding.” *Tuttle*, 471 U.S. at 842 (Stevens, J., dissenting).

⁹⁰ *Id.* at 820-24 (reversing jury verdict against city in suit by widow of a man shot by a police officer, despite evidence that city’s training of its officers was grossly inadequate); *Board of County Comm’rs of Bryan County, Okla. v. Brown*, 520 U.S. 397 (1997) (reversing jury verdict against city in excessive force suit involving Sheriff’s twenty-one-year-old great-nephew, who was hired despite his criminal record).

⁹¹ *Connick v. Thompson*, 563 U.S. 51 (2011) (reversing \$14 million jury verdict against local prosecutor’s office alleging deliberate indifference to office’s responsibility to disclose exculpatory evidence).

⁹² *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (reversing verdict against city for retaliating against employee for truthful testimony he gave on matters of public importance).

⁹³ The last time was the Court’s 1986 decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), in which the Court held that a local government could be held liable for forcibly entering a doctor’s office based on the fact that a final policymaker, the county prosecutor, made the decision.

⁹⁴ *Brown*, 520 U.S. at 433 (Breyer, J., dissenting).

⁹⁵ *Owen*, 445 U.S. at 657 (holding that “municipalities have no immunity from damages liability flowing from their constitutional violations”).

⁹⁶ *Praprotnik*, 485 U.S. at 128.

⁹⁷ Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 *Geo. L.J.* 1753, 1778-79 (1989) (“Th[e] doctrine . . . has precipitated a quest not only for a discrete, static, readily definable norm (the ‘policy’) but also for an easily identifiable, high-level progenitor of the norm (the ‘final policymaking authority’). In many cases, however, entities of that kind turn out not to exist in the real world—at least not in the form or in the hierarchical location that the doctrine demands.”); Gilles, *supra* note 27, at 35 (arguing that Court’s understanding of

need to respect constitutional guarantees, the Court has adopted complex rules that effectively doom such claims to failure, insisting that without “stringent culpability and causation requirements,” claims based on training deficits “raise[] serious federalism concerns.”⁹⁸ So what began as an inquiry into policy has morphed into one about culpability. Meanwhile the Supreme Court has never held a local government liable based on a municipal custom, even though, as Myriam Gilles has argued, “unwritten codes of conduct among rank-and-file officers” are “the most pervasive force causing the deprivation of constitutional rights on the local level.”⁹⁹

Monell restricts local government liability in a manner fundamentally inconsistent with Section 1983. The main abuses Section 1983 sought to remedy were not unconstitutional regulations adopted by policymakers, but the fact that state and local officials winked at or participated in Klan violence and refused to enforce laws that protected Black Americans from harm.¹⁰⁰ Rather than heeding the statute’s text and history, the Court’s doctrine prioritizes local autonomy over the statute’s goal of ensuring constitutional accountability by remedying and deterring constitutional wrongs.

To justify the “policy or custom” requirement, the Court in *Monell* made two points. Looking to the language of the statute, it first suggested that Section 1983’s causation language “cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor.”¹⁰¹ But in 1871, it was well-established that municipalities were persons in the law,¹⁰² and municipalities were regularly held liable for the wrongful acts of their employees in the course of their employment.¹⁰³ And where the government makes it possible for its employees to act in ways that violate fundamental constitutional rights, pays them, directs them, equips them, and gives them immense power to inflict harm, it is fair to say that the government has “caused” the individual “to be subjected” to the constitutional violation.¹⁰⁴ The fact that Section 1983

what constitutes official policy “focus[es] exclusively and unrealistically on high-level city officials and virtually ignore the unconstitutional actions of low-level officials”).

⁹⁸ *Brown*, 520 U.S. at 415; *Connick*, 563 U.S. at 61 (arguing that a “municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on failure to train”); *id.* at 74 (Scalia, J., concurring) (arguing that strict limits on failure-to-train claims are necessary “because without them, ‘failure to train’ would become a talismanic incantation producing municipal liability” and “thereby diminish[] the autonomy of state and local governments”); *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (raising fears that entertaining municipal liability based on failure to train would lead to “an endless exercise of second-guessing municipal employee-training programs” and “would implicate serious questions of federalism”).

⁹⁹ Gilles, *supra* note 27, at 50.

