

**A THEORY OF GOVERNMENTAL DAMAGES LIABILITY:  
TORTS, CONSTITUTIONAL TORTS, AND TAKINGS**

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TABLE OF CONTENTS

INTRODUCTION .....	798
I. THE CONTOURS OF GOVERNMENTAL TORT LIABILITY .....	800
A. Common-Law Torts .....	801
1. Federal Liability .....	801
2. State and Local Liability .....	804
3. Asymmetry with Private Tort Liability.....	813
B. Constitutional Torts .....	815
1. Federal Liability .....	815
2. State and Local Liability .....	816
3. Asymmetry with Private Tort Liability.....	818
C. Takings .....	821
II. THE POLITICS OF GOVERNMENTAL TORT LIABILITY .....	822
A. The Case Against Governmental Tort Liability.....	822
1. Theories of Tort Liability .....	822
2. The Inapplicability of the Conventional Theory to Government.....	824
B. The Politics of Governmental Damages Liability.....	831
1. A Theory of Political Behavior .....	832
2. Assessing the Theory.....	833
3. Immunity Legislation as Empirical Evidence in Support of the Theory .....	838
4. Corroborative Evidence for the Theory.....	840
C. The Impact of Governmental Tort Liability.....	842
III. ASSESSING GOVERNMENTAL LIABILITY.....	844
A. Common-Law Torts .....	847
1. The Marginal Utility of Governmental Liability..	847
2. The Difficulty of Adjudicating Governmental Liability .....	850
3. The Weak Case for Governmental Liability .....	853
B. Constitutional Torts.....	856
1. The Irrelevance of Political Accountability .....	856
2. Qualified Immunity and Vicarious Employer	

Liability .....	856
3. Measure of Damages.....	860
4. Statutory Limitations on Damages.....	861
C. Takings .....	863
1. The Role of Compensation in Limiting Overuse of Eminent Domain.....	863
2. The Public-Use Inquiry.....	864
3. The Standard for Just Compensation .....	868
CONCLUSION.....	870

## INTRODUCTION

Governmental damages liability in tort represents a special case, to say the least. The rules governing governmental liability are riddled with immunities unknown in the private sector—a confusing patchwork seemingly without explanation.<sup>1</sup> Governmental tort liability is also without a justificatory theory. Theories of tort liability generally fall within two broad camps: the instrumentalists claim that tort liability promotes efficient investments in safety by visiting financial consequences on those who underinvest in safety, and the advocates of corrective justice claim that tort liability embodies a moral obligation of culpable parties to provide compensation for losses for which they are fairly considered responsible.<sup>2</sup> Neither theory, however, offers much support for governmental tort liability. Unlike private tortfeasors, the government's objective is not profit maximization; it responds to political and not market discipline. Thus, the instrumental justification for tort liability is wanting in the public sector, at least in the economic terms used by the instrumentalists.<sup>3</sup> As for corrective justice, the government passes its legal costs along to the taxpayers, who bear little meaningful culpability for the underlying tortious conduct, but who can be taxed to fund essentially unlimited liability far in excess of the exposure to liability faced, for example, by a shareholder in a private corporation. Thus, corrective justice also

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<sup>1</sup> See *infra* Part I.

<sup>2</sup> For explication of this bifurcated characterization of tort theory, see, for example, Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 370 (2005), and Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801–11 (1997).

<sup>3</sup> See *infra* text accompanying notes 112–21.

supplies little support for public-sector tort liability.<sup>4</sup> Indeed, there is an emerging consensus among legal scholars that governmental tort liability lacks a coherent justification.<sup>5</sup> Moreover, this unease with governmental liability is not confined to the academy; the United States Supreme Court has itself expressed doubts about the utility of damages awards against the government, leaving unclear what, if any, justification might support even limited forms of governmental liability for damages.<sup>6</sup>

In the discussion that follows, I mean to show that the emerging consensus is wrong. To do so, I anchor the justification for governmental tort liability in a theory of political behavior. I look to politics because the government responds primarily to political costs and benefits, whereas private tortfeasors respond primarily to economic rewards or punishment. I argue that governmental tort liability exacts a political price by diverting the funds used to pay judgments and other litigation costs from what elected officials regard as their politically optimal use. Governmental liability therefore creates a political incentive to invest in loss prevention in order to maximize political control over tax and spending policy. This theory, however, does not argue for unlimited governmental liability; to the contrary, it provides a justification for most of the immunities from governmental liability that have been recognized.

The discussion below proceeds in three parts. Part I describes the scope of governmental damages liability. Part II then demonstrates the inability of conventional theories of tort law to support governmental liability. It goes on to offer a justificatory theory for governmental tort liability: the theory of political behavior advanced in Part II suggests that governmental damages liability can be expected to create a political incentive for the government to make cost-justified investments in safety not present in a regime of nonliability. Part II submits that there is considerable empirical evidence to support the theory of political behavior it advances—the consistent legislative practice of enacting governmental immunity statutes.

While Parts I and II are largely descriptive, Part III is evaluative. It argues that the case for common-law tort liability against government is weak because its marginal utility is unclear—there are important political incentives to invest in loss prevention apart from the threat of tort liability. Moreover, tort actions against the government require juries to assess the manner in which scarce public resources are allocated among competing priorities, something jurors have little ability to do. And forcing the government to divert scarce resources

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<sup>4</sup> See *infra* text accompanying notes 122–24.

<sup>5</sup> See *infra* text accompanying notes 141–45.

<sup>6</sup> See *infra* text accompanying notes 86–94.

to the defense of litigation and the payment of judgments has important adverse impacts on essentially innocent third parties—the taxpayers and those dependent upon the ability of government to adequately fund public services. Part III therefore argues that governmental tort liability is unwarranted when it is reasonable to believe that ordinary political accountability will adequately encourage governmental investments in safety. Statutory immunity for discretionary decision-making is a good example of the point—it confers immunity in cases when political accountability will likely provide sufficient protection for the public without need of a damages remedy. Limitations on recoverable damages—such as ceilings on damages awards and a prohibition on punitive damages—are warranted as a means of mitigating the adverse effects of governmental liability.

When it comes to constitutional torts, however, Part III takes a different view. The Constitution does not leave its enforcement to the political process; accordingly, political accountability is never an adequate remedy for a constitutional violation. Discretionary and other categorical immunities are therefore inappropriate for constitutional violations; a law of constitutional torts should place pressure on the government to conform all of its conduct to the Constitution. That does not mean, however, that every constitutional violation must result in a damages award. The doctrine of qualified immunity properly limits liability when the government has committed adequate resources to avoiding constitutional violations. Statutory limitations on recoverable damages and the requirement that only traditional tort damages be awarded are also justifiable as a means of mitigating the risk that large damages awards will compromise the government's ability to provide public services. But for one type of constitutional liability rule—the obligation to pay just compensation when government takes private property for a public purpose—immunity is never appropriate. The compensation requirement creates a political check against unwarranted takings; officials incur a political cost when they must allocate public resources to the payment of compensation. Still, the political costs imposed by the just-compensation requirement are particularly high, and for that reason the Supreme Court has been correct to defer to the political process on the question of what kinds of takings are for a public use, as in the Court's recent decision in *Kelo v. City of New London*.<sup>7</sup>

#### I. THE CONTOURS OF GOVERNMENTAL TORT LIABILITY

The rules for governmental tort liability are complex. One set of rules controls suits against a unit of government, and another con-

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<sup>7</sup> 545 U.S. 469 (2005).

trols suits against a public employee, even when sued for acts undertaken within the scope of employment and at the direction of a governmental employer. Liability rules differ as well for federal, state, and local governments, and for constitutional and nonconstitutional torts. One type of constitutional injury—a “taking” of private property for public use—receives different treatment altogether.<sup>8</sup>

### A. Common-Law Torts

The history of governmental liability in tort reflects an evolution from a common-law doctrine of sovereign immunity to a seemingly unprincipled patchwork of statutory immunities.

#### 1. Federal Liability

Under the doctrine of sovereign immunity, the federal government is immune from liability for damages without its consent.<sup>9</sup> Federal employees, however, are personally liable for their own wrongful conduct even when acting within the scope of employment under this common-law doctrine.<sup>10</sup>

It is sometimes said that the sovereign immunity of the United States is inconsistent with the Constitution, which treats suits against the United States as within the scope of the judicial power.<sup>11</sup> To be sure, Article III provides that “[t]he judicial Power shall extend . . . to Controversies to which the United States shall be a Party,”<sup>12</sup> and the Constitution breathes not a word about a federal immunity from li-

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<sup>8</sup> Governmental liability for breach of contract involves considerations beyond the scope of this Article. For a helpful discussion of governmental contractual liability, see Daniel R. Fischel & Alan O. Sykes, *Government Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313 (1999).

<sup>9</sup> See, e.g., *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 587 (1941). For early statements of the doctrine, albeit containing little in the way of a supporting rationale, see *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821).

<sup>10</sup> See, e.g., *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580 (1943); *Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922). At common law, this rule was not applicable, however, when the relief sought went beyond the payment of damages by the individual defendant and involved remedial measures thought to implicate the interests of the sovereign. See, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687–88 (1949). For general discussions of the scope of federal sovereign immunity, see, for example, David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149; David E. Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1 (1972); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003); and Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987).

<sup>11</sup> See, e.g., Jackson, *supra* note 10, at 523; Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 38–46, 65–66 (2002).

<sup>12</sup> U.S. CONST. art. III, § 2.

ability.<sup>13</sup> The view that sovereign immunity has no constitutional grounding, however, overlooks the Appropriations Clause: “[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”<sup>14</sup> Most state constitutions contain similar restrictions.<sup>15</sup> Under such a constitutional limitation on the use of public funds, a court cannot hear a case asking it to compel

<sup>13</sup> The only scholarship of which I am aware to suggest some basis for federal sovereign immunity in the Constitution’s text is Professor Nelson’s claim, albeit in the context of his discussion of the immunity of nonconsenting states from suit in federal court, that the term “controversy” was understood at the time of Article III’s adoption to exclude a suit against a sovereign without its consent. Professor Nelson assembles considerable evidence that in the eighteenth century a court could not exercise jurisdiction over a sovereign without its consent but much less evidence to support his claim that such a suit was not considered a “controversy.” Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1580–92 (2002). There is, moreover, ample historical evidence to the contrary. See, e.g., John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1908–12 (1983). Indeed, if Professor Nelson is right about the original understanding of Article III, then surely it is remarkable that in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), all of the Justices somehow failed to remember what the term “controversy” meant when they held that Article III permitted suit against a nonconsenting state—including Justice Wilson, a member of the committee that drafted Article III at the constitutional convention. See Nelson, *supra*, at 1562. Even the dissenting opinion in *Chisholm* failed to rely on the meaning of the term “controversy,” *Chisholm*, 2 U.S. (2 Dall.) at 469–79 (Jay, C.J., dissenting), as did the contemporaneous critics of that decision, on Professor Nelson’s own account of that criticism, Nelson, *supra*, at 1564–65. Perhaps some skepticism is in order about a view that depends on Professor Nelson’s greater familiarity with eighteenth-century legal concepts than that evinced by eighteenth-century lawyers and judges.

<sup>14</sup> U.S. CONST. art. I, § 9, cl. 7. For the leading account of the Appropriations Clause, see Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988).

<sup>15</sup> Forty states have parallel constitutional provisions. See ALA. CONST. art. IV, § 72; ALASKA CONST. art. IX, § 13; ARK. CONST. art. 5, § 29; CAL. CONST. art. XVI, § 7; DEL. CONST. art. VIII, § 6(a); FLA. CONST. art. VII, § 1(c); GA. CONST. art. III, § IX, para. I; HAW. CONST. art. VII, § 5, cl. 2; IDAHO CONST. art. VII, § 13; ILL. CONST. art. VIII, § 2(b); IND. CONST. art. 10, § 3; IOWA CONST. art. III, § 24; KAN. CONST. art. 2, § 24; KY. CONST. § 230; LA. CONST. art. III, § 16; ME. CONST. art. V, pt. 3d, § 4; MD. CONST. art. III, § 32; MINN. CONST. art. XI, § 1; MO. CONST. art. III, § 36; MONT. CONST. art. VIII, § 14; NEB. CONST. art. III-25; NEV. CONST. art. 4, § 19; N.J. CONST. art. VIII, § II, para. 2; N.M. CONST. art. IV, § 30; N.Y. CONST. art. VII, § 7; N.C. CONST. art. V, § 7; N.D. CONST. art. X, § 12, para. 1; OHIO CONST. art. II, § 22; OKLA. CONST. art. V-55; OR. CONST. art. IX, § 4; PA. CONST. art. III, § 24; S.C. CONST. art. X, § 8; S.D. CONST. art. XI, § 9; TENN. CONST. art. II, § 24; TEX. CONST. art. 8, § 6; VA. CONST. art. X, § 7; WASH. CONST. art. VIII, § 4; W. VA. CONST. art. X, § 10-3; WIS. CONST. art. VIII, § 2; WYO. CONST. art. 3, § 35. In addition, three state constitutions expressly provide for sovereign immunity. See ALA. CONST. art. I, § 14 (“That the State of Alabama shall never be made a defendant in any court of law or equity.”); ARK. CONST. art. 5, § 20 (“The State of Arkansas shall never be made defendant in any of her courts.”); W. VA. CONST. art. VI, § 6-35 (“The state of West Virginia shall never be made defendant in any court of law or equity . . . .”). Twenty-two grant the state legislature authority to determine governmental liability. See ALASKA CONST. art. II, § 21; CONN. CONST. art. XI, § 4; DEL. CONST. art. I, § 9; FLA. CONST. art. X, § 13; GA. CONST. art. I, § II, para. IX(a); ILL. CONST. art. XIII, § 2(a); IND. CONST. art. 4, § 24; KY. CONST. § 231; LA. CONST. art. XII, § 10(c); MONT. CONST. art. 2, § 18; NEB. CONST. art. V-22; NEV. CONST. art. 4, § 22; N.Y. CONST. art. III, § 19; OHIO CONST. art. I, § 16, cl. 2; OKLA. CONST. art. XXIII-7; OR. CONST. art. IV, § 24; PA. CONST. art. I, § 11; S.D. CONST. art. III, § 27; TENN. CONST. art. I, § 17; WASH. CONST. art. II, § 26; WIS. CONST. art. IV, § 27; WYO. CONST. art. I, § 8.

the government to pay a judgment absent legislative authorization for payment; in such a case, the remedy sought is itself unconstitutional.

For example, in *District of Columbia v. Eslin*,<sup>16</sup> while the cases at issue were on appeal, Congress forbade payment of the judgments that the plaintiffs had obtained, and the Supreme Court therefore held that no court could enforce the judgments, rendering the cases non-justiciable.<sup>17</sup> More recently, in *Office of Personnel Management v. Richmond*,<sup>18</sup> the Court held that a claimant could not use common-law estoppel principles to obtain federal disability benefits not authorized by statute because a court-ordered payment of benefits without congressional authorization would violate the Appropriations Clause.<sup>19</sup> Thus, the Appropriations Clause and its state counterparts effectively insulate the government from suit for damages absent legislative authorization.<sup>20</sup> An appropriations-based understanding of sovereign immunity, moreover, explains why sovereign immunity poses no obstacle to a suit against a public employee even when he acts at the direction of the sovereign. Under the Appropriations Clause, the United States cannot satisfy a damages judgment absent legislative consent, but there is no similar restriction on enforcing a damages award against a federal official's assets.

Despite the availability of sovereign immunity, Congress has been unwilling to shield the federal treasury from all tort liability. The Federal Tort Claims Act (FTCA) provides, “[t]he United States shall be liable . . . in the same manner and to the same extent as a private

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<sup>16</sup> 183 U.S. 62 (1901).

<sup>17</sup> *Id.* at 65–66.

<sup>18</sup> 496 U.S. 414 (1990).

<sup>19</sup> *Id.* at 424–26.

<sup>20</sup> To be sure, appropriations legislation may itself be challenged under a substantive constitutional provision. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 540–49 (2001); *United States v. Lovett*, 328 U.S. 303, 315 (1946). Moreover, under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), appropriations legislation is thought to impermissibly infringe upon the judicial power under Article III when it directs the judiciary to apply a rule of decision without altering substantive law. *See Miller v. French*, 530 U.S. 327, 347–49 (2000); *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438–41 (1992). But, as the holding in *Eslin* demonstrates, *Klein* does not invalidate legislation that merely declines to fund the judgment sought by the plaintiff. *Eslin*, in turn, is consistent with contemporary Article III jurisprudence. Article III is understood to prevent a court from hearing a case when the plaintiff's injury cannot be redressed by a favorable judicial decision. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Allen v. Wright*, 468 U.S. 737, 750–52 (1984); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Thus, when there is no appropriation available to pay the damages award sought by the plaintiff, a court would be unable to hear the case under Article III because it could not issue an enforceable damages award in light of the Appropriations Clause. Indeed, the Supreme Court held that the Court of Claims could issue judgments against the United States without running afoul of Article III's prohibition on advisory opinions only by relying on Congress's consistent practice of appropriating funds to pay judgments of that court. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 570 (1962) (Harlan, J., announcing judgment).

individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”<sup>21</sup> The FTCA adds that it supplies the exclusive remedy for torts committed by a federal employee acting within the scope of employment except for an action brought under the United States Constitution or a federal statute.<sup>22</sup>

The liability created by the FTCA is significantly circumscribed. The FTCA grants immunity from liability on

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.<sup>23</sup>

The FTCA also confers immunity from liability for “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter,”<sup>24</sup> a “claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer,”<sup>25</sup> and “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . .”<sup>26</sup>

## 2. State and Local Liability

Only one state has enacted legislation providing that governmental defendants are liable in tort on the same terms as private tortfeasors.<sup>27</sup> All other states limit governmental tort liability by statute.

<sup>21</sup> 28 U.S.C. § 2674 (2000).

<sup>22</sup> *Id.* § 2679(b).

<sup>23</sup> *Id.* § 2680(a).

<sup>24</sup> *Id.* § 2680(b).

<sup>25</sup> *Id.* § 2680(c).

<sup>26</sup> *Id.* § 2680(h). The Act additionally confers immunity from liability for the fiscal operations of the Treasury or the regulation of the monetary system, *id.* § 2680(i), claims arising out of the combatant activities of the military, *id.* § 2680(j), claims arising in a foreign country, *id.* § 2680(k), and claims arising from the activities of the Tennessee Valley Authority, the Panama Canal Company, or from the activities of federal banks, *id.* § 2680(l)–(n).

<sup>27</sup> See WASH. REV. CODE ANN. §§ 4.92.090, 4.96.010 (West 2006). Even so, the Washington Supreme Court has construed the statute to preserve common-law governmental immunity for discretionary functions. See *McCluskey v. Handorff-Sherman*, 882 P.2d 157, 161–63 (Wash. 1994) (en banc). There is, however, a Washington statute granting public officials immunity for discretionary acts or omissions, but it provides that their employer remains liable. WASH. REV. CODE ANN. § 4.24.470 (West 2005). For contrasting discussions of the experience of Washington under this regime, compare Michael Tardif & Rob McKenna, *Washington State’s 45-Year Experiment in Government Liability*, 29 SEATTLE U. L. REV. 1 (2005), with Debra L. Stephens & Bryan P. Harnetiaux, *The Value of Government Tort Liability: Washington State’s Journey from Immunity to Accountability*, 30 SEATTLE U. L. REV. 35 (2006).

Many state immunity statutes confer immunities on governmental defendants and public employees similar to those in the FTCA. For example, thirty-three states recognize discretionary-function immunity,<sup>28</sup> twenty-three recognize immunity for injuries caused by reliance on statutes or other enactments,<sup>29</sup> twenty-three immunize the collection of a tax,<sup>30</sup> seventeen immunize specified intentional torts of public

<sup>28</sup> See ALASKA STAT. § 09.50.250(1) (2004 & Supp. 2005); *id.* § 09.65.070(d)(2); ARIZ. REV. STAT. ANN. § 12-820.01 (2003); CAL. GOV'T CODE § 820.2 (West 1995); CONN. GEN. STAT. ANN. § 52-557n(a)(2)(B) (West 2005); DEL. CODE ANN. tit. 10, §§ 4001(1), 4011(b)(3) (1999 repl.); GA. CODE ANN. § 50-21-24(2) (2006); HAW. REV. STAT. § 662-15(1) (1993 repl. & Supp. 2004); IDAHO CODE ANN. § 6-904(1) (2004); 745 ILL. COMP. STAT. ANN. § 10/2-201 (West 2002); IND. CODE ANN. § 34-13-3-3(7) (West 1999 & Supp. 2006); IOWA CODE ANN. §§ 669.14(1), 670.4(3) (West 1998 & Supp. 2006); KAN. STAT. ANN. § 75-6104(e) (1997 & Supp. 2005); KY. REV. STAT. ANN. § 44.073(13)(a) (LexisNexis 1997 repl. & Supp. 2005); *id.* § 65.2003(3)(d) (LexisNexis 2004 repl.); LA. REV. STAT. ANN. § 9:2798.1(B) (1997); ME. REV. STAT. ANN. tit. 14, §§ 8104-B(3), 8111(1)(C) (2003); MD. CODE ANN., CTS. & JUD. PROC. § 5-507(b)(1) (LexisNexis 2002 repl.); MASS. ANN. LAWS ch. 258, § 10(b) (LexisNexis 2004); MINN. STAT. ANN. § 3.736, subdiv. 3(b) (West 2005); *id.* § 466.03, subdiv. 6 (West 2001 & Supp. 2006); MISS. CODE ANN. § 11-46-9(1)(d) (West 1999); NEB. REV. STAT. § 13-910(2) (1997 & Supp. 2005); *id.* § 81-8,219(1) (2003 & Supp. 2005); NEV. REV. STAT. ANN. § 41.032(2) (LexisNexis 2002 repl.); N.H. REV. STAT. ANN. § 541-B:19 (LexisNexis 2006 repl.); N.J. STAT. ANN. § 59:2-3(a), (c)-(d) (West 1992); N.D. CENT. CODE §§ 32-12.1-03(3)(d), -12.2-02(3)(b) (1996 repl. & Supp. 2005); OHIO REV. CODE ANN. § 2744.03(A)(2), (5) (LexisNexis 2000 repl. & Supp. 2002); OKLA. STAT. ANN. tit. 51, § 155 (West 2000); OR. REV. STAT. ANN. § 30.265(3)(c) (West 1983 & Supp. 2005); 42 PA. CONS. STAT. §§ 8524(3), 8546(3) (2002); S.C. CODE ANN. § 15-78-60(5) (2005 & Supp. 2005); TENN. CODE ANN. § 29-20-205(1) (2000 repl.); TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (Vernon 2005); UTAH CODE ANN. § 63-30d-301(5)(a) (2004 repl. & Supp. 2005); VT. STAT. ANN. tit. 12, § 5601(e)(1) (2002); WIS. STAT. ANN. § 893.80(4) (West 2006). Other jurisdictions recognize discretionary immunity as a common-law doctrine. See *Powell v. District of Columbia*, 602 A.2d 1123, 1126 (D.C. 1992); *Weiss v. Fote*, 167 N.E.2d 63, 65-68 (N.Y. 1960); *City of Chesapeake v. Cunningham*, 604 S.E.2d 420, 426 (Va. 2004); *Libercent v. Aldrich*, 539 A.2d 981, 984 (Vt. 1987); *McCluskey*, 882 P.2d at 161-63; *Parkulo v. W. Va. Bd. of Prob. & Parole*, 483 S.E.2d 507, 522 (W. Va. 1996).

<sup>29</sup> See CAL. GOV'T CODE § 820.6 (West 1995); GA. CODE ANN. § 50-21-24(1) (2006); HAW. REV. STAT. § 662-15(1) (1993 repl. & Supp. 2004); IDAHO CODE ANN. § 6-904(1) (2004); 745 ILL. COMP. STAT. ANN. § 10/2-203 (West 2002); IND. CODE ANN. § 34-13-3-3(9) (West 1999 & Supp. 2006); IOWA CODE ANN. §§ 669.14(1), 670.4(3) (West 1998 & Supp. 2006); KAN. STAT. ANN. § 75-6104(c) (1997 & Supp. 2005); MASS. ANN. LAWS ch. 258, § 10(a) (LexisNexis 2004); MINN. STAT. ANN. § 3.736, subdiv. 3(a) (West 2005); *id.* § 466.03, subdiv. 5 (West 2001 & Supp. 2006); MISS. CODE ANN. § 11-46-9(1)(b) (West 1999); MONT. CODE ANN. § 2-9-103 (2005); NEB. REV. STAT. § 13-910(1) (1997 & Supp. 2005); *id.* § 81-8,219(1) (2003 & Supp. 2005); NEV. REV. STAT. ANN. § 41.032(1) (LexisNexis 2002 repl.); N.H. REV. STAT. ANN. § 541-B:19 (LexisNexis 2006 repl.); N.J. STAT. ANN. § 59:3-4 (West 1992); N.D. CENT. CODE §§ 32-12.1-03(3)(a), -12.2-02(3)(a) (1996 repl. & Supp. 2005); OKLA. STAT. ANN. tit. 51, § 155(4) (West 2000); OR. REV. STAT. § 30.265(3)(f) (1983 & Supp. 2005); 42 PA. CONS. STAT. ANN. § 8524(2) (2002); S.C. CODE ANN. § 15-78-60(4) (2005 & Supp. 2005); VT. STAT. ANN. tit. 12, § 5601(e)(1) (2002); W. VA. CODE ANN. § 29-12A-5(a)(4) (LexisNexis 2004 repl.).

<sup>30</sup> See ARK. CODE ANN. § 19-10-204(b)(2)(B) (1998 repl. & Supp. 2003); CAL. GOV'T CODE § 860.2 (West 1995); GA. CODE ANN. § 50-21-24(3) (2006); HAW. REV. STAT. § 662-15(2) (1993 repl. & Supp. 2004); IDAHO CODE ANN. § 6-904(A)(1) (2004); IOWA CODE ANN. §§ 669.14(2), 670.4(2) (West 1998 & Supp. 2006); KAN. STAT. ANN. § 75-6104(f) (1997 & Supp. 2005); KY. REV. STAT. ANN. § 65.2003(2) (LexisNexis 2004 repl.); MASS. ANN. LAWS ch. 258, § 10(d) (LexisNexis 2004); MINN. STAT. ANN. § 3.736, subdiv. 3(c) (West 2005); *id.* § 466.03, subdiv. 3 (West

employees,<sup>31</sup> and forty states confer immunity from punitive damages.<sup>32</sup> Other common immunities conferred on state and local gov-

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2001 & Supp. 2006); MISS. CODE ANN. § 11-46-9(1)(i) (West 1999); NEB. REV. STAT. § 13-910(5) (1997 & Supp. 2005); *id.* § 81-219(2) (2003 & Supp. 2005); N.J. STAT. ANN. § 59:7-2 (West 1992); N.D. CENT. CODE § 32-12.2-02(3)(h) (1996 repl. & Supp. 2005); OKLA. STAT. ANN. tit. 51, § 155(11) (West 2000); OR. REV. STAT. ANN. § 30.265(3)(b) (West 1983 & Supp. 2005); S.C. CODE ANN. § 15-78-60(11) (2005 & Supp. 2005); TENN. CODE ANN. § 29-20-205(8) (2000 repl.); TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(1) (Vernon 2005); UTAH CODE ANN. § 63-30d-301(5)(a) (2004 repl. & Supp. 2005); VT. STAT. ANN. tit. 12, § 5601(e)(2) (2002); VA. CODE ANN. § 8.01-195.3(5) (2000 repl.); W. VA. CODE § 29-12A-5(a)(8) (LexisNexis 2004 repl.); *see also* S.S. Kresge Co. v. Bouchard, 306 A.2d 179, 181 (R.I. 1973) (construing statutory waivers of sovereign immunity not to reach action alleging unlawful overassessment of taxes).

<sup>31</sup> *See* ALASKA STAT. § 09.50.250(3) (2004 & Supp. 2005); CONN. GEN. STAT. ANN. § 52-557n(a)(2)(A) (West 2005); GA. CODE ANN. § 50-21-24(7) (2006); HAW. REV. STAT. § 662-15(4) (1993 & Supp. 2004); IDAHO CODE ANN. § 6-904(3) (2004); IOWA CODE ANN. § 669.14(4) (West 1998 & Supp. 2006); KY. REV. STAT. ANN. § 44.072 (LexisNexis 1997); MD. CODE ANN., CTS. & JUD. PROC. § 5-522(a)(4) (LexisNexis 2002 repl.); MASS. ANN. LAWS ch. 258, § 10(c) (LexisNexis 2004); NEB. REV. STAT. § 13-910(7) (1997 & Supp. 2005); *id.* § 81-8,219(4) (2003 & Supp. 2005); N.J. STAT. ANN. § 59:2-10 (West 1992); N.D. CENT. CODE § 32-12.2-02(3) (1996 repl. & Supp. 2005); OHIO REV. CODE ANN. § 2744.03(A)(2) (LexisNexis 2000 & Supp. 2002); TENN. CODE ANN. § 9-8-307(d) (1999 repl. & Supp. 2005); *id.* § 29-20-205(2) (2000 repl.); TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2) (Vernon 2005); UTAH CODE ANN. § 63-30d-301(5)(b) (2004 repl. & Supp. 2005); VT. STAT. ANN. tit. 12, § 5601(e)(6) (2002).

<sup>32</sup> *See* ALA. CODE § 6-11-26 (LexisNexis 2005 repl.); ALASKA STAT. § 09.50.280 (2004); ARIZ. REV. STAT. ANN. § 12-820.04 (2003); CAL. GOV'T CODE § 818 (West 1994); COLO. REV. STAT. § 24-10-114(4) (2005); FLA. STAT. § 768.28(5) (2005); GA. CODE ANN. § 50-21-30 (2006); HAW. REV. STAT. § 662-15 (1993 repl. & Supp. 2004); IDAHO CODE ANN. § 6-918 (2004); 745 ILL. COMP. STAT. ANN. § 10/2-102 (West 2002); IND. CODE ANN. § 34-13-3-4(b) (West 1999 & Supp. 2004); IOWA CODE ANN. §§ 669.4, 670.4(5) (West 1998 & Supp. 2006); KAN. STAT. ANN. § 75-6105(c) (1997); KY. REV. STAT. ANN. § 65.2002 (LexisNexis 2004 repl.); ME. REV. STAT. ANN. tit. 14, § 8105(5) (2003); MD. CODE ANN., CTS. & JUD. PROC. §§ 5-303(c)(1), -522(a)(1) (LexisNexis 2002 & Supp. 2005); MASS. ANN. LAWS ch. 258, § 2 (LexisNexis 2004); MINN. STAT. ANN. § 3.736, subdiv. 3 (West 2005); *id.* § 466.04, subdiv. 1(b) (West 2001); MISS. CODE ANN. § 11-46-15(2) (West 1999); MO. ANN. STAT. § 537.610(3) (West 2000); MONT. CODE ANN. § 2-9-105 (2005); NEV. REV. STAT. ANN. § 41.035(1) (LexisNexis 2002 repl.); N.H. REV. STAT. ANN. § 507-B:4(II) (LexisNexis 1997 repl.); *id.* § 541-B:14(I) (LexisNexis 2006); N.J. STAT. ANN. § 59:9-2(c) (West 1992 & Supp. 2000); N.M. STAT. ANN. § 41-4-19(C) (LexisNexis 1996); N.D. CENT. CODE §§ 32-12.1-03(2), -12.2-02(2) (1996 repl. & Supp. 2005); OHIO REV. CODE ANN. § 2744.05(A) (LexisNexis 2000 & Supp. 2001); OKLA. STAT. ANN. tit. 51, § 154(C) (West 2000 & Supp. 2006); OR. REV. STAT. ANN. § 30.270(2) (West 1983 & Supp. 1987); 42 PA. CONS. STAT. §§ 8528(c), 8553(c) (2002); S.C. CODE ANN. § 15-78-120(b) (2005); TENN. CODE ANN. § 9-8-307(d) (1999 repl. & Supp. 2005); TEX. CIV. PRAC. & REM. CODE ANN. § 101.024 (Vernon 2005); VA. CODE ANN. § 8.01-195.3 (2000 repl.); W. VA. CODE ANN. § 29-12A-7(a) (LexisNexis 2004 repl.); WIS. STAT. ANN. § 893.80(3) (West 2006); WYO. STAT. ANN. § 1-39-118(d) (2005); *see also* Hazen v. Municipality of Anchorage, 718 P.2d 456, 465-66 (Alaska 1986) (“[I]n the absence of statutory authorization punitive damages are not available against a municipality . . .”); City of Hartford v. Int’l Ass’n of Firefighters, Local 760, 717 A.2d 258, 264 (Conn. App. Ct. 1998) (holding that punitive damages awards against municipalities are contrary to public policy); Prigge v. Conn. Dep’t of Child & Families, No. X06CV02181467, 2004 Conn. Super. LEXIS 804, at \*13 (Conn. Super. Ct. Mar. 26, 2004) (mem.) (barring punitive damages awards against the state); Schueler v. Martin, 674 A.2d 882, 889 (Del. Super. Ct. 1996) (finding no legislative intent to allow punitive damages against local governments); Graff v. Motta, 695 A.2d 486, 490 (R.I. 1997) (holding that there can be no punitive damages awards against a municipality absent a specific waiver of such immunity).

ernments or their employees include immunity for issuance, denial, or revocation of a license;<sup>33</sup> a failure to inspect or to make an adequate inspection of property;<sup>34</sup> the adoption or failure to adopt legislation or other legislative functions;<sup>35</sup> acts or omissions in the execution or enforcement of the law;<sup>36</sup> the institution of judicial or

<sup>33</sup> See ALASKA STAT. § 09.65.070(d)(3) (2004); ARIZ. REV. STAT. ANN. § 12-820.02(A)(5) (2003); CAL. GOV'T CODE § 818.4 (West 1994); CONN. GEN. STAT. ANN. § 52-557n(a)(2)(b)(7) (West 2005); DEL. CODE ANN. tit. 10, § 4011(b)(2) (1999 repl.); GA. CODE ANN. § 50-21-24(9) (2006); IDAHO CODE ANN. § 6-904B(3) (2004); 745 ILL. COMP. STAT. ANN. § 10/2-104 (West 2002); IND. CODE ANN. § 34-13-3-3(11) (West 1999 & Supp. 2006); IOWA CODE ANN. § 670.4(9)-(10) (West 1998 & Supp. 2003); KY. REV. STAT. ANN. § 65.2003(3)(c) (LexisNexis 2004 repl.); ME. REV. STAT. ANN. tit. 14, § 8104-B(2) (2003); *id.* § 8111(1)(B); MASS. ANN. LAWS ch. 258, § 10(e) (LexisNexis 2004); MINN. STAT. ANN. § 3.736, subdiv. 3(k) (West 2005); *id.* § 466.03, subdivs. 6d, 10, 15 (Supp. 2006); MISS. CODE ANN. § 11-46-9(1)(h) (West 1999); NEB. REV. STAT. § 13-910(4) (1997 & Supp. 2005); *id.* § 81-8,219(8) (2003 & Supp. 2005); N.J. STAT. ANN. § 59:2-5 (West 1992); N.D. CENT. CODE §§ 32-12.1-03(3)(f), -12.2-02(3)(d) (1996 repl. & Supp. 2005); OHIO REV. CODE ANN. § 2743.01(A), (E) (LexisNexis 2000 repl.); OKLA. STAT. ANN. tit. 51, § 155(13) (West 2000); S.C. CODE ANN. § 15-78-60(12) (2005 & Supp. 2005); TENN. CODE ANN. § 9-8-307(a)(2)(B) (1999 repl. & Supp. 2005); *id.* § 29-20-205(3) (2000 repl.); UTAH CODE ANN. § 63-30d-301(5)(c) (2004 repl. & Supp. 2005); W. VA. CODE ANN. § 29-12A-5(a)(9) (LexisNexis 2004 repl.); see also R.I. Affiliate, ACLU v. R.I. Lottery Comm'n, 553 F. Supp. 752, 765 n.9 (D.R.I. 1982) (construing Rhode Island's statutory waiver of sovereign immunity not to reach licensing cases).