¹⁰⁰ Robert J. Kaczorowski, *Reflections on Monell’s Analysis of the Legislative History of Section 1983*, 31 Urb. Law. 407, 430 (1999) (“It was not racially discriminatory laws and policies that presented the greatest concern to Congress in 1871. Rather, it was the inaction of law enforcement officers, the complicity of public officials in criminal wrongdoing, and the failure of states’ civil and criminal justice systems to protect against and to redress rights violations that Congress was attempting to address.”); Gilles, *supra* note 27, at 92 (observing that “the § 1983 framers were acutely aware that unwritten codes of conduct, adhered to by rank and file officers, were uniquely potent forces in undermining rights guaranteed by the Fourteenth Amendment”).

¹⁰¹ *Monell*, 436 U.S. at 692.

¹⁰² Act of Feb. 25, 1871, § 2, 16 Stat. 431 (defining the term “person” to include “bodies politic and corporate”).

¹⁰³ See Smith, *supra* note 8, at 468 (observing that “leading authorities around the time of § 1983’s passage stated that the prevailing view was that municipalities and corporations should be treated similarly on questions of causation”).

¹⁰⁴ Schuck, *supra* note 97, at 1785 (“Municipalities are morally, causally, and functionally responsible for

requires a causal nexus between the government action in question and the violation of constitutional rights hardly justifies holding localities unaccountable for constitutional violations committed by subordinate officers.

Monell spent little time focusing on the textual point. Instead, it relied principally upon Congress’s rejection of the Sherman Amendment, a different part of the 1871 legislation that included Section 1983. It is dangerous for a court to interpret one section of a statute based on Congress’ failure to enact a different provision.¹⁰⁵ That is particularly so when the two provisions deal with distinct problems. But *Monell* insisted that the “policy or custom” requirement was necessary in light of the rejection of the Sherman Amendment. This argument has been subjected to devastating criticism, which the Court has simply ignored.¹⁰⁶

The Sherman Amendment—named for its sponsor Ohio Senator John Sherman—sought to make municipalities shoulder the costs of injuries inflicted by Klan violence, whether or not they were to blame in any way. Sherman’s proposal sought to require localities to “take the necessary steps to put down lawless violence” or face legal liability.¹⁰⁷ There were three versions of the Sherman Amendment. The first sought to make the inhabitants of a municipality strictly liable for injuries caused by Klan violence, whether or not they had taken any action to prevent the injuries.¹⁰⁸ The second version—adopted by a Conference Committee after the House rejected the original Sherman Amendment—imposed strict liability on the municipalities rather than on local property owners.¹⁰⁹ Both versions of the Sherman Amendment were sweeping in their breadth: they imposed liability for injuries caused by “riotous[] and tumultuous[]” mob violence whether or not the inhabitants or the municipality was at fault. Liability attached simply because legal offenses had occurred in the municipality.¹¹⁰

The Sherman Amendment, as modified, passed the Senate, but was rejected by the House of Representatives. Opponents stressed two arguments. First, they argued that the Sherman Amendment would have created an unprecedented form of liability. The Amendment, they claimed, would have created “a corporate liability for personal injury which no prudence or foresight could have

most officially inflicted injuries in precisely the same sense that private enterprises are; ‘official policy’ is but one source of that responsibility.”); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping § 1983’s Asymmetry*, 140 U. Pa. L. Rev. 755, 787 (1982) (“If local government officials and low-level employees could be reached precisely because they carried the badge of government authority, is it reasonable to suppose that the 1871 Congress intended to absolve the very governments who handed out the badges?”).

¹⁰⁵ See *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019) (“The private intent behind a drafter’s rejection of one version of a text is shoddy evidence of the public meaning of an altogether different text.”).

¹⁰⁶ See, e.g., Kaczorowski, *supra* note 100, at 432 (arguing that “*Monell*’s conclusion that supporters of § 1983 intended to hold municipalities liable, but rejected vicarious liability for municipalities, is untenable”); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 S. Ct. Rev. 249, 301 (“[T]here is no evidence in the Civil Rights Act of 1871 or its legislative history that the Forty-Second Congress intended to limit vicarious liability for the torts of municipal employees to actions that are taken pursuant to ‘policy.’”); Eisenberg, *supra* note 54, at 516 (arguing that *Monell* “drew an unsupported conclusion from the rejection of the Sherman amendment” because “the amendment imposed two forms of liability that *respondeat superior* liability does not impose”).

¹⁰⁷ Cong. Globe, 42d Cong., 1st Sess. 761 (1871).

¹⁰⁸ *Id.* at 663.

¹⁰⁹ *Id.* at 749.