<sup>34</sup> See ALASKA STAT. § 09.65.070(d)(1) (2004); ARIZ. REV. STAT. ANN. § 12-820.02(A)(6) (2003); CAL. GOV'T CODE § 818.6 (West 1995); DEL. CODE ANN. tit. 10, § 4011(b)(1) (1999 repl.); GA. CODE ANN. § 50-21-24(8) (2006); IDAHO CODE ANN. § 6-904B(4) (2004); 745 ILL. COMP. STAT. ANN. § 10/2-105 (West 2002); IND. CODE ANN. § 34-13-3-3(12) (West 1999 & Supp. 2006); IOWA CODE ANN. § 669.14(13) (West 1998 & Supp. 2005); *id.* § 670.4(6), (12) (West 1998 & Supp. 2003); KAN. STAT. ANN. § 75-6104(k) (1997 & Supp. 2005); KY. REV. STAT. ANN. § 65.2003(e) (LexisNexis 2004 repl.); MASS. ANN. LAWS ch. 258, § 10(f) (LexisNexis 2004); NEB. REV. STAT. § 13-910(3) (1997 & Supp. 2005); *id.* § 81-8,219(7) (2003 & Supp. 2005); NEV. REV. STAT. ANN. § 41.033 (LexisNexis 2002 repl.); N.J. STAT. ANN. § 59:2-6 (West 1992); N.Y. GEN. MUN. LAW § 205-d (McKinney 1999); N.D. CENT. CODE §§ 32-12.1-02(3)(f), -12.2-02(3)(f) (1996 repl. & Supp. 2005); OHIO REV. CODE ANN. § 2743.01(A), (E) (LexisNexis 2000 & Supp. 2003); OKLA. STAT. ANN. tit. 51, § 155 (West 2000); S.C. CODE ANN. § 15-78-60(13) (2005 & Supp. 2005); TENN. CODE ANN. § 9-8-307(a)(2)(A) (1999 repl. & Supp. 2005); *id.* § 29-20-205(4) (2000 repl.); UTAH CODE ANN. § 63-30d-301(5)(d) (2004 repl. & Supp. 2005); W. VA. CODE ANN. § 29-12A-5(a)(10) (LexisNexis 2004 repl.); WIS. STAT. ANN. § 893.80(1p) (West 2006).

<sup>35</sup> See CAL. GOV'T CODE § 818.2 (West 1995); GA. CODE ANN. § 50-21-24(4) (2006); 745 ILL. COMP. STAT. ANN. § 10/2-103 (West 2002); IND. CODE ANN. § 34-13-3-3(8) (West 1999 & Supp. 2006); KAN. STAT. ANN. § 75-6104(a) (1997 & Supp. 2005); KY. REV. STAT. ANN. § 65.2003(3)(a) (LexisNexis 2004 repl.); ME. REV. STAT. ANN. tit. 14, §§ 8104-B(1), 8111(1)(A) (2003); MISS. CODE ANN. § 11-46-9(1)(a), (e) (West 1999); MONT. CODE ANN. § 2-9-111(2) (2005); N.J. STAT. ANN. § 59:2-3(b) (West 1992); N.D. CENT. CODE §§ 32-12.1-03(3)(b), -12.2-02(3)(c) (1996 repl. & Supp. 2005); OHIO REV. CODE ANN. § 2744.03(A)(1) (LexisNexis 2000 repl. & Supp. 2002); OKLA. STAT. ANN. tit. 51, § 155(1) (West 2000); S.C. CODE ANN. § 15-78-60(1), (2), (4) (2005 & Supp. 2005); VA. CODE ANN. § 8.01-195.3(2) (2000); W. VA. CODE ANN. § 29-12A-5(a)(4) (LexisNexis 2004 repl.).

<sup>36</sup> See CAL. GOV'T CODE § 821.4 (West 1995); CONN. GEN. STAT. ANN. § 52-557n(a)(2)(b)(8), (9) (West 2005); IDAHO CODE ANN. § 6-904B(1) (2004); 745 ILL. COMP. STAT. ANN. § 10/2-202 (West 2002); IOWA CODE ANN. § 669.14(3), (11) (West 1998 & Supp. 2006); KAN. STAT. ANN. § 75-6104(c) (1997 & Supp. 2005); KY. REV. STAT. ANN. § 44.073(13)(d) (LexisNexis 1997 repl. & Supp. 2005); *id.* § 65.2003(3)(b) (LexisNexis 2004 repl.); MISS. CODE ANN. § 11-46-9(1)(j)

administrative proceedings;<sup>37</sup> the plan or design for public improvements;<sup>38</sup> the condition of property or facilities used for recreational purposes<sup>39</sup> or of unimproved public property;<sup>40</sup> a failure to provide adequate police service or protection<sup>41</sup> or to provide adequate jails or

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(West 1999); N.J. STAT. ANN. § 59:2-4 (West 1992); OKLA. STAT. ANN. tit. 51, § 155(4) (West 2000); S.C. CODE ANN. § 15-78-60(4) (2005 & Supp. 2005); W. VA. CODE ANN. § 29-12A-5(a)(4) (LexisNexis 2004 repl.); *see also* *Dang v. Ehredt*, 977 P.2d 29, 35–36 (Wash. Ct. App. 1999) (holding that law-enforcement officers possess common-law immunity for reasonable enforcement decisions).

<sup>37</sup> *See* CAL. GOV'T CODE § 821.6 (West 1995); CONN. GEN. STAT. ANN. § 52-557n(a)(2)(b)(5) (West 2005); GA. CODE ANN. § 50-21-24(5) (2006); 745 ILL. COMP. STAT. ANN. § 10/2-208 (West 2002); IND. CODE ANN. § 34-13-3-3(6) (West 1999 & Supp. 2006); ME. REV. STAT. ANN. tit. 14, §§ 8104-B(4), 8111(1)(D) (2003); N.J. STAT. ANN. § 59:2-3(b) (West 1992); OHIO REV. CODE ANN. § 2744.03(A)(1) (LexisNexis 2000 repl. & Supp. 2002); OKLA. STAT. ANN. tit. 51, § 155(2) (West 2000); S.C. CODE ANN. § 15-78-60(23) (2005 & Supp. 2005); TENN. CODE ANN. § 29-20-205(5) (2000 repl.); UTAH CODE ANN. § 63-30d-301(5)(c) (2004 repl. & Supp. 2005); VA. CODE ANN. § 8.01-195.3(6) (2000); W. VA. CODE ANN. § 29-12A-5(a)(2) (LexisNexis 2004 repl.).

<sup>38</sup> *See* CAL. GOV'T CODE § 830.6 (West 1995); IDAHO CODE ANN. § 6-904(7) (2004); 745 ILL. COMP. STAT. ANN. § 10/3-103 (West 2002); IOWA CODE ANN. §§ 669.14(8), 670.4(7)–(8) (West 1998 & Supp. 2006); KAN. STAT. ANN. § 75-6104(m) (1997 & Supp. 2005); ME. REV. STAT. ANN. tit. 14, § 8104-A(2)(A), (4) (2003); MINN. STAT. ANN. § 466.03, subdvs. 18, 20 (West 2001 & Supp. 2006); MISS. CODE ANN. § 11-46-9(1)(p) (West 1999); NEB. REV. STAT. § 13-910(11) (1997 & Supp. 2005); *id.* § 81-8,219(11) (2003 & Supp. 2005); N.J. STAT. ANN. § 59:4-6 (West 1992); TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.063, 101.064(b) (Vernon 2005); UTAH CODE ANN. § 63-30d-301(5)(n) (2004 repl. & Supp. 2005); VT. STAT. ANN. tit. 12, § 5601(e)(8) (2002); WYO. STAT. ANN. § 1-39-120 (2005).

<sup>39</sup> *See* CAL. GOV'T CODE §§ 831.21, .4 (West 1995); CONN. GEN. STAT. ANN. § 52-557n(a)(2)(b)(4) (West 2005); HAW. REV. STAT. §§ 662-15(7), -19 (1993 repl. & Supp. 2004); 745 ILL. COMP. STAT. ANN. § 10/3-106 (West 2002); IND. CODE ANN. § 34-13-3-3(4), (5) (West 1999 & Supp. 2006); IOWA CODE ANN. § 670.4(15) (West 1998 & Supp. 2006); KAN. STAT. ANN. § 75-6104(o) (1997 & Supp. 2005); ME. REV. STAT. ANN. tit. 14, § 8104-A(2)(A) (2003); MINN. STAT. ANN. § 3.736, subd. 3(i) (West 2005); *id.* § 466.03, subdvs. 6e, 6f, 15 (Supp. 2006); N.H. REV. STAT. ANN. § 507-B:11 (LexisNexis 1997); N.J. STAT. ANN. § 59:2-7 (West 1992); S.C. CODE ANN. § 15-78-60(16), (26) (2005 & Supp. 2005).

<sup>40</sup> *See* CONN. GEN. STAT. ANN. § 52-557n(a)(2)(b)(1) (West 2005); IND. CODE ANN. § 34-13-3-3(1) (West 1999 & Supp. 2006); KAN. STAT. ANN. § 75-6104(p) (1997 & Supp. 2005); ME. REV. STAT. ANN. tit. 14, § 8104-A(2)(A) (2003); MINN. STAT. ANN. § 3.736, subd. 3(g) (West 2005); *id.* § 466.03, subdvs. 13, 15 (Supp. 2006); N.J. STAT. ANN. § 59:4-8, -9 (West 1992); N.D. CENT. CODE § 32-12.2-02(3)(k) (1996 repl. & Supp. 2005); OKLA. STAT. ANN. tit. 51, § 155(9)–(10) (West 2000); S.C. CODE ANN. § 15-78-60(10) (2005 & Supp. 2005); UTAH CODE ANN. § 63-30d-301(5)(k) (2004 repl. & Supp. 2005); W. VA. CODE ANN. § 29-12A-5(a)(7) (LexisNexis 2004 repl.).

<sup>41</sup> *See* ARIZ. REV. STAT. ANN. § 12-820.02(A)(1), (7)–(8) (2003); CAL. GOV'T CODE §§ 845, 846 (West 1995); GA. CODE ANN. § 50-21-24(6) (2006); 745 ILL. COMP. STAT. ANN. § 10/4-102, -107 (West 2002); KAN. STAT. ANN. § 75-6104(n) (1997 & Supp. 2005); KY. REV. STAT. ANN. § 44.073(13)(e) (LexisNexis 1997 repl. & Supp. 2005); MASS. ANN. LAWS ch. 258, § 10(h) (LexisNexis 2004); MISS. CODE ANN. § 11-46-9(1)(c) (West 1999); N.J. STAT. ANN. § 59:5-4 (West 1992); N.D. CENT. CODE §§ 32-12.1-03(3)(f), -12.2-02(3)(f) (1996 repl. & Supp. 2005); OHIO REV. CODE ANN. § 2743.02(A)(3)(a) (LexisNexis 2000 repl. & Supp. 2005); OKLA. STAT. ANN. tit. 51, § 155 (West 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(3) (Vernon 2005); W. VA. CODE ANN. § 29-12A-5(a)(5) (LexisNexis 2004 repl.); WIS. STAT. ANN. § 893.80(6) (West 2006).

other corrections or penal facilities;<sup>42</sup> the probation, parole, release, or escape of arrestees, convicts, or prisoners;<sup>43</sup> a failure to provide adequate firefighting or other emergency service;<sup>44</sup> a failure to provide adequate medical care<sup>45</sup> or to prevent disease or impose a quarantine;<sup>46</sup> and specified unintentional torts.<sup>47</sup> Some immunity statutes, rather than granting categorical immunities, delineate the circumstances under which governmental defendants can be held liable—usually involving injuries caused by the condition or use of public

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<sup>42</sup> See ARIZ. REV. STAT. ANN. § 12-820.02(A)(4) (2003); CAL. GOV'T CODE § 845.2 (West 1995); 745 ILL. COMP. STAT. ANN. § 10/4-103 (West 2002); IOWA CODE ANN. § 669.14(6) (1998 & Supp. 2006); MINN. STAT. ANN. § 3.736, subdiv. 3(m) (West 2005); *id.* § 466.03, subdiv. 12 (Supp. 2006); MISS. CODE ANN. § 11-46-9(1)(d), (m) (West 1999); MONT. CODE ANN. § 2-9-108(2) (2005); N.J. STAT. ANN. § 59:5-1 (West 1992); OKLA. STAT. ANN. tit. 51, § 155(24) (West 2000); S.C. CODE ANN. § 15-78-60(25) (2005 & Supp. 2005); S.D. CODIFIED LAWS § 3-21-8 (2004); UTAH CODE ANN. § 63-30d-301(5)(j) (2004 repl. & Supp. 2005); W. VA. CODE ANN. § 29-12A-5(a)(14) (LexisNexis 2004 repl.).

<sup>43</sup> See ARIZ. REV. STAT. § 12-820.02(A)(2)–(3) (2003); CAL. GOV'T CODE § 845.8 (West 1995); IDAHO CODE ANN. § 6-904A(2) (2004); 745 ILL. COMP. STAT. ANN. § 10/4-106 (West 2002); IND. CODE ANN. § 34-13-3-3(17) (West 1999 & Supp. 2006); KAN. STAT. ANN. § 75-6102(d)(1) (1997 & Supp. 2005); MASS. ANN. LAWS ch. 258, § 10(i) (LexisNexis 2004); N.D. CENT. CODE §§ 32-12.1-03(3)(f), -12.2-02(3)(f) (1996 repl. & Supp. 2005); N.J. STAT. ANN. § 59:5-2 (West 1992); OKLA. STAT. ANN. tit. 51, § 155(22), (24) & (25) (West 2000); S.C. CODE ANN. § 15-78-60(21) (2005 & Supp. 2005); S.D. CODIFIED LAWS § 3-21-9 (2004); TENN. CODE ANN. § 9-8-307(a)(2) (1999 repl. & Supp. 2005); VT. STAT. ANN. tit. 24, § 296a (2005); W. VA. CODE ANN. § 29-12A-5(a)(13) (LexisNexis 2004 repl.).

<sup>44</sup> See ALASKA STAT. § 09.65.070(c) (2004); CAL. GOV'T CODE §§ 850–850.4 (West 1995); D.C. CODE ANN. § 2-412 (LexisNexis 2001); 745 ILL. COMP. STAT. ANN. §§ 10/5-101, -103 (West 2002); IOWA CODE ANN. § 670.4(11) (West 1998); KAN. STAT. ANN. § 75-6104(j) (1997 repl. & Supp. 2005); LA. REV. STAT. ANN. § 9:2793.1 (1997); MD. CODE ANN., CTS. & JUD. PROC. § 5-604 (LexisNexis 2002 repl.); MASS. ANN. LAWS ch. 258, § 10(g) (LexisNexis 2004); MISS. CODE ANN. § 11-46-9(1)(c) (West 1999); N.Y. GEN. MUN. LAW § 205-b (McKinney 1999); N.D. CENT. CODE § 32-12.1-03(3)(f), -12.2-02(3)(f) (1996 repl. & Supp. 2005); OHIO REV. CODE ANN. § 9.60 (LexisNexis 2001 repl. & Supp. 2003); *id.* § 2743.01(A), (E) (LexisNexis 2000 repl. & Supp. 2002); *id.* § 3737.221 (LexisNexis 2005 repl.); S.C. CODE ANN. § 23-47-70 (2005); S.D. CODIFIED LAWS § 33-15-38 (2004); TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2), (3) (Vernon 2005); UTAH CODE ANN. § 63-30d-301(5)(o), (p) (2004 repl. & Supp. 2005); W. VA. CODE ANN. § 29-12A-5(a)(5) (LexisNexis 2004 repl.).

<sup>45</sup> See CAL. GOV'T CODE §§ 855.4, .6 (West 1995); 745 ILL. COMP. STAT. §§ 10/6-105, -106 (West 2002); MINN. STAT. ANN. § 3.736, subdiv. 3(1) (West 2005); *id.* § 466.03, subdiv. 11 (West 2001 & Supp. 2002); MISS. CODE ANN. § 11-46-9(1)(r) (West 1999); N.J. STAT. ANN. §§ 59:6-2, -4 to -6 (West 1992).

<sup>46</sup> See ALASKA STAT. § 09.50.250(1) (2004 & Supp. 2005); CAL. GOV'T CODE § 855.4 (West 1995); IDAHO CODE ANN. § 6-904(2) (2004); 745 ILL. COMP. STAT. ANN. § 10/6-104 (West 2002); IOWA CODE ANN. § 669.14(3) (West 1998 & Supp. 2006); MISS. CODE ANN. § 11-46-9(1)(k) (West 1999); NEB. REV. STAT. § 13-910(6) (1997 & Supp. 2005); *id.* § 81-8,219(3) (2003 & Supp. 2005); N.H. REV. STAT. ANN. § 541-B:21(I) (2006); N.J. STAT. ANN. § 59:6-3 (West 1992); S.C. CODE ANN. § 15-78-60(18) (2005 & Supp. 2005); UTAH CODE ANN. § 63-30d-201(2) (2004 repl.); VT. STAT. ANN. tit. 12, § 5601(e)(3) (2002).

<sup>47</sup> See IND. CODE ANN. § 34-13-3-3(14) (West 1999 & Supp. 2006); ME. REV. STAT. ANN. tit. 14, § 8111(1)(E) (2003); NEV. REV. STAT. ANN. § 41.0334 (2002); N.H. REV. STAT. ANN. § 541-B:19(d) (2006); OKLA. STAT. ANN. tit. 51, § 155(17) (West 2000); 42 PA. CONS. STAT. § 8546(2) (2002); W. VA. CODE ANN. § 29-12A-5(a)(12) (LexisNexis 2004 repl.).

property—and otherwise grant immunity.<sup>48</sup> In addition, forty-two states limit the damages recoverable from a governmental defendant or a public employee.<sup>49</sup>

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<sup>48</sup> See ALA. CODE § 11-47-190 (LexisNexis 1992 repl. & Supp. 1994) (allowing municipalities to be liable for torts of employees within the scope of employment and for conditions on streets, alleys, and public ways); COLO. REV. STAT. § 24-10-106 (2005) (allowing public entities to be liable for negligent acts arising from the operation of nonemergency vehicles and the maintenance of hospitals, jails, correctional facilities, public buildings, and roadways); DEL. CODE ANN. tit. 10, §§ 4011(c), 4012 (1999 repl.) (allowing municipal employees to be liable for “wanton negligence or willful and malicious intent”; allowing municipalities to be liable for negligent acts arising from the ownership, use, or maintenance of vehicles, equipment, or aircraft; construction, operation, or maintenance of buildings; and the sudden and accidental discharge of pollutants); D.C. CODE ANN. § 2-412 (LexisNexis 2005 repl.) (holding the district liable for damages caused by the operation of vehicles); ME. REV. STAT. ANN. tit. 14, §§ 8104-A(1)(A)–(G) (2003) (allowing liability for negligent acts or omissions in the ownership, maintenance, or use of any vehicle; negligent construction, maintenance, or operation of a public building; negligent and sudden or accidental discharge of pollutants; and negligent construction, cleaning, or repair of roads); MICH. COMP. LAWS ANN. §§ 691.1402(1), .1405, .1407, .1413, .1417(3) (West 2000 & Supp. 2006) (preserving state and local government immunity except for proprietary functions, negligent operation of motor vehicles, negligent medical care except for hospitals owned by department of community health or department of corrections, overflow of sewer drains caused by a negligent failure to repair, and negligent maintenance of highways); MO. ANN. STAT. §§ 537.600, .610.1 (West 2000 & Supp. 2005) (allowing state and local governments to be liable for operation of motor vehicles and dangerous conditions on public property); N.M. STAT. ANN. §§ 41-4-5 to -12 (LexisNexis 1996 repl.) (allowing government entities to be liable for negligence in the operation of vehicles, negligence in the operation or maintenance of public property or equipment, and battery, false imprisonment, and other intentional torts); N.C. GEN. STAT. §§ 115C-42, 153A-435, 160A-485 (2005) (immunizing local governments and employees only to the extent they purchase insurance); 42 PA. CONS. STAT. § 8522 (2002) (allowing the State and state employees to be liable for negligence in operation of vehicles, medical malpractice, and other situations); TENN. CODE ANN. §§ 29-20-201, -202 (2000 repl.) (allowing local governments to be liable for willful or wanton conduct, gross negligence, the operation of vehicles, and unsafe conditions on public property); UTAH CODE ANN. § 63-30d-301 (2004 repl. & Supp. 2005) (waiving immunity for damage to property held for purposes of forfeiture, defective or dangerous conditions of public property except when latent, and negligent acts of public employees); WIS. STAT. ANN. §§ 345.05, 893.81, .83 (West 2006) (allowing local-governmental liability for riots, failure to repair highways, and negligent operation of a motor vehicle); WYO. STAT. ANN. §§ 1-39-104 to -108 (2005) (establishing liability for negligent operation of vehicles, negligent care of buildings and recreation areas, and tortious conduct of police officers); *see also* Scott v. Savers Prop. & Cas. Ins. Co., 663 N.W.2d 715, 721 (Wis. 2003) (permitting only actions against public officers involving “(1) ministerial duties . . . , (2) duties to address a known danger, (3) actions involving professional discretion, and (4) actions that are malicious, willful, and intentional”).

<sup>49</sup> See ALA. CODE § 11-93-2 (LexisNexis 1994 repl.) (limiting damages judgments against government entities to \$100,000 per claimant or \$300,000 per occurrence); *id.* §§ 41-9-62, -68, -70 (LexisNexis 2000 repl.) (permitting claims against the State heard by the Board of Adjustment subject to worker’s compensation caps); ALASKA STAT. § 09.50.270 (2004) (permitting the Department of Administration to approve payment or recommend an appropriation to the legislature); ARK. CODE ANN. §§ 19-10-204, -215 (1998 repl. & Supp. 2003) (allowing claims against the State to be heard by the State Claims Commission, which can award up to \$10,000); COLO. REV. STAT. § 24-10-114 (2005) (limiting damages awards against the State to \$150,000 per person and \$600,000 per incident); CONN. GEN. STAT. §§ 4-142, -159 (1998) (permitting claims against the State to be heard by the Office of Claims Commissioner, which can award up to \$7,500 or recommend a greater award to the legislature); DEL. CODE ANN. tit. 10, § 4013 (1999

repl.) (limiting damages judgments against the State to \$300,000 per occurrence); FLA. STAT. § 768.28(5), (8) (2005) (limiting damages judgments against the State to \$100,000 per claimant and \$200,000 per occurrence); GA. CODE ANN. § 50-21-29(b) (2006) (limiting damages judgments against the State to \$1 million per plaintiff and \$3 million per occurrence); IDAHO CODE ANN. §§ 6-924, -926 (2004) (limiting damages judgments against state entities to \$500,000 per occurrence); 705 ILL. COMP. STAT. ANN. § 505/8 (West 1999 & Supp. 2003) (permitting Court of Claims to enter judgments against the State up to \$100,000 per claimant); IND. CODE ANN. § 34-13-3-4(a) (West 1999 & Supp. 2006) (limiting damages judgments against the State to \$300,000 per person for actions accruing before 2006); KAN. STAT. ANN. § 75-6105(a) (1997) (limiting damages judgments against the State to \$500,000 per incident); KY. REV. STAT. ANN. §§ 44.070, .072 (LexisNexis 1997 repl. & Supp. 2005) (permitting claims against the State to be heard by the Board of Claims, which can award \$200,000 per person and \$350,000 per incident); LA. REV. STAT. ANN. § 13:5106(B) (2006) (limiting damages judgments against the State to \$500,000 per person); ME. REV. STAT. ANN. tit. 14, §§ 8104-D, 8105(1) (2003) (limiting damages judgments against public employees to \$10,000 per occurrence and against the State to \$400,000 per occurrence); MD. CODE ANN., CTS. & JUD. PROC. § 5-303(a)(1) (LexisNexis 2002 repl. & Supp. 2005) (limiting damages judgments against local governments to \$200,000 per person and \$500,000 per incident); MD. CODE ANN., STATE GOV'T § 12-104(a)(2) (LexisNexis 2004 repl.) (limiting damages judgments against the State to \$200,000 per person); MASS. ANN. LAWS ch. 258, § 2 (LexisNexis 2004) (capping negligence liability of public employees at \$100,000); MICH. COMP. LAWS § 600.6419(1) (2000) (permitting the Court of Claims to award up to \$1,000 against the State); MINN. STAT. ANN. § 3.736, subdiv. 4 (West 2005) (limiting damages judgments against the State to \$1 million per occurrence and \$300,000 for wrongful death); *id.* § 466.04, subdiv. 1(a) (West 2001 & Supp. 2002) (limiting damages judgments against municipalities to \$1 million per occurrence and \$300,000 for wrongful death); MISS. CODE ANN. § 11-46-15(2)(c) (West 1999) (limiting damages judgments against government entities to \$500,000 per occurrence); MO. ANN. STAT. § 537.610.1(2) (West 2000) (limiting damages judgments against the State to \$300,000 per plaintiff and \$2 million per occurrence); MONT. CODE ANN. § 2-9-108(1) (2005) (limiting damages judgments against the State to \$750,000 per claim and \$1.5 million per occurrence); NEB. REV. STAT. §§ 13-915, -922 (1997 & Supp. 2005) (limiting damages judgments against local governments and employees to \$1 million per person and \$5 million per incident); *id.* §§ 81-8,209, -8,211, -8,214, -8,215 (2003 & Supp. 2005) (permitting the State Claims Board to award damages against the State up to \$5,000, or \$25,000 if unanimously approved); NEV. REV. STAT. ANN. § 41.035 (LexisNexis 2002 repl.) (limiting damages judgments against the State to \$50,000); N.H. REV. STAT. ANN. § 507-B:4 (LexisNexis 1997 repl.) (limiting damages judgments against local governments and employees to \$150,000 per claimant and \$500,000 per incident); *id.* § 541-B:14 (LexisNexis 2006 repl.) (limiting damages judgments against the State and state employees to \$250,000 per claimant and \$2 million per incident); N.M. STAT. ANN. § 41-4-19(A) (LexisNexis 1996 repl. & Supp. 2004) (limiting damages judgments against the State to \$100,000 per occurrence for property damage, \$300,000 per occurrence for medical expenses, and \$400,000 per person or \$750,000 per occurrence for all other damages); N.Y. CT. CL. ACT § 9 (McKinney 2005) (capping claims against state and local governments heard by the Court of Claims); N.C. GEN. STAT. §§ 143-291, -299.1, -299.2, -299.4, -300.1, -300.6, -3001A (2005) (capping damages judgments against the State, agencies, and employees at \$150,000 per person and \$500,000 per occurrence); N.D. CENT. CODE §§ 32-12.1-03(3)(2), -12.2-02(2) (1996 repl. & Supp. 2005) (limiting damages judgments against political subdivisions to \$250,000 per person and \$500,000 per occurrence and against the State to \$250,000 per person and \$1 million per occurrence); OHIO REV. CODE ANN. §§ 2743.02(D), 2744.05(B) (LexisNexis 2000 repl. & Supp. 2002) (permitting the State to be sued in the Court of Claims with reduction of recovery for collateral recoveries by plaintiff and limiting noneconomic damages judgments against local governments to \$250,000); OKLA. STAT. ANN. tit. 51, § 154 (West 2000) (capping damages awards at \$25,000 per person for property damage, \$125,000 for other losses, \$175,000 in cities with a population of 300,000 or more, \$200,000 for medical negligence, and \$175,000 for a wrongful felony conviction); OR. REV. STAT. ANN. § 30.270 (West 1983 & Supp. 1987) (limiting damages to \$50,000 per person for

State statutes usually grant public employees additional protections from the threat of liability.<sup>50</sup> Public employers are usually required by statute to indemnify their employees or otherwise pay judgments against those employees arising from torts committed within the scope of their employment, although indemnity is generally not required in cases of egregious individual misconduct.<sup>51</sup> Like

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property damage, \$100,000 for special damages, \$100,000 for general damages for personal injuries, and \$500,000 in the aggregate arising from a single incident); 42 PA. CONS. STAT. §§ 8549, 8528(b), 8553 (2002) (limiting damages judgments against the State and state employees to \$250,000 per person and \$1 million aggregate and against local governments and employees to \$500,000 total); R.I. GEN. LAWS §§ 9-31-2, -3, 24-5-13(b) (1997) (limiting damages judgments against the State to \$100,000 except for proprietary functions and capping local-governmental liability for potholes at \$300); S.C. CODE ANN. § 15-78-190 (2005) (limiting damages judgments against government entities to \$300,000 per person and \$600,000 per occurrence); S.D. CODIFIED LAWS §§ 3-22-8, -10, 21-32-16, -19, 21-32A-1 (2004) (permitting the State to be liable up to \$2,000 and only beyond to the extent the defendant is covered by insurance); TENN. CODE ANN. §§ 9-8-108(a)(7)(A), -307(e) (1999 repl. & Supp. 2005) (referring specified claims against the State to the Claims Commission with a cap of \$300,000 per claimant and \$1 million per occurrence and other claims against the State to Board of Claims with \$1 million aggregate cap); TEX. CIV. PRAC. & REM. CODE ANN. § 101.023(a)-(c), 108.002 (Vernon 2005) (limiting state liability to \$250,000 per person and \$500,000 per occurrence; nonmunicipal-local-governmental liability to \$100,000 per person and \$300,000 per occurrence for personal injury and \$100,000 per occurrence for property damage; municipal liability to \$250,000 per person and \$500,000 per occurrence for personal injury and \$100,000 per occurrence for property damage; and public-employee liability to \$100,000 for personal injury, death, or deprivation of a right, privilege, or immunity, and \$100,000 for property damage); UTAH CODE ANN. § 63-30d-604(1) (2004 repl. & Supp. 2006) (capping personal injury at \$553,500 per person and \$1,107,000 per occurrence and property damage at \$221,400 per occurrence); VA. CODE ANN. § 8.01-195.3 (2000) (capping damages against the State at \$100,000 or available insurance); W. VA. CODE §§ 14-2-2, -13, 29-12-1, -12A-7(b) (LexisNexis 2004 repl.) (directing claims against the State to the Court of Claims, which can issue judgments within appropriated limits, requiring insurance in specified cases, and capping noneconomic damages at \$500,000 per person); WIS. STAT. ANN. § 893.80(3) (West 2006) (limiting damages judgments against governmental subdivisions to \$50,000 per person); WYO. STAT. ANN. § 1-39-118(a) (2005) (limiting damages judgments against government entities to \$250,000 per plaintiff and \$500,000 per incident).

<sup>50</sup> In some states, plaintiffs can circumvent sovereign immunity by suing an individual public employee in tort when the claim is deemed to be based on the employee's abuse of authority through his own wrongful conduct. *See, e.g.,* *Curry v. Woodstock Slag Corp.*, 6 So. 2d 479, 480 (Ala. 1942) (noting that sovereign "immunity does not extend to officers" who "act[] not within their authority . . . injurious[ly] to the rights of others"); *Currie v. Lao*, 592 N.E.2d 977, 983 (Ill. 1992) (holding that a state trooper could be sued where the duty he breached did not arise out of his status as a government employee); *Guffey v. Cann*, 766 S.W.2d 55, 58 (Ky. 1989) (explaining that under Kentucky law "[t]he doctrine of sovereign immunity [does not] protect state employees[] sued in their individual capacities"); *Morell v. Balasubramanian*, 514 N.E.2d 1101, 1103 (N.Y. 1987) (holding that the New York Court of Claims Act did not abolish the common-law practice of holding state employees individually liable for tortious acts); *see also* *Coffee County Sch. Dist. v. Snipes*, 454 S.E.2d 149, 151 (Ga. Ct. App. 1995) (noting that state employees lack "immunity for ministerial acts negligently performed or for ministerial or discretionary acts performed with malice").

<sup>51</sup> *See* ALA. CODE § 11-47-24 (LexisNexis 1992 repl.); ARIZ. REV. STAT. ANN. §§ 12-820.04, 41-621(P) (2003); ARK. CODE ANN. § 21-9-203(a) (2006); CAL. GOV'T CODE § 825 (West 1995); COLO. REV. STAT. § 24-10-118(2)(a) (2005); CONN. GEN. STAT. ANN. §§ 5-141d(a), 7-465 (West 1998 & Supp. 2006); DEL. CODE ANN. tit. 10, § 4002 (1999 repl.); D.C. CODE ANN. § 1-109(a)

the FTCA, some states bar actions against public employees based on tortious conduct occurring within the scope of their public employment.<sup>52</sup>

### 3. *Asymmetry with Private Tort Liability*

We have seen that federal, state, and local governments and their employees are free to engage in a broad swath of tortious activities

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(LexisNexis 2003 repl.); GA. CODE ANN. § 45-9-22(a) (2002); IDAHO CODE ANN. § 6-903(b)-(c) (2005); 745 ILL. COMP. STAT. ANN. 10/9-102 (West 2002); IND. CODE ANN. §§ 34-13-3-5, -4-1 (West 1999 & Supp. 2006); IOWA CODE ANN. §§ 669.21, .22, 670.8 (West 1998); KAN. STAT. ANN. § 75-6109 (1997); KY. REV. STAT. ANN. § 65.2005 (LexisNexis 2004 repl.); LA. REV. STAT. ANN. § 13:5108.1 (2006); ME. REV. STAT. ANN. tit. 14, § 8112 (2003); MD. CODE ANN., CTS. & JUD. PROC. § 5-303 (LexisNexis 2002 & Supp. 2005); MD. CODE ANN., STATE GOV'T § 12-404 (LexisNexis 2004 repl.); MASS. ANN. LAWS ch. 258, §§ 9, 9A, 13 (LexisNexis 2004); MICH. COMP. LAWS ANN. § 466.07 (West 2001); *id.* § 691.1408(1) (West 2000); MINN. STAT. ANN. § 3.736, subdiv. 9 (West 2005); *id.* § 466.07 (West 2001 & Supp. 2002); MISS. CODE ANN. §§ 11-46-7(3) (West 1999); MO. ANN. STAT. § 105.711(2)(2) (West 2000 & Supp. 2005); MONT. CODE ANN. § 2-9-305 (2005); NEB. REV. STAT. § 13-1801 (1997); *id.* § 81-8,239.05 (2003); NEV. REV. STAT. ANN. § 41.0349 (LexisNexis 2002 repl.); N.H. REV. STAT. ANN. §§ 29-A:2, 31:105 (2001 repl. & Supp. 2003); *id.* § 99-D:2 (2004 repl.); N.J. STAT. ANN. § 59:10-1, -4 (West 1992); N.M. STAT. ANN. § 41-44(C) to (E) (LexisNexis 1996 repl.); N.Y. PUB. OFF. LAW §§ 17(2), (3), 18 (McKinney 2001); N.C. GEN. STAT. § 143-300.3 (2005); N.D. CENT. CODE §§ 32-12.1-04(4), -12.2-03(4) (1996 repl. & Supp. 2005); OHIO REV. CODE ANN. § 9.87 (LexisNexis 2001 repl. & Supp. 2003); *id.* § 2744.07(A) (LexisNexis 2000 repl. & Supp. 2001); OKLA. STAT. ANN. tit. 51, § 162 (West 2000); OR. REV. STAT. ANN. § 30.285 (West 1983 & Supp. 1987); 42 PA. CONS. STAT. § 8550 (2002); R.I. GEN. LAWS § 9-31-12(a) (1997); *id.* § 45-15-16 (1999); S.C. CODE ANN. § 1-11-440 (2005); *id.* § 12-4-325(A) (2000); S.D. CODIFIED LAWS §§ 3-19-1 to -3 (2004); TENN. CODE ANN. § 9-8-112(a) (1999 repl.); *id.* § 29-20-310 (2000 repl. & Supp. 2001); TEX. CIV. PRAC. & REM. CODE ANN. §§ 102.002, 104.001 (Vernon 2005); UTAH CODE ANN. § 63-30d-603(1)(b) (2004 repl.); VT. STAT. ANN. tit. 12, § 5601 (2002); *id.* tit. 24, § 901a(b) (2005); VA. CODE ANN. § 2-2-1837 (2005 repl.); *id.* § 15.2-1520 (2000); WASH. REV. CODE ANN. §§ 4.92.075, .96.075 (West 2006); W. VA. CODE ANN. § 29-12A-11(a)(2) (LexisNexis 2004 repl.); WIS. STAT. ANN. § 895.46 (West 2006); WYO. STAT. ANN. § 1-39-104(c) (2005); *Gamble v. Fla. Dep't of Health & Rehabilitative Servs.*, 779 F.2d 1509, 1517-18 (11th Cir. 1986) (construing Florida law to require the indemnification of state officers absent intentional misconduct); *Livesay v. Baltimore*, 862 A.2d 33, 38 (Md. 2004) (construing Maryland law to require the indemnification of local employees).