¹¹⁰ Kaczorowski, *supra* note 100, at 419 (“[I]t was not that the wrongdoers were citizens of the municipality that gave rise to the municipality’s liability The wrongdoers need not have been residents or have had any relationship to the municipality.”).

prevented.”¹¹¹ Even if the local government “performed its duty to the utmost,” it could still be held liable.¹¹² A key part of the problem was that the Sherman Amendment would have made municipalities strictly liable for conduct by third parties they could not control. As Kentucky Senator John Stevenson asked, “[i]s it possible for any city . . . to foresee what the midnight incendiary may do, or what bad men may do upon the eve of the election, secretly and clandestinely in combination?”¹¹³

Second, opponents of the Sherman Amendment argued, based on then-binding Supreme Court precedent, that Congress lacked power under the Constitution to impose on localities a new legal obligation to keep the peace.¹¹⁴ As Representative John Farnsworth declared, “[t]he Supreme Court of the United States has decided repeatedly that Congress can impose no duty on a State officer. . . . Nor can Congress confer any power or impose any duty upon the county or city. Can we then impose on a county or other State municipality liability where we cannot require a duty? I think not.”¹¹⁵ Ultimately, Congress adopted a much narrower provision, which imposed liability on any person who could have prevented Klan violence, but failed to do so.¹¹⁶

Monell held that the rejection of the Sherman Amendment foreclosed holding local governments liable for constitutional violations committed by their officials under color of law. According to *Monell*, “creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional.”¹¹⁷ This reasoning is badly flawed.

First, Section 1983 did not impose a new legal duty akin to the one that opponents of the Sherman Amendment objected. Rather, Section 1983 provided a legal remedy for enforcing constitutional rights—rights that state and local governments were already under a constitutional duty to respect. Section 1983, hence, did not create any new rights or duties; it simply provided a cause of action to ensure that those victimized by abuse of power could go to federal court to hold government actors

¹¹¹ Cong. Globe, 42d Cong., 1st Sess. 762 (1871).

¹¹² *Id.* at 771; *id.* at 788 (“Under this section it is not required, before liability shall attach, that it shall be known that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality.”).

¹¹³ *Id.* at 762.

¹¹⁴ *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871) (holding that Congress could not impose a tax on a state court judge); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (holding that Congress could not require state officials to enforce the Fugitive Slave Law); see also *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861) (same). Ultimately, the Supreme Court held that these cases did not apply to legislation enforcing the Fourteenth Amendment because “the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment.” *Ex Parte Virginia*, 100 U.S. (10 Otto) 339, 347-48 (1880). Given the explicit enforcement power in Section 5, the *Virginia* Court could “not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.” *Id.* at 348.

¹¹⁵ Cong. Globe, 42d Cong., 1st Sess. 799 (1871); see also *id.* at 794 (“[E]nforcing a liability . . . is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever.”); *id.* at 795 (noting that the Supreme Court has held that “we cannot command a State officer to do any duty whatever, as such; and I ask gentlemen to show me the difference between that and commanding a municipality, which is equally the creature of the State, to perform a duty”).

¹¹⁶ That section is now codified at 42 U.S.C. § 1986.

¹¹⁷ *Monell*, 436 U.S. at 693; *id.* at 707 (Powell, J., concurring) (arguing that the “rejection of the Sherman Amendment can best be understood . . . as a limitation of the statutory ambit to actual wrongdoers, *i.e.*, a rejection of *respondeat superior* or any other principle of vicarious liability”).

accountable for violating the Constitution.¹¹⁸ *Monell* went badly astray in suggesting that holding municipalities liable for constitutional violations committed by their officers raised any constitutional issue.

Second, the Sherman Amendment did not involve a form of respondeat superior liability, and nothing in the debate over the Sherman Amendment impugned municipal liability for legal wrongs committed by a city's employees. In 1871, respondeat superior municipal liability—the idea that governments could be held liable for legal wrongs committed by their agents within the scope of their employment—was well established in the law. Courts regularly recognized that “[g]overnmental corporations then, from the highest to the lowest, can commit wrongful acts through their authorized agents, for which they are responsible; and the only question is, how that responsibility shall be enforced. The obvious answer is, in courts of justice, where, by the law, they can be sued.”¹¹⁹ As David Achtenberg has shown, this rule of governmental liability reflected four ideas which defined the rule and its limits: (1) the legal unity of employer and employee; (2) the employer's legal power to direct and control his employee; (3) the fact that the employer holds out his employees as careful, competent, and well-intentioned; and 4) the need to ensure that the benefits and liabilities of the employer-employee relationship were reciprocal.¹²⁰ The Sherman Amendment proved so controversial because it departed so significantly from these precepts. It sought to hold localities liable for the conduct of third parties whom they could neither direct nor control, whether or not the local government had notice of impending violence or any means at their disposal to prevent it.¹²¹ In short, the defeat of the Sherman Amendment was based on concerns about the form of liability it would have created, not about municipal liability writ large.