<sup>52</sup> See ALASKA STAT. § 09.50.253 (2004); ARK. CODE ANN. § 19-10-305(a) (2005) (state employees); FLA. STAT. § 768.28(9)(a) (2005); GA. CODE ANN. § 50-21-25(a) (2006); HAW. REV. STAT. § 662-10 (1993 repl.); IND. CODE § 34-13-3-5(c) (West 1999 & Supp. 2005); MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b) (LexisNexis 2002 repl.); MASS. ANN. LAWS ch. 258, § 2 (LexisNexis 2004); MICH. COMP. LAWS ANN. § 691.1407(2) (West 2000); MISS. CODE ANN. § 11-46-7(2) (West 1999); MONT. CODE ANN. § 2-9-305(5)-(6) (2005); OHIO REV. CODE ANN. § 9.86 (LexisNexis 2001 repl.); OR. REV. STAT. ANN. § 30.265(1) (West 1983 & Supp. 2005); R.I. GEN. LAWS § 9-31-12(b) (1997); S.C. CODE ANN. § 15-78-70 (2005 & Supp. 2005); S.D. CODIFIED LAWS § 21-32-17 (2004); TENN. CODE ANN. § 9-8-307(h) (1999 repl.); *id.* § 29-20-310(b) (2000 repl.); UTAH CODE ANN. § 63-30d-202(3) (2004 repl.); VT. STAT. ANN. tit. 24, § 901a(b) (2005); VA. CODE ANN. § 8.01-195.3 (2000); W. VA. CODE ANN. § 29-12A-5(b) (LexisNexis 2004 repl.); see also *State v. Chase Sec., Inc.*, 424 S.E.2d 591, 599-600 (W. Va. 1992) (holding that state officials, even those outside the scope of statutory immunity, are personally immune "for official acts if the involved conduct did not violate clearly established laws"). But see *Kyllo v. Panzer*, 535 N.W.2d 896, 903 (S.D. 1995) (holding South Dakota Codified Laws Section 21-32-17 unconstitutional as applied "to state employees performing ministerial functions").

without fear of liability. It should therefore be no surprise that the main line of attack on governmental immunity has been that it improperly undermines the obligation of the government to conform its conduct to the rule of law.<sup>53</sup> Indeed, Justice Stevens, perhaps the foremost judicial advocate of this view, has argued that “all Governments . . . should generally be accountable for their illegal conduct.”<sup>54</sup>

Although sovereign immunity is sometimes defended as compelled by the original understanding of governmental liability at the time of the Constitution’s framing or as a doctrine with limited practical significance,<sup>55</sup> there have been few attempts to defend it in terms of first principles. One of the few such efforts was undertaken by Roderick Hills, who has argued that immunity protects the public fisc from the improvidence of public officials who, he believes, lack sufficient incentive to avoid improvident payouts of excessive damages awards or settlements.<sup>56</sup> But the truth of this supposition is far from evident. After all, elected officials have political incentives to keep taxes low and to avoid unnecessary government expenditures. Professor Hills develops no argument to explain why these incentives are insufficient to restrain profligate government litigation costs, nor does he identify any empirical evidence that governments defend litigation with any less vigor than private-sector defendants. I was a supervisory government lawyer for many years, and I received intense pressure from elected officials when they believed litigation expenses were escalating, whether justifiably or not. Professor Hills seems quite unaware of such phenomena.

Harold Krent has offered a different justification for immunity, claiming that it preserves the separation of powers by ensuring that legislative or executive policy is not undermined by damages awards.<sup>57</sup> But this argument has a cart-before-the-horse quality: it does not explain why legislative or executive prerogatives properly include the

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<sup>53</sup> See, e.g., Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091, 1101–03; Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1213–15 (2001); Jackson, *supra* note 10, at 599–603; Mark C. Niles, “*Nothing But Mischief*”: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1279 (2002); Randall, *supra* note 11, at 100–04.

<sup>54</sup> Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514 (1991) (Stevens, J., concurring).

<sup>55</sup> See, e.g., Jesse H. Choper & John C. Yoo, *Who’s Afraid of the Eleventh Amendment? The Limited Impact of the Court’s Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 233 (2006); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 497 (2001); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 59–68 (1988); Nelson, *supra* note 13, at 1564.

<sup>56</sup> Roderick M. Hills, Jr., *The Eleventh Amendment as a Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1234–35 (2001).

<sup>57</sup> Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1534–39 (1992).

power to engage in tortious conduct without paying the injured party compensation. In any event, this argument does not justify immunity in cases when the plaintiff's injury is caused by a violation of the Constitution. After all, it is considered the province of the judiciary to define the scope of legislative or executive power under the Constitution.<sup>58</sup> The constitutional tort thus merits separate consideration.<sup>59</sup>

### B. Constitutional Torts

Liability for constitutional torts turns on whether the defendant is the federal government, a state, or a unit of local government, and whether suit is brought against the government itself or a public employee.

#### 1. Federal Liability

Sovereign immunity bars an action seeking to recover damages from the federal government itself for a constitutional tort.<sup>60</sup> The federal employee who actually committed the tort, however, is in a different legal position. In *Bivens v. Six Unknown Named Agents*,<sup>61</sup> the Supreme Court held that federal officials are liable for damages when they violate the plaintiff's constitutional rights.<sup>62</sup> A damages remedy is available absent what the Court regards as "special factors counseling hesitation in the absence of affirmative action by Congress,"<sup>63</sup> or the availability of a more limited statutory remedy nevertheless deemed to be adequate.<sup>64</sup> Constitutional tort damages are not based

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<sup>58</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), *superseded by statute on other grounds*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2000)); *United States v. Lopez*, 514 U.S. 549, 566 (1995); *United States v. Will*, 449 U.S. 200, 217 (1980).

<sup>59</sup> The phrase "constitutional tort" refers to actions seeking damages for a violation of the plaintiff's constitutional rights. See, e.g., Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 323-24 (1965).

<sup>60</sup> See *FDIC v. Meyer*, 510 U.S. 471, 477 (1994).

<sup>61</sup> 403 U.S. 388 (1971).

<sup>62</sup> *Id.* at 395-97. *Bivens* involved an alleged Fourth Amendment violation, but its holding has since been applied to other constitutional provisions. See *Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (recognizing a cause of action for a violation of Eighth Amendment rights by a prison official); *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (recognizing a cause of action for a violation of the plaintiff's Fifth Amendment rights); *Butz v. Economou*, 438 U.S. 478, 504-06 (1978) (recognizing a cause of action for violations of due process and First Amendment rights).

<sup>63</sup> *Bivens*, 403 U.S. at 396; *accord, e.g.*, *United States v. Stanley*, 483 U.S. 669, 682-83 (1987); *Chappell v. Wallace*, 462 U.S. 296, 298 (1983).

<sup>64</sup> See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 424-29 (1988) (rejecting a *Bivens* claim for consequential damages caused by a wrongful denial of disability benefits in light of a statutory remedy limited to an award of benefits); *Bush v. Lucas*, 462 U.S. 367, 386-90 (1983) (rejecting a *Bivens* claim for consequential damages caused by a wrongful demotion of federal employee in

on the presumed or intrinsic value of constitutional rights; they can be awarded only for what the common law of torts considers an actual and compensable loss.<sup>65</sup>

Individual federal officials sued for constitutional torts are entitled to assert the defense of qualified immunity.<sup>66</sup> Under this doctrine, officials enjoy immunity unless their conduct contravened clearly established constitutional law.<sup>67</sup> Qualified immunity is unavailable when prior decisional law makes the illegality of an official's conduct manifest or when the official undertakes conduct that no reasonable person could think was constitutional despite the absence of controlling precedent.<sup>68</sup> The Court has considered the risk that the threat of personal liability will inhibit the vigorous performance of public employees' duties sufficient justification for the defense of qualified immunity.<sup>69</sup>

## 2. State and Local Liability

States enjoy immunity from damages liability for constitutional torts by virtue of the Eleventh Amendment, which, despite its textual limitation to cases involving citizens of different states,<sup>70</sup> is thought to incorporate a general principle of sovereign immunity.<sup>71</sup> The Court,

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light of statutory remedies limited to backpay and retroactive seniority). *Bivens* liability, however, is limited to federal employees. Even when sovereign immunity has been waived, no constitutional tort claim is recognized against the federal government or federal agencies because the remedy against individual employees is thought sufficient to protect the victims of constitutional torts. See *Meyer*, 510 U.S. at 484–86; see also *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70–72 (2001) (reasoning that, because the purpose of *Bivens* is to deter officers, it would be illogical to allow a constitutional tort claim against a federal agency).

<sup>65</sup> See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *Carey v. Piphus*, 435 U.S. 247, 253–58 (1978).

<sup>66</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 813–15 (1982). There are some officials, however, who are entitled to absolute immunity. The President enjoys absolute immunity from damages liability arising from the performance of his duties, members of Congress and their staffs are absolutely immune from civil liability for legislative acts, judges and other adjudicative officials enjoy absolute immunity for their adjudicative functions, and prosecutors enjoy absolute immunity for prosecutorial acts. See *id.* at 807.

<sup>67</sup> See, e.g., *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001); *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Anderson v. Creighton*, 483 U.S. 635, 638–40 (1987); *Davis v. Scherer*, 468 U.S. 183, 190–91 (1984); *Harlow*, 457 U.S. at 817–19.

<sup>68</sup> See *Hope v. Pelzer*, 536 U.S. 730, 740–44 (2002); *Wilson*, 526 U.S. at 615–18; *Mitchell v. Forsythe*, 472 U.S. 511, 530–35 (1985).

<sup>69</sup> See, e.g., *Richardson v. McKnight*, 521 U.S. 399, 407–08 (1997); *Wyatt v. Cole*, 504 U.S. 158, 167–68 (1992); *Forrester v. White*, 484 U.S. 219, 223–24 (1988); *Mitchell*, 472 U.S. at 525–26.

<sup>70</sup> “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.” U.S. CONST. amend. XI.

<sup>71</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 712–30 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). The Eleventh Amendment is also understood to preclude Congress

however, construes the Eleventh Amendment to permit Congress to authorize damages actions against states under its power to enforce the Fourteenth Amendment.<sup>72</sup> Moreover, the Eleventh Amendment does not protect state officials from personal liability for constitutional torts.<sup>73</sup> State officials are also considered “persons” amenable to suit for depriving the plaintiff of rights under the Constitution or federal law under Section 1983 of Title 42 of the United States Code.<sup>74</sup> But state officials sued for constitutional torts may assert qualified immunity as a defense to their personal liability.<sup>75</sup>

Local governments are not protected by the Eleventh Amendment<sup>76</sup> and are amenable to suit under Section 1983.<sup>77</sup> Section 1983, however, has been construed to reject vicarious municipal liability for the constitutional torts of municipal employees acting within the scope of their employment.<sup>78</sup> Instead, local governments can be held liable only for their own policies or customs or for the acts of municipal policymakers.<sup>79</sup> Curiously, this is precisely the basis on which discretionary immunity is available for common-law tort liability; in that context, the touchstone for immunity is whether the challenged decision involves a judgment rooted in government policy.<sup>80</sup> But while discretionary immunity applies no matter how likely government policy is to inflict compensable injury within the ambit of the common law of torts, courts impose municipal liability for constitutional torts when a municipal policy or custom is unconstitutional or reflects de-

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from compelling states to defend damages actions for an alleged violation of federal law even in a state court. *See Alden*, 527 U.S. at 745–46.

<sup>72</sup> *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 518–20 (2004); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).

<sup>73</sup> *See Hafer v. Melo*, 502 U.S. 21, 29–31 (1991); *Scheuer v. Rhodes*, 416 U.S. 232, 237–38 (1974). Additionally, the Supremacy Clause of the Constitution prevents states from enacting immunity laws that can be used as defenses in constitutional tort litigation. *See Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 375–78 (1990); *Felder v. Casey*, 487 U.S. 131, 141–45 (1987); *Martinez v. California*, 444 U.S. 277, 284 & n.8 (1980).

<sup>74</sup> *See Hafer*, 502 U.S. at 27–29. In contrast, the Court has held that a state itself is not considered a “person” amenable to suit under Section 1983. *See Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65–71 (1989). 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 . . . .

42 U.S.C. § 1983 (2000).

<sup>75</sup> *See Scheuer*, 416 U.S. at 239–49.

<sup>76</sup> *See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368–69 (2001); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

<sup>77</sup> *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

<sup>78</sup> *See id.* at 693–95.

<sup>79</sup> *See, e.g., Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 403–04 (1997); *City of Canton v. Harris*, 489 U.S. 378, 388–90 (1989).

<sup>80</sup> *See, e.g., United States v. Gaubert*, 499 U.S. 315, 323–26 (1991).

liberate indifference to constitutional violations by municipal employees.<sup>81</sup> Local governments, moreover, may not assert the defense of qualified immunity,<sup>82</sup> although they enjoy immunity from punitive damages.<sup>83</sup> Precisely the opposite liability rules apply to local officials sued for constitutional torts: they can assert the defense of qualified immunity,<sup>84</sup> but are subject to awards of punitive damages for intentional or reckless misconduct.<sup>85</sup>

### 3. *Asymmetry with Private Tort Liability*

The immunity doctrines for constitutional torts have for the most part been devised by the Supreme Court.<sup>86</sup> The Court, however, has made little effort to explain why it grants government tortfeasors defenses unavailable in private tort law—and the rather slender efforts the Court has made along these lines are strikingly unpersuasive. In *Richardson v. McKnight*,<sup>87</sup> for example, as it held that the employees of a private firm hired to run a state prison were not entitled to assert the defense of qualified immunity, the Court endeavored to justify the asymmetry between private-sector and governmental immunity:

First, the most important special government immunity-producing concern—unwarranted timidity [caused by fear of personal liability]—is less likely present, or at least is not special, when a private company subject to competitive market pressures operates a prison. Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job.

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This is not to say that government employees, in their efforts to act within constitutional limits, will always, or often, sacrifice the otherwise effective performance of their duties. Rather, it is to say that government employees typically act within a *different* system. They work within a system that is responsible through elected officials to voters who, when they vote, rarely consider the performance of individual subdepartments or

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<sup>81</sup> See *Brown*, 520 U.S. at 407–11; *Collins v. City of Harker Heights*, 503 U.S. 115, 123–24 (1992); *Harris*, 489 U.S. at 386–89.

<sup>82</sup> See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

<sup>83</sup> See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258–70 (1981).

<sup>84</sup> See *Owen*, 445 U.S. at 654–56.

<sup>85</sup> See *Smith v. Wade*, 461 U.S. 30, 56 (1983).

<sup>86</sup> The Court has sometimes derived the immunity rules for constitutional torts from the governmental immunity and liability principles in effect when Section 1983 was enacted, see, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993), but it has altered these rules if they come to be viewed as counterproductive or otherwise inadvisable, see, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982).

<sup>87</sup> 521 U.S. 399 (1997).

civil servants specifically and in detail. And that system is often characterized by multidepartment civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments or supervisors flexibly to reward, or to punish, individual employees. Hence a judicial determination that “effectiveness” concerns warrant special immunity-type protection in respect to this latter (governmental) system does not prove its need in respect to the former. Consequently, we can find no *special* immunity-related need to encourage vigorous performance.

Second, privatization helps to meet the immunity-related need to ensure that talented candidates are not deterred by the threat of damages suits from entering public service. . . . [I]nsurance increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face. Because privatization law also frees the private prison-management firm from many civil service law restraints, it permits the private firm, unlike a government department, to offset any increased employee liability risk with higher pay or extra benefits. In respect to this second government-immunity-related purpose then, it is difficult to find a *special* need for immunity, for the guards’ employer can operate like other private firms; it need not operate like a typical government department.

Third, lawsuits may well “distrac[t]” these employees “from their . . . duties,” but the risk of “distraction” alone cannot be a sufficient grounds for an immunity.<sup>88</sup>

The Court accordingly justified special rules of governmental immunity on the ground that a private firm’s employees are not likely to be overdeterred by the threat of liability because they will be indemnified, but it offered no support for its claim that indemnification is less likely to exist in the public sector. In fact, indemnification is nearly always offered to public employees by statute, policy, or collective bargaining agreement,<sup>89</sup> a fact well known to the author of *Richardson*, since he recited it in another case less than two months before *Richardson* came down.<sup>90</sup>

The ubiquity of public employee indemnification should be unsurprising; labor economics teaches that employers must offer suffi-

<sup>88</sup> *Id.* at 409–11 (internal citations and quotation marks omitted).

<sup>89</sup> See, e.g., Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 587, 590–96 (2000); Neal Miller, *Less-than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force*, 28 CREIGHTON L. REV. 733, 749–52 (1995); Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability under Bivens*, 88 GEO. L.J. 65, 76–77 (1999); Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer’s § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1216–23 (2001); Nicole G. Tell, Note, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a § 1983 Police Misconduct Suit*, 65 FORDHAM L. REV. 2825, 2836 (1997). For a list of state indemnification statutes, see *supra* note 51.

<sup>90</sup> See *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting).

cient compensation to account for the risk of liability that employees face and that they will choose indemnification as the simplest way to minimize the risk that their employees' financial interests in avoiding liability will reduce their productivity.<sup>91</sup> There is also little reason to credit the Court's assertion in *Richardson* that public employers cannot cope with overdeterrence—public managers are accountable to elected officials, who have political incentives to enhance the performance of governmental agencies. Indeed, the Court did not identify any civil-service rules which prevent public employers from firing those who engage in tortious misconduct or rewarding those who improve agency performance.<sup>92</sup>

Thus we are left with little in the way of a rationale for special rules of governmental immunity.<sup>93</sup> What is more, if we credit the Court's view that the voters have little ability to evaluate the performance of governmental agencies and that public-sector supervisors have little control over their subordinates, then the rationale for governmental damages liability itself is thrown into doubt. If neither the voters nor supervisors have much ability to punish public employees who commit torts, and given the ubiquity of indemnification of wrongdoers and that government can readily recoup its legal expenses by levying taxes, it is hard to see any efficiency or corrective-justice justification for governmental tort liability—it neither deters wrongdoing nor shifts costs to culpable parties. At most, governmental liability offers an injured party compensation, but if that is its only virtue, surely this objective could be achieved through a system of publicly funded insurance with far lower transaction costs than those inhering in a system of tort liability.<sup>94</sup> Indeed, if loss-spreading is the only objective achieved by governmental damages liability, it is far from clear why insurance must be publicly funded at all; those con-

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<sup>91</sup> See, e.g., Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1239–43 (1984).

<sup>92</sup> Justice Scalia made many of these points in his dissenting opinion. See *Richardson*, 521 U.S. at 418–21 (Scalia, J., dissenting). For additional criticism of *Richardson*, see Clayton P. Gillette & Paul B. Stephan, *Richardson v. McKnight and the Scope of Immunity After Privatization*, 8 SUP. CT. ECON. REV. 103 (2000).

<sup>93</sup> An additional justification sometimes offered for qualified immunity is that it reduces the costs of adopting a new rule of constitutional law by immunizing the government from damages liability for conduct preceding adoption of the new rule. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999). But the more straightforward way to address this concern is through the law of retroactivity, and on that score the Supreme Court has held that new rules of constitutional law are applicable to all cases pending at the time the new rule is announced. See *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96–97 (1993). Moreover, municipalities are denied qualified immunity even when their policies do not violate clearly established law. See *supra* text accompanying note 82.

<sup>94</sup> This point, for example, is at the core of the case for no-fault automobile insurance. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.14 (4th ed. 1992).

cerned about the risks of uncompensated loss could simply purchase insurance in the private market.

### C. Takings

The Fifth Amendment's Takings Clause declares that "private property [shall not] be taken for public use, without just compensation."<sup>95</sup> Since the Fifth Amendment's text mandates the provision of just compensation for anything that amounts to a "taking," presumably no rules of immunity from the obligation to provide compensation can be reconciled with the Fifth Amendment itself. This is largely an academic question, however, since the federal government has waived whatever sovereign immunity it might otherwise have against damages liability for an uncompensated taking,<sup>96</sup> and it is settled that a plaintiff may obtain injunctive relief against state officials for an uncompensated taking.<sup>97</sup> Thus, the ability of a plaintiff to obtain a remedy for an allegedly unconstitutional taking of property is not in doubt.<sup>98</sup>

The text of the Takings Clause resolves the questions that vex governmental liability for common-law and constitutional torts. Unlike any other constitutional text, the Takings Clause by its terms imposes an obligation to pay compensation. Accordingly, courts properly award compensation for takings without worrying about the risk of overdeterrence that concerned the Court in *Richardson*. Moreover, the Takings Clause suggests a rationale for a taxpayer-funded just-compensation requirement quite apart from any conception of deterrence. Instead of treating takings for a public use as a

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<sup>95</sup> U.S. CONST. amend. V, cl. 3.

<sup>96</sup> See, e.g., *United States v. Causby*, 328 U.S. 256, 267 (1946).

<sup>97</sup> See *Tindal v. Wesley*, 167 U.S. 204, 212–23 (1897). This rule is an aspect of the familiar doctrine, most frequently associated with the decision in *Ex parte Young*, 209 U.S. 123 (1908), that the Eleventh Amendment does not bar an action seeking injunctive relief against a state official to halt a violation of federal law. See, e.g., *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004); *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645–48 (2002); *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991); see also *United States v. Lee*, 106 U.S. 196, 222–23 (1882) (stating a similar rule authorizing injunctive relief against federal officials for an uncompensated taking prior to the federal waiver of sovereign immunity).

<sup>98</sup> The one exception is a plaintiff seeking a remedy for a temporary uncompensated taking against a state. Injunctive relief would be moot in such a case, but the Constitution still requires compensation. See *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304, 318–22 (1987). It is unclear whether the Eleventh Amendment, as presently construed, would protect a state against a suit seeking compensation under the Fifth Amendment for either a temporary or permanent taking. For discussion of this issue, see Eric Berger, *The Collision of the Takings and Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493 (2006) (arguing that the Takings Clause trumps state sovereign immunity), and Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067 (2001) (contending that the State and state officials enjoy immunity from just-compensation suits in federal court, but not in their own courts of general jurisdiction by virtue of the Due Process Clause).

legal wrong in the sense that torts are legal wrongs that demand deterrence or corrective justice, the Takings Clause acknowledges the propriety of taking private property for public use, while adding that it is “just” to expect the public to provide compensation for the forced acquisition of property for its own use. Thus, the compensation requirement responds to a concept of unjust enrichment and undue burden by requiring that the public compensate those whose property it takes for public use.<sup>99</sup> Common-law and constitutional torts, in contrast, are accompanied by no similarly textually based constitutional obligation to provide compensation—indeed, the Appropriations Clause and its state counterparts decisively defeat any supposed obligation along those lines—and we have seen that there is great doubt that governmental tort liability offers either deterrence or punishment of culpable parties, at least on the view taken in *Richardson*. Thus, the contrast between governmental liability for takings and governmental liability for common-law and constitutional torts only reinforces the problematic character of the latter. Since the Constitution itself does not require compensation except for takings, surely we should expect some persuasive justification for a constitutional or common-law tort damages remedy against government. Such a justification, however, has proven elusive.

## II. THE POLITICS OF GOVERNMENTAL TORT LIABILITY

The emerging consensus among legal scholars is that the justification for governmental tort liability is essentially incoherent. I hope to demonstrate that the emerging consensus is quite wrong. But first, a look at this emerging consensus is in order.

### A. *The Case Against Governmental Tort Liability*

The case against governmental tort liability is straightforward—the premises and policies of tort law fit private tortfeasors far better than government.

#### 1. *Theories of Tort Liability*

The two major schools of thought about tort law share the objective of shifting losses to culpable parties; hence both distinguish tort

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<sup>99</sup> Professor Michelman has provided the leading account of the just-compensation requirement as rooted in a conception of justice framed in utilitarian terms, by using a compensation requirement to deter inefficient takings, and in Rawlsian terms, as an obligation of fairness to individuals put to undue burdens for the sake of others. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967).

law from mere loss-spreading through insurance by means of a conception of culpability. The instrumental account justifies tort liability as creating an incentive to make cost-justified investments in safety.<sup>100</sup> Thus, as Learned Hand famously put it, tort liability turns on whether the cost of the injury multiplied by the likelihood that it would occur exceeds the cost that the defendant would have had to incur to avoid the loss.<sup>101</sup> An employer's vicarious liability for the torts of its employees committed within the scope of their employment is therefore necessitated by the risk that employees will prove judgment proof, leading to suboptimal investments in safety absent employer liability.<sup>102</sup> The advocates of corrective justice, in contrast, argue that tort law embodies a widely accepted moral obligation on the part of a wrongdoer to make the injured party whole.<sup>103</sup> Vicarious employer liability is warranted because an employee acting within the scope of employment is part of a larger organization that can fairly be held responsible for the conduct of an employee working on its behalf.<sup>104</sup>

The justifications for constitutional tort liability are no different; the Supreme Court tells us that the law of constitutional torts is governed by the same principles as ordinary tort law.<sup>105</sup> Constitutional tort damages have an instrumental justification in that they are thought to create an economic incentive for the government and its officials to make cost-justified investments in preventing constitutional violations<sup>106</sup> and have a corrective-justice justification based on an asserted moral entitlement to compensation when one has been the victim of a constitutional wrong.<sup>107</sup>

Essentially the same justifications are advanced for the obligation to compensate for takings. The instrumental account contends that the Takings Clause promotes social welfare by giving government a disincentive to take property when the social benefits of the taking

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<sup>100</sup> See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 135–73 (1970); POSNER, *supra* note 94, at § 6.1; STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 5–32 (1987).

<sup>101</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169, 172 (2d Cir. 1947).

<sup>102</sup> See, e.g., POSNER, *supra* note 94, at § 6.8; Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 608–09 (1988).

<sup>103</sup> See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 303–85 (1992); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 145–70 (1995); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 571–73 (1972).

<sup>104</sup> See, e.g., WEINRIB, *supra* note 103, at 185–87.

<sup>105</sup> See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709–10 (1999); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994).

<sup>106</sup> See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 16–19, 135–46 (1983).

<sup>107</sup> See, e.g., Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1009–22 (1990).

will not exceed the cost of paying compensation to the owner.<sup>108</sup> The intrinsic account of the just-compensation requirement contends that it embodies a moral entitlement of property owners not to be subjected to disproportionate burdens for the benefit of others.<sup>109</sup>

## 2. *The Inapplicability of the Conventional Theory to Government*

Initially, the assumption that governmental tort liability works in the same manner as the common-law liability of private tortfeasors went unquestioned. The Supreme Court repeatedly opined that constitutional tort liability can be counted upon to provide compensation while deterring official misconduct in the same manner as private tort law,<sup>110</sup> and the leading commentators indulged the same assumption.<sup>111</sup>

The first to attack this citadel was Daryl Levinson, who observed that, unlike a private firm, the government is organized not to maximize profits but to respond to the preferences of voters, who “are not uniquely interested in maximizing the profits, or total wealth, of the jurisdiction.”<sup>112</sup> Instead, “government responds to political, not market, incentives [and] cares not about dollars, only about votes.”<sup>113</sup> Accordingly, requiring government to pay damages for constitutional torts will fail to reliably deter constitutional violations, which frequently produce political benefits.<sup>114</sup> For example, a policy of randomly searching young men in high-crime areas could greatly increase constitutional-tort liability, but it could also pay such handsome political dividends that liability would have no deterrent effect on elected officials.<sup>115</sup> Moreover, a majoritarian theory of political behavior predicts that, “[s]o long as the social benefits of constitutional violations exceed the compensable costs to the victim and

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<sup>108</sup> See, e.g., POSNER, *supra* note 94, at 58–59; Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 997 (1999); Michelman, *supra* note 99, at 1214–18.

<sup>109</sup> See, e.g., Michelman, *supra* note 99, at 1218–24.

<sup>110</sup> See, e.g., *Elder v. Holloway*, 510 U.S. 510, 514–15 (1994); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *Carlson v. Green*, 446 U.S. 14, 20–21 (1980); *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980); *Butz v. Economou*, 438 U.S. 478, 506 (1978); *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978).

<sup>111</sup> See, e.g., John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1461–64 (1989); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 276–87; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 253–78 (1988).

<sup>112</sup> Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 355 (2000).

<sup>113</sup> *Id.* at 420.

<sup>114</sup> *Id.* at 367–68.

<sup>115</sup> *Id.* at 369–70.

are enjoyed by a majority of the population, compensation will *never* deter a majoritarian government from violating constitutional rights . . . .”<sup>116</sup> As for the obligation to compensate for takings, Levinson argued that compensation is unlikely to create an incentive to engage in only efficient takings: “why should we expect government to fully internalize the benefits of takings when it does not receive them in the form of revenues?”<sup>117</sup> In particular, even an inefficient taking could garner majority support when a majority of voters stands to experience benefits from it that exceed the increase in taxes to fund compensation.<sup>118</sup> Levinson added that public-choice theory predicts that powerful interest groups might be able to successfully lobby for unconstitutional policies or improvident takings that provide them with special benefits despite the obligation to pay compensation; an influential homeowners association, for example, might lobby to condemn nearby property it dislikes even though the cost of condemnation might exceed its overall benefits.<sup>119</sup> Levinson concluded, “the most consistent prediction generated by interest group analysis is that compensation for takings or constitutional torts will tend to defuse political opposition and therefore increase the incidence of both.”<sup>120</sup> At best, “any predictions about the incentive effects of constitutional cost remedies on government behavior are highly suspect.”<sup>121</sup>

Levinson also rejected corrective justice as a justification for governmental liability for constitutional torts or a requirement of compensation for takings. As to the former, the fact that “constitutional tort compensation ultimately comes from the pockets of taxpayers . . . attenuates the connection between moral responsibility and the burden of rectification.”<sup>122</sup> One could add that the shareholders

<sup>116</sup> *Id.* at 370. Levinson added that deterrence cannot be expected when a majority of citizens experience greater benefits than any increase in their taxes. *Id.* at 370–73.

<sup>117</sup> *Id.* at 350 (footnote omitted).

<sup>118</sup> *Id.* at 364–66. He illustrated the point:

[T]he proposed regulation will benefit each of citizens 1–6 (the members of the minimum winning coalition) by \$2000, while costing each of citizens 7–10 \$4000. Citizens 1–6 will support the regulation because it leaves them better off by \$400 (\$2000 in direct benefits minus one-tenth of \$16,000, or \$1600, in compensation taxes), and the inefficient regulation will therefore pass.

*Id.* at 365.

<sup>119</sup> *Id.* at 375–79.

<sup>120</sup> *Id.* at 379–80.

<sup>121</sup> *Id.* at 386–87; see also Daryl J. Levinson, *Empire-Building in Constitutional Law*, 118 HARV. L. REV. 915, 964–68 (2005) (contending that government actors care significantly more about political incentives than about budgetary considerations).

<sup>122</sup> Levinson, *supra* note 112, at 408. Levinson also observed that many constitutional violations are systemic in nature, making it unrealistic to identify the particular plaintiff as a victim, *id.* at 409, and that many constitutional injuries are difficult to monetize in any fair or principled fashion, *id.* at 410.

of private corporations have the benefit of liability limited to their investment even though they can readily sell their stock at any time, yet taxpayers must fund essentially unlimited liability and face substantial costs if they wish to “exit” the jurisdictions that tax them to fund governmental liabilities.<sup>123</sup> As for takings, Levinson rejected a moral claim of property owners to compensation on the ground that the existing distribution of property cannot itself be defended as just.<sup>124</sup>

Although he seemed not to realize it, Levinson’s view argues against governmental liability for common-law torts no less than for constitutional torts and takings. On Levinson’s account, there is no instrumental justification for governmental liability for common-law torts since we cannot know that government will make cost-justified investments in loss prevention to minimize its future liability. When the political cost of diverting public resources to loss prevention is sufficiently high, government will not make the investment even when it is economically justified. As a result, tort liability cannot be expected to promote efficient governmental investment in loss prevention. And since the economic cost of damages awards falls on taxpayers not responsible in any direct fashion for tortious conduct, the corrective-justice rationale for governmental damages liability for common-law torts is also wanting. At most, we are left with an argument for providing those injured by tortious government conduct with some form of publicly funded insurance—although, as we have seen, the justification for having taxpayers fund this obligation rather than leaving the insurance decision to each individual is entirely unclear.

Levinson is clearly onto something. While we can assume that private-sector tortfeasors are primarily motivated to maximize revenues and accordingly are likely to experience a form of deterrence or punishment from tort liability, voters’ demands on government are much broader and more amorphous. Accordingly, the deterrent and punitive effects of tort liability are far more uncertain in the public sector.<sup>125</sup> Indeed, as Levinson points out, tort liability may even pay

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<sup>123</sup> For a discussion of the nature of limited shareholder liability, see, for example, Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387 (1992).

<sup>124</sup> See Levinson, *supra* note 112, at 397–400.

<sup>125</sup> To be sure, there are those that doubt the efficacy of tort liability even in the private sector in terms of deterrence or corrective justice. See generally Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990) (suggesting that tort law is inefficient with regard to its purported goals of responding to the victim’s need for compensation and encouraging future safety); John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820 (1987) (discussing how various doctrines of corporate law undermine the practical utility of the social efficiency justification of torts); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985) (analyzing the ineffectiveness of tort as a deterrent and critiquing the compensation system of tort). Levinson’s argument, however, does not rest upon an assessment of the efficacy

political dividends in the public sector. Thus, after Levinson's attack, the justification for any form of governmental damages liability law is in shambles.