Monell has produced a tortured jurisprudence that undermines Section 1983's goal of constitutional accountability, prevents systemic reform, and mires courts in confusing inquiries. A rule with such deleterious consequences that, in the words of Justice Breyer, “requires so many such distinctions to maintain its legal life may not deserve such longevity.”¹²²

C. The Exclusion of States From the Scope of Section 1983

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

¹¹⁸ Kramer & Sykes, *supra* note 106, at 261 (arguing that “the constitutional objections to the Sherman Amendment have no bearing on whether a municipality may be liable under §1983 on a *respondeat superior* theory” because “there was no constitutional impediment to holding [state] officers liable if they violated the Constitution while performing tasks delegated to them by the state”).

¹¹⁹ *Allen v. City of Decatur*, 23 Ill. 332, 335 (1860); see also *Tuttle*, 471 U.S. at 836-37 & nn.8-9 (Stevens, J., dissenting) (collecting cases).

¹²⁰ David J. Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 Fordham L. Rev. 2183, 2196-2203 (2005).

¹²¹ *Id.* at 2196 (arguing the four rationales for respondeat superior “were powerful arguments in favor of holding employers (including municipal employers) liable for the torts of their employees and were equally powerful arguments against adopting the type of liability contemplated by the Sherman Amendment”).

¹²² *Brown*, 520 U.S. at 435 (Breyer, J., dissenting).

In *Will v. Michigan Department of State Police*,¹²³ the Supreme Court held that “a State is not a person within the meaning of [Section] 1983,” reasoning that the statute’s text reflected no design to alter the constitutional balance of power between states and the federal government.¹²⁴ It did not matter that the central purpose of Section 1983 was to enforce the Fourteenth Amendment and to provide a cause of action that allowed persons victimized by abuse of state power to seek redress. That fact, the majority said, “does not suggest that the State itself was a person that Congress intended to be subject to liability.”¹²⁵ Thus, state entities can never be sued under Section 1983.

Will’s holding ignores that, at the time Section 1983 was framed, states were considered “bodies politic and corporate” and therefore were persons for purposes of federal law.¹²⁶ Legal dictionaries at the time explained that the term “body politic” when “applied to the government . . . signifies the state.”¹²⁷ Supreme Court opinions of the era, too, recognized that “[e]very sovereign State is of necessity a body politic, or artific[i]al person.”¹²⁸ Indeed, the members of Congress that enacted Section 1983 into law employed this very same usage.¹²⁹ The text of Section 1983 does not require excluding states from the reach of Section 1983.

The Court’s sterile textual analysis not only ignored powerful evidence that states were persons under the law, but also turned a blind eye to the transformation Section 1983 wrought. Section 1983 sought to accomplish what no statute had previously contemplated: it opened the courthouse doors to injured individuals by unconstitutional abuses committed by states and state actors for the first time in history. As even its opponents conceded, the statute gave federal courts the power to redress constitutional violations committed by state and local governments—“a jurisdiction that may be constitutionally conferred upon it . . . but that has never yet been conferred upon it” before that time.¹³⁰ To ensure enforcement of the Fourteenth Amendment, Congress revolutionized the jurisdiction of the federal courts to ensure that the federal judiciary could perform the task of ensuring constitutional accountability by states and state actors. And the term “person” was easily broad enough to include state governments. *Will* simply ignored the vast ways in which the Reconstruction Congress altered the balance between the federal and state governments to enforce the Fourteenth Amendment’s promises of freedom and equality.

¹²³ 491 U.S. 58 (1989).

¹²⁴ *Id.* at 64, 65.

¹²⁵ *Id.* at 68.

¹²⁶ Act of Feb. 25, 1871, § 2, 16 Stat. 431.

¹²⁷ John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the Union* 185 (11th ed. 1862).

¹²⁸ *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1851); *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885) (“The State is a political corporate body, can act only through agents, and can command only by laws.”).

¹²⁹ Cong. Globe, 42d Cong., 1st Sess. 661 (1871) (“What is a State? Is it not a body politic and corporate?”); *id.* at 696 (“A State is a corporation.”).

¹³⁰ Cong. Globe, 42d Cong., 1st Sess. app. 216 (1871).

IV. Conclusion

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

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