The efforts made to date to defend governmental tort liability from Levinson's attack have been deeply unsatisfying. For example, Bernard Dauenhauer and Michael Wells have defended constitutional tort liability in terms of corrective justice, arguing that the taxpayers are properly held responsible for governmental torts since they largely correspond to the universe of voters responsible for electing those who run the government.<sup>126</sup> But this is hardly corrective justice from the standpoint of those voter-taxpayers who backed the losing candidate in the last election. Moreover, a shareholder who is dissatisfied with management policy may always sell, but a taxpayer can relocate to another jurisdiction only at considerable cost. And taxpayers do not have the kind of effective control over government policy vested in owner-shareholders. Voting is governed by a one-person-one-vote rule,<sup>127</sup> but taxes are not levied on that basis.<sup>128</sup> To top it off, the responsibility of politically accountable elected officials for most governmental torts is unclear. Courts will usually impose tort liability without any requirement that elected officials were involved in or culpable for the tort; only a Section 1983 claim against a municipality requires any showing of culpability on the part of policymakers.<sup>129</sup> As the Supreme Court explained in *Richardson*, however, most constitutional torts are committed by relatively low-level officials subject to limited control by elected officials or the voters.<sup>130</sup> Thus, even if taxpayers are fairly held accountable for the conduct of elected officials, the responsibility of elected officials for most governmental torts that give rise to damages liability is highly attenuated.

Attacks on Levinson's position from an instrumental perspective have been no more persuasive. For example, Mark Brown has argued that citizens are more likely to obey the law when the government is required to honor its own legal obligations and is held liable for its violations.<sup>131</sup> He offers no empirical evidence to support this view, however, and his theory seems implausible. The Supreme Court rec-

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of either public or private tort liability; his point is that whatever the efficacy of tort liability in the private sector, it has significantly less efficacy in the public sector.

<sup>126</sup> Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 914–28 (2001).

<sup>127</sup> See, e.g., *Bd. of Estimate v. Morris*, 489 U.S. 688, 692 (1989); *Avery v. Midland County*, 390 U.S. 474 (1968).

<sup>128</sup> Indeed, it is usually unconstitutional to make eligibility to vote turn on one's status as a taxpayer. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632 (1969).

<sup>129</sup> See *supra* Part I.

<sup>130</sup> See *supra* text accompanying note 88.

<sup>131</sup> Mark R. Brown, *Deterring Bully Government: A Sovereign Dilemma*, 76 TUL. L. REV. 149, 172–78 (2001).

ognized constitutional tort liability as we know it today in *Monroe v. Pape*.<sup>132</sup> While constitutional tort litigation exploded in the wake of that decision,<sup>133</sup> there is no evidence that people became more law abiding. In fact, crime rates rose in the years following *Monroe*, and criminologists certainly have not observed any relationship between the rise of constitutional tort litigation and norms of law-abidingness.<sup>134</sup>

Somewhat more plausibly, Myriam Gilles has attempted to meet Levinson on his own terms. Admitting that governmental tort liability can have little deterrent effect unless it exacts a political price, she claims that tort litigation does just that by unearthing damaging information or producing adverse verdicts and rulings, thus creating damaging publicity for officeholders.<sup>135</sup> But she offers a paucity of empirical evidence to support this claim. Especially in light of the enormous scrutiny of government—systemically promoted by a competitive political system and a free press—there is little reason to believe that civil litigation is a major vehicle for unearthing governmental misconduct. Professor Gilles offers no evidence that damages litigation has produced effective political accountability; indeed, it is difficult to think of any major governmental scandal uncovered by tort litigation. The major national scandals of recent decades, such as Watergate or the Iran-Contra affair, for example, were not unearthed by tort plaintiffs.<sup>136</sup> At the local level, it is equally difficult to identify a major scandal unearthed by a tort plaintiff; it was a Los Angeles police investigation, for example, that discovered the huge

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<sup>132</sup> 365 U.S. 167, 183 (1961), *overruled in part on other grounds by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

<sup>133</sup> As Justice Powell once observed, “[i]n 1961 . . . only 270 civil rights actions were begun in the federal district courts[, but by] 1981[] over 30,000 such suits were commenced.” *Patsy v. Bd. of Regents*, 457 U.S. 496, 533 (1981) (Powell, J., dissenting). To be sure, these figures are somewhat misleading because they include cases that are not fairly characterized as constitutional torts, such as employment discrimination actions. See Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 658–68 (1987). Still, there can be little doubt that, since *Monroe*, constitutional tort litigation has expanded dramatically.

<sup>134</sup> See generally GARY LAFREE, *LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA* (1998) (analyzing the increase in American crime rates from the end of World War II to the early 1990s, particularly in the 1960s).

<sup>135</sup> Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 859–65 (2001). Similarly, James Park has argued that awards of damages are necessary so that courts are able to articulate constitutional principles and rights in cases where other types of relief are unavailable. James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 422–24 (2003).

<sup>136</sup> See CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974) (Watergate); 1 LAWRENCE E. WALSH, *FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS* 23–25 (1993) (Iran-Contra).

Ramparts police corruption scandal.<sup>137</sup> What is more, only a tiny fraction of civil litigation against the government is likely to generate publicity, much less significant political consequences. When a governmental tort has political consequences, it is more likely because of the underlying conduct than the ensuing litigation. For example, Rodney King's beating by Los Angeles police officers produced an immediate and enormous adverse public reaction well before any civil litigation arose.<sup>138</sup> Given the incentive of the political opposition and the press, among others, to unearth governmental misconduct, and the ordinary political checks that come into play whenever allegations of governmental misconduct enter the political arena, the marginal utility of civil litigation in exposing such misconduct and punishing officeholders is not likely to be great.

But if Professor Gilles is right, then her argument suggests that the cure may be worse than the disease. If civil litigation is uniquely valuable at ferreting out governmental misconduct because of the financial incentive that the civil plaintiff has to pursue such allegations, then elected officials would presumably pay premiums—beyond the amount necessary to compensate the plaintiff—in order to settle litigation that might otherwise cause political embarrassment.<sup>139</sup> Thus, governmental tort liability effectively enables plaintiffs to extort excessive settlements funded with tax dollars. Indeed, we have seen that to avoid just this perverse result Professor Hills defends sovereign immunity.<sup>140</sup>

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<sup>137</sup> Andrew Chung, 'O'er the Ramparts . . . Still Gallantly Streaming?', CHAMPION, Apr. 2000, at 12.

<sup>138</sup> See, e.g., Seth Mydans, *Tape of Beating Revives Charges of Racism*, N.Y. TIMES, Mar. 7, 1991, at A18; Elaine Woo, *Rev. Jackson Joins Call for Gates' Ouster, Scolds Bradley*, L.A. TIMES, Mar. 17, 1991, at B1.

<sup>139</sup> Publicity surrounding settlements can be minimized through sealed settlement agreements, which are used with increasing frequency by defendants who wish to inhibit public scrutiny of the events surrounding the litigation. See, e.g., Alan F. Blakley, *To Squeal or Not To Squeal: Ethical Obligations of Officers of the Court in Possession of Information of Public Interest*, 34 CUMB. L. REV. 65, 79–86 (2003); Laurie Kratky Doré, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 384–401 (1999); Heather Waldbeser & Heather DeGrave, *A Plaintiff's Lawyer's Dilemma: The Ethics of Entering a Confidential Settlement*, 16 GEO. J. LEG. ETHICS 815, 815–20 (2003).

<sup>140</sup> See *supra* text accompanying note 56. Christopher Serkin has offered a defense of the takings liability of local governments on the ground that local governments are largely funded by property taxes and property owners largely internalize the costs and benefits of local land-use policy. Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1644–65 (2006); see also WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 39–71 (2001) (arguing that residents internalize the costs and benefits of local-government activities because their property tax payments represent the cost of local government and the quality of local-government service is reflected in local property values). We have seen, however, that the universes of voters and property owners differ, and for all but the broadest-based public projects, only a small minority of property owners will be likely to

These responses, however, are far from the typical academic reaction to Professor Levinson's critique of governmental damages liability. It is perhaps only a slight exaggeration to say that Levinson has revolutionized academic thinking about governmental damages liability.<sup>141</sup> Most academics have been persuaded by Levinson; it has now become fashionable to warn that the consequences of imposing damages liability on government are uncertain at best.<sup>142</sup> For this reason, some scholars now advocate imposing personal liability on public employees for their torts while mandating sanctions against such employees.<sup>143</sup> Sanctioning an individual official, however, ignores the very dynamic that has led to a nearly universal regime of indemnification—if individual officials face a credible threat of serious sanctions, the risk of overdeterrence would be quite real, and the resulting decline in the effective value of public-sector compensation would produce a concomitant decline in the quality of the public workforce

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experience any perceptible change in the value of their property as a result of the taking. Thus, it is far from clear that Professor Serkin has persuasively answered Levinson, even in the limited context of local-governmental takings liability.

<sup>141</sup> Indeed, the editors of the *Georgia Law Review* found Levinson's argument so provocative that they devoted a symposium to an assessment of Levinson's article. Symposium, *Re-examining First Principles: Deterrence and Corrective Justice in Constitutional Torts*, 35 GA. L. REV. 837 (2001).

<sup>142</sup> For a survey of some of the many articles that refer to Levinson's argument and the uncertain effects of the imposition of damages liability on governments, see, for example, Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 89–90 (2003); Choper & Yoo, *supra* note 55, at 259; Reza Dibadj, *Reconceiving the Firm*, 26 CARDOZO L. REV. 1459, 1517 (2005); Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 58–59 (2005); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 956–61 (2003); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708, 721 n.43 (2006); Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13, 15–16 (2005); Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161, 192–95 (2003); Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1187–88 (2005); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1031 (2005); Evan J. Mandery, *Efficiency Considerations of Compensating the Wrongfully Convicted*, 41 CRIM. L. BULL. 287–89 (2005); John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After Chavez v. Martinez*, 39 GA. L. REV. 733, 831–35 (2005); Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1014–15 (2004); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 725–27 (2005); and Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 22–24 (2003).

<sup>143</sup> See, e.g., Dunahoe, *supra* note 142, at 71–109; Emery & Maazel, *supra* note 89, at 596–600; David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1225–26. Another potential solution is to rely on property rather than liability rules, which enforce legal rights through the issuance of injunctive relief. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Injunctive relief is unavailable, however, when the wrongful conduct at issue has ceased. See, e.g., *Renne v. Geary*, 501 U.S. 312, 320–21 (1990); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983). Thus, injunctive relief will frequently be unavailable as a remedy when the alleged misconduct is not ongoing.

unless the government offered compensation amounting to effective indemnification.<sup>144</sup> Sanctioning individual public employees is no answer to Levinson.<sup>145</sup>

When I first read Levinson's article, I was a rather senior official in municipal government in Chicago. Levinson's claim that the government responds to political and not market forces struck me as exactly right. I had long been editing out of briefs that came to me for review an argument that expansive liability of police officers or fire-fighters might cause cities to discontinue such services because of their cost. Attorneys that I supervised had encountered this kind of argument against tort liability in law school, where private-sector liability is the focus of instruction, but try as one might to adapt it to a municipal defendant, this claim simply was not credible in the public sector. Private entities might get out of a business if liability became too costly, but no politician would ever propose reducing police or fire protection in order to avoid tort liability. At the same time, Levinson's claim that governmental damages liability has indeterminate political consequences did not ring true to me. If Levinson were right, the officials within Chicago's government with whom I worked should have been indifferent to municipal damages liability. Yet, in fact, city government devoted enormous resources to trying to minimize liability. Why was that so? Why did Chicago pay for risk managers and a legal department that vigorously contested liability if, as Levinson supposed, the payment of compensation was actually an effective means of defusing political opposition?

### B. *The Politics of Governmental Damages Liability*

Precisely because government responds to political and not economic incentives, an assessment of governmental tort liability requires an inquiry into the political significance of liability.

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<sup>144</sup> See *supra* text accompanying note 91.

<sup>145</sup> In this connection, it is worth contemplating the fate of *Westfall v. Erwin*, 484 U.S. 292 (1988). In that case, the Court held that federal employees lack immunity from liability in tort even when sued for acts within the scope of employment unless their conduct is discretionary. See *id.* at 296–99. Within months, Congress responded by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, which amended the Federal Tort Claims Act (FTCA) to provide that a suit against the United States under the FTCA would provide the exclusive remedy for any plaintiff injured by the negligent or wrongful act of a federal employee. Pub. L. No. 100-694, 102 Stat. 4563 (1988); see also *United States v. Smith*, 499 U.S. 160, 165–69 (1991). This sequence of events illustrates the political dynamics that come into play when government employees face personal liability.

### 1. *A Theory of Political Behavior*

Consider the following account of political behavior as it relates to governmental damages liability: The primary objective of elected officials is to prevail in their next election, whether they are seeking reelection or some different, presumably higher office. To do this, they offer voters and other potential supporters what they believe to be an attractive mix of policies. In particular, elected officials impose taxes and allocate available resources generated by those taxes in what they regard as a politically optimal manner. They must distribute public resources in a manner that meets the demands of actual and desired supporters while keeping taxes low enough as to avoid politically offsetting opposition. In this fashion, elected officials seek to craft policies that a majority coalition will conclude have created a sufficiently high ratio of benefits to taxes paid to make success sufficiently probable in the next election. On this view, it is immaterial whether one accepts a majority-rule account of political behavior—postulating that elected officials are concerned with the views of a majority of their constituents—or a public-choice account asserting that elected officials are likely to be more responsive to those groups with particular stakes in various public-policy issues.<sup>146</sup> Under the theory advanced above, all that matters is that elected officials concern themselves with utilizing the public resources over which they have control to secure a likelihood of success in future elections.

On this view of political behavior, elected officials will be highly sensitive to tort liability. Tort liability reduces the resources available for allocation in order to produce what elected officials regard as the optimal ratio of governmental benefits to taxes. To pay judgments and other litigation expenses, officials must either raise taxes; incur debt in jurisdictions where that is permitted, which, of course, requires that additional tax revenues be diverted in future budgets to repay the debt with market-rate interest; or experience a reduction in the funds available for allocation in what elected officials regard as the politically optimal manner. All of these options impose significant political costs on incumbents. Moreover, sums paid out to judgment creditors result in particularly small political dividends since these plaintiffs likely view such sums as an entitlement rather than a politically bestowed reward likely to produce loyalty to incumbent officials. And, because there is a political incentive to maximize discretionary spending on politically favored constituencies while minimizing taxes, an elected official should be willing to make investments in loss prevention in order to reduce governmental liability costs. Indeed, the interest in maximizing political control over tax

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<sup>146</sup> See, e.g., POSNER, *supra* note 94, at § 19.3.

and spending policy is one all elected officials share, regardless of partisan affiliation or whether they exercise executive or legislative powers. Finally, this theory also predicts that there will be political pressure—from interest groups unable to obtain desired benefits when resources must be allocated to litigation and from elected officials themselves—to enact immunity legislation in order to respond to the voters' tax and spending preferences.

## 2. *Assessing the Theory*

How would one go about assessing the merits of the theory advanced above? The initial premise—that politicians are concerned about winning the next election—is perhaps uncontroversial. To be sure, the view that elected officials behave in ways that enhance their likelihood of success in the next election could be rejected by a “Profiles in Courage” model of elected officials discharging their duties without regard for electoral consequences. There is little reason to embrace such a model, however; the political equivalent of natural selection will eventually oust elected officials who ignore constituent preferences. In any event, political-science research consistently shows that reelection is one of the primary concerns of elected officials.<sup>147</sup>

The next premise—elected officials consider their power to allocate available public resources an important means of building electoral support—is perhaps more doubtful. One could argue that incumbent officials have other, more useful ways of building or maintaining political support, or that they rarely fear defeat at the next election. Incumbents, however, face one type of vulnerability not shared by challengers: as the political-science literature demonstrates, the voters have much more information about incumbents as a consequence of their records, and, as a result, the efficacy of campaign promises is reduced when they come from incumbents.<sup>148</sup> For that reason, incumbents have special incentives to utilize their control over tax and spending policy in order to offset the disadvantage of a concrete record.

Considerable empirical evidence supports this view of the importance of allocational politics to incumbents. At the local level, as Paul Peterson has observed, politicians have long been concerned with allocating resources to maximize political benefits:

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<sup>147</sup> See, e.g., RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 1–14 (1973); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 13–17 (1975).

<sup>148</sup> See, e.g., John Ferejohn, *Incumbent Performance and Electoral Control*, 50 *PUB. CHOICE* 5, 7–8 (1986).

Many political controversies fall within the allocational arena. Locational politics, which consumes much of the energy of urban politicians, usually involves the allocation of government resources to one or another part of the city. Where should a school building be sited? What should be the route of a badly needed roadway? Should a new hospital be built on parkland? The housekeeping services of government compose another set of allocational issues. What streets should be cleared first? Which sidewalks need repairing? How often is the garbage to be collected? Where should fire stations be located? What should be city policy on the enforcement of parking and traffic ordinances? Even minor tax questions are largely allocational issues with little effect on the city's long-term interests. Should needed revenue be collected through increasing water and sewer fees, by charging admission to city museums, by increasing library fines, or by slightly raising the property tax?

The allocational policies that have provoked the most enduring local conflict have related to the terms and conditions of public employment. Their centrality in local politics has often been attributed to their material and divisible qualities. Jobs can quite literally be divided into ever smaller packages and distributed to ever more specific segments of the community. Policies controlling their disposition can be almost infinitely varied from one sector of public service to another and from one rank to another within the service. Different groups can each be given their own parcel of positions, whose recruitment and promotion policies can be geared to that group's interests. The benefit, moreover, is perfectly concrete and material, a tangible good whose value can be fairly accurately calculated.<sup>149</sup>

Similarly, studies of congressional behavior consistently identify a desire on the part of members of Congress to allocate public resources to the use of "pork barrel" projects that are likely to provide particularized benefits to their constituents.<sup>150</sup> Studies of both executive and legislative behavior at the state level, while less frequent, reach the same conclusion.<sup>151</sup> Litigation costs, however, reduce the resources

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<sup>149</sup> PAUL E. PETERSON, CITY LIMITS 150–51 (1981) (internal citation omitted).

<sup>150</sup> See, e.g., JOHN A. FERREJOHN, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947–1968, at 233–52 (1974); MAYHEW, *supra* note 147, at 52–59; ROBERT M. STEIN & KENNETH N. BICKERS, PERPETUATING THE PORK BARREL: POLICY SUBSYSTEMS AND AMERICAN DEMOCRACY 118–36 (1995); Steven J. Balla et al., *Partisanship, Blame Avoidance, and the Distribution of Legislative Pork*, 46 AM. J. POL. SCI. 515 (2002); Frances E. Lee, *Senate Representation and Coalition Building in Distributive Politics*, 94 AM. POL. SCI. REV. 59 (2000); Matthew D. McCubbins & Terry Sullivan, *Constituency Influences on Legislative Policy Choice*, 18 QUALITY & QUANTITY 299 (1984); Robert M. Stein & Kenneth N. Bickers, *Congressional Elections and the Pork Barrel*, 56 J. POL. 377 (1994); Barry R. Weingast et al., *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642 (1981); Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245 (1979). For an interesting demonstration of the efficacy of this type of allocative politics, see Steven D. Levitt & James M. Snyder, Jr., *The Impact of Federal Spending on House Election Outcomes*, 105 J. POL. ECON. 30 (1997).

<sup>151</sup> See, e.g., ALAN ROSENTHAL, GOVERNORS AND LEGISLATURES: CONTENDING POWERS 133–35, 158–60 (1990); Charles S. Bullock, III, & M.V. Hood, III, *When Southern Symbolism Meets the Pork Barrel: Opportunity for Executive Leadership*, 86 SOC. SCI. Q. 69, 78–83 (2005).

available to elected officials available for allocational politics. For that reason, elected officials have reason to be sensitive to those costs.

Even granting the concern of elected officials with maximizing the resources available for allocational politics, objections remain to the theory of political behavior advanced above. For example, it is reasonable to believe that the time frame of concern to politicians is the next electoral cycle and that their political judgments are therefore made with only that time frame in mind.<sup>152</sup> For that reason, elected officials might ignore litigation costs or liability exposure, believing that they have no real ability to reduce them quickly enough to affect the current electoral cycle. Still, there is reason for skepticism about this view of the time horizons of public officials—most politicians likely plan long careers in public service and will pay a political price if they are still in office when tort judgments must be paid.<sup>153</sup>

One might also argue that litigation costs are not a sufficiently significant proportion of government budgets to be of concern to elected officials. It is difficult to assess this objection, since it is notoriously difficult to obtain information from governments about litigation-related costs, although anecdotal evidence suggests that governmental tort litigation generates substantial budgetary outlays.<sup>154</sup> For example, between 1994 and 1996, New York City paid some seventy million dollars to plaintiffs in police misconduct litigation.<sup>155</sup> The City of Los Angeles was required to expend the same amount to settle police misconduct litigation stemming from corruption in a single antigang unit.<sup>156</sup> And a U.S. Department of Justice task force concluded that in the early 1980s municipalities had experienced significant financial difficulties as a result of rapidly escalating tort liability costs.<sup>157</sup> At the federal level, Harold Krent has estimated that discretionary-function immunity saves the government several billion dol-

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<sup>152</sup> See, e.g., James M. Buchanan & Dwight R. Lee, *Tax Rates and Tax Revenues in Political Equilibrium: Some Simple Analytics*, 20 ECON. INQUIRY 344, 345–50 (1982).

<sup>153</sup> Moreover, time horizons may not be all that different in the public and private sectors. There is increasing concern that the emphasis on short-term profits and stock prices in the private sector has incited management to be less than fully sensitive to threats to the long-term financial health of the firm. See, e.g., Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1245–48 (2002); David Millon, *Why Is Corporate Management Obsessed With Quarterly Earnings and What Should Be Done About It?*, 70 GEO. WASH. L. REV. 890, 892–900 (2002); Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263, 1283–94 (1992).

<sup>154</sup> See, e.g., Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 766–74 (2004).

<sup>155</sup> Emery & Maazel, *supra* note 89, at 590 (citation omitted).

<sup>156</sup> John M. Broder, *Los Angeles Paying Victims \$70 Million for Police Graft*, N.Y. TIMES, Apr. 1, 2005, at A20.

<sup>157</sup> See U.S. DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AFFORDABILITY AND AVAILABILITY 8–9 (1986).

lars per year.<sup>158</sup> Even that estimate may be low. In *United States v. Gaubert*,<sup>159</sup> for example, the Court held that discretionary immunity barred a hundred-million-dollar claim representing the loss of a single investor allegedly caused by federal negligence in supervising a single federally regulated bank.<sup>160</sup> Had there been no immunity, the budgetary impact of liability for negligent supervision of federally regulated banks could have been enormous.<sup>161</sup> But reliable statistics are difficult to find; in particular, it is difficult to know how much the government saves because of the cases that are never filed as a consequence of immunity.<sup>162</sup> And it is also difficult to evaluate the political magnitude of these expenditures since their political significance depends on a comparison to the portion of government budgets that are available for discretionary distribution after fixed costs not subject to effective political control are disregarded—a calculation that is difficult if not impossible to make.

But even if elected officials perceived litigation-related costs as politically significant, one could still object that elected officials may have little ability to understand or control litigation costs. Although most liability-creating events are the result of the actions of relatively low-level officials, civil-service protections and a variety of other arrangements insulate the bureaucracy from political control, leaving elected officials with limited authority over bureaucratic behavior.<sup>163</sup> This may mean that elected officials view litigation expenses as essentially a fixed cost over which they have no control. Moreover, senior bureaucrats have an incentive to conceal problems within their areas of responsibility from elected officials.<sup>164</sup> Still, elected officials must ultimately appropriate sufficient funds to pay for litigation expenses, so there is reason to believe that elected officials at least have some knowledge of litigation costs.<sup>165</sup>

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<sup>158</sup> Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort*, 38 UCLA L. REV. 871, 871 (1991).

<sup>159</sup> 499 U.S. 315 (1991).

<sup>160</sup> *Id.* at 319–20.

<sup>161</sup> See Barry R. Goldman, Note, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 GA. L. REV. 837, 851–52 (1992).

<sup>162</sup> It is worth noting, however, that some observers have argued that Washington, the only state without government-tort immunity, has experienced serious financial consequences as a result of litigation costs. Tardif & McKenna, *supra* note 27, at 44–53.

<sup>163</sup> See SCHUCK, *supra* note 106, at 60–66. See generally GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* 157–77 (1965); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 263 (1974).

<sup>164</sup> See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 138–54 (1971).

<sup>165</sup> Bureaucratic insulation from political control is likely to be reduced when elected officials have a low-cost means of monitoring bureaucratic conduct. See generally Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 AM. J. POL. SCI. 509 (1992) (detailing the informational advantage bureaucrats possess over politicians and how

The existence of term limits that prevent incumbents from seeking reelection in some jurisdictions might also be expected to reduce the concern of elected officials with the allocation of public resources in order to enhance future electoral prospects, although the effect of term limits is far from clear. Even officials barred from seeking reelection may wish to use public resources to build support for election to another office or for a designated successor; party leadership may also seek to use pork-barrel policies in an effort to win or retain an office that the incumbent must vacate as a result of term limits; and by increasing the number of newly elected officials who may feel especially vulnerable at the next election, term limits may actually increase the number of incumbents particularly concerned about distributional politics.<sup>166</sup>

A final objection to the theory advanced above comes from Professor Levinson himself. We have seen that he believes that elected officials actually welcome tort liability as a means for deflecting opposition to their policies.<sup>167</sup> If that is right, then governmental damages liability actually yields political benefits.

Thus, in the absence of persuasive empirical evidence, it is fairly debatable whether the theory of political behavior advanced above has merit. Having observed municipal government at close range for many years, I will confess that it has always been obvious to me that elected officials would always prefer to control the disposition of public funds rather than yield control to judges and juries, if for no other reason than to be able to take credit when funds are paid out—even when paid as compensation to those injured by governmental conduct. But surely this debate should be resolved on the basis of something other than my own anecdotal experiences. There is, however, empirical evidence available to test the reaction of elected officials to the threat of tort liability—the existence of tort immunity legislation.

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politicians seek to mitigate such an advantage in their design of agencies). The fact that bureaucrats must ask the legislature for an annual appropriation to pay judgments gives elected officials a ready means of monitoring bureaucratic risk management, and therefore suggests that political control over litigation costs is relatively high.

<sup>166</sup> For a discussion of the complicated effect of term limits on distributional politics, see Dan Bernhardt et al., *Term Limits and Pork Barrel Politics*, 88 J. PUB. ECON. 2383 (2004). For a discussion of how, for politicians, removal of the reelection preference elevates the relative importance of wielding power, setting policy, and reaping benefits from special interests, see Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623 (1996). For empirical evidence that term limits actually increase electoral competition by reducing the number of entrenched incumbents, see Kermit Daniel & John R. Lott, Jr., *Term Limits and Electoral Competitiveness: Evidence from California's State Legislative Races*, 90 PUB. CHOICE 165 (1997).

<sup>167</sup> See *supra* text accompanying note 120.

### 3. *Immunity Legislation as Empirical Evidence in Support of the Theory*

We have seen that statutory tort immunity is ubiquitous; the federal government and forty-nine states have legislation offering governmental defendants substantial protection from tort liability.<sup>168</sup> Enacting such legislation, however, is not politically costless; it is reasonable to expect political opposition to tort immunity. From the standpoint of the economic interests of the typical voter, tort-immunity legislation is a wash, since whatever risk of uncompensated loss an individual voter is likely to run should be roughly equal to the additional taxes that the voter must pay to finance government litigation costs. But voters might be expected to oppose tort immunity on the basis of the widely held belief that people who are wrongfully injured should be entitled to recover fair compensation from the wrongdoer, a point that corrective justice theorists argue reflects a deeply held moral intuition.<sup>169</sup>

Public-choice theory predicts that the problems of collective action, present when the stakes for each individual are relatively small, mean that the holders of particularly large economic interests in policy questions will play a disproportionate role in the political process.<sup>170</sup> This view suggests that interest groups with a substantial financial interest in pressing tort liability will be a particularly important source of political opposition to immunity. Indeed, the plaintiffs' bar acts as a potent lobby opposing legislation restricting tort liability.<sup>171</sup> On governmental immunity issues, it could form alliances with any number of interest groups that have a financial interest in governmental liability, such as trucking firms that experience losses when public roads are not well designed or maintained, or businesses that experience losses when negligent or otherwise unlawful governmental licensing or other regulatory decisions curtail their operations.<sup>172</sup>

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<sup>168</sup> See *supra* text accompanying notes 21–52.

<sup>169</sup> See *supra* text accompanying note 103.

<sup>170</sup> For a sampling of the leading public choice literature on this point, see, for example, MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 111–67 (1965); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987); and George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

<sup>171</sup> See, e.g., Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 827 (1994).

<sup>172</sup> Opposition to governmental-immunity legislation, among other things, would also reflect the demoralization costs likely to ensue if residents of a jurisdiction are required to run the risk that they will suffer an injury at the hands of the government, or a government official for which they can receive no compensation. The concept of demoralization costs was first advanced by Professor Michelman as one of the justifications for the prohibition on uncompensated takings, Michelman, *supra* note 99, at 1214–18, but it has application to governmental tort immunity as well, *id.* at 1169 n.5.

And on particular liability issues, any number of lobbies are likely to press for governmental liability, such as community organizations concerned about police brutality, domestic-violence victims' advocates concerned about police indifference to this issue, bicyclists' advocates concerned about improving the design and maintenance of bike paths, patients' rights groups concerned about the quality of service provided by public ambulances and hospitals, and so on.

In contrast, other than the government itself, it is difficult to identify a lobby that should favor governmental tort immunity. The insurance industry might ordinarily be expected to advocate immunity, but governmental immunity works against insurance interests by limiting the ability of insurance companies to seek recovery from the government when its wrongful acts cause insured losses to policyholders whose rights the insurers can assert through subrogation or similar arrangements.<sup>173</sup> Taxpayers' advocates and public-employee unions might have some interest in this issue, but they would be far more likely to pursue their interests directly—by lobbying for tax cuts or indemnity, respectively—rather than deploying their limited resources and political capital on an issue that only indirectly affects their core interests. I know of no evidence that these groups—or any other organized lobby aside from those controlled by elected officials—have ever taken a position on governmental tort-immunity legislation. Indeed, when I was in municipal government, we frequently tried to interest these groups in lobbying on governmental tort immunity issues; we never succeeded. But even if these groups were thought to be vigorous proponents of immunity legislation, that point would only strengthen the theory of political behavior advanced above. After all, to the extent that tort liability increases tax burdens—thereby activating the taxpayers' lobby—or reduces the government's ability to provide its employees with their desired compensation—thereby activating public-employee unions—then tort liability imposes a political price on elected officials.

In short, the ubiquity of governmental tort immunity legislation itself suggests that tort immunity confers political benefits on incumbents. It therefore follows that tort liability exacts a political price. For this reason, the claim that tort liability cannot be expected to produce governmental investments in loss prevention should not persuade.

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<sup>173</sup> Such arrangements are common in the insurance industry as a vehicle by which insurance companies are able to sue those responsible for insured losses. See, e.g., Jeffrey A. Greenblatt, *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?*, 64 U. CHI. L. REV. 1337, 1339–42 (1997).

#### 4. Corroborative Evidence for the Theory

Thus, government-immunity statutes powerfully suggest that elected officials are sensitive to tort liability. But additional evidence can also be mustered in support of this conclusion. Consider the aftermath of *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.<sup>174</sup> In that case, the Supreme Court held that federal legislation subjecting states to damages liability for patent infringement violated the Eleventh Amendment's prohibition on damages actions against nonconsenting states.<sup>175</sup> Given the strength of the patent lobby and its interest in this issue as evinced by its ability to obtain federal legislation that imposed liability on the states (but, significantly, without a corresponding waiver of federal sovereign immunity),<sup>176</sup> the patent lobby should have been able to secure state legislation granting patentees the right to seek damages for patent infringement. Yet such legislation has not been forthcoming.<sup>177</sup> It is difficult to understand this apparent lobbying failure unless state legislatures and governors perceive a cost to state patent infringement liability that was not apparent to Congress, which saw no obstacle to refusing the entreaties of the patent lobby when federal revenues were not at risk.

The history of government-immunity legislation provides additional support for the theory advanced above. Prior to the enactment of the FTCA, there was a long history of Congress granting legislative relief to victims of federal torts until it found itself overwhelmed by the volume of requests for legislative relief.<sup>178</sup> That is itself a fairly clear indication of the political momentum behind compensation. Even since the FTCA, this political dynamic has asserted itself; after the Supreme Court, in *Dalehite v. United States*,<sup>179</sup> held that the United States enjoyed discretionary immunity from liability for an explosion and fire,<sup>180</sup> Congress nevertheless felt compelled to enact the Texas City Disaster Relief Act, which authorized compensation while mitigating budgetary impact by capping permissible recovery at \$25,000 per claimant.<sup>181</sup> This history suggests that there is political potency to

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<sup>174</sup> 527 U.S. 627 (1999).

<sup>175</sup> *Id.* at 635–48.

<sup>176</sup> See 35 U.S.C. § 271(h) (2000 & Supp. III 2003).

<sup>177</sup> See, e.g., Jason Karasik, Note, *Leveling the IP Playing Field: Conditional Waiver Theory and the Intellectual Property Protection Restoration Act*, 27 HASTINGS COMM. & ENT. L.J. 475, 498 (2005).

<sup>178</sup> See, e.g., Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 682–84 (1985).

<sup>179</sup> 346 U.S. 15 (1953).

<sup>180</sup> *Id.* at 26–32.

<sup>181</sup> Ch. 864, § 5(a), 69 Stat. 707, 708 (1955), amended by 1959 Amendment to the Texas City Disaster Relief Act, Pub. L. No. 86-381, 73 Stat. 706 (providing additional relief). The statute also did not compensate losses that had been indemnified by insurance, § 6(c), and limited

the demand that compensation be provided to the victims of governmental torts. There must be some offsetting political benefit to explain why elected officials enact immunity statutes that deny their constituents compensation.

Evidence that tort liability exacts a political price by reducing political control over public resources is also reflected in the pattern of immunity legislation. If the relevant political calculus was a product solely of the strength of the various lobbies pressing their position on a legislature, then one would expect the pattern of statutory immunity to reflect the strength of the various lobbies.<sup>182</sup> Some of that is going on in immunity legislation; the statutes that immunize governments from paying damages to prisoners, for example, seem to reflect a legislative loss by a disfavored group lacking political influence. But the most common categorical immunity, for discretionary decisions, is aimed at no particular class of plaintiffs, but instead is directly aimed at protecting the political prerogative to set policy.<sup>183</sup> The same is true of the even more common caps on damages recoverable from governmental defendants.<sup>184</sup> This pattern suggests that the interest in maintaining control over public resources drives the enactment of immunity legislation rather than the relative strength of competing lobbies.

But perhaps all this is beside the point. The existence of immunity legislation is itself the strongest evidence for the conclusion that elected officials are highly sensitive to governmental damages liability. If, as predicted by Levinson, elected officials were indifferent to liability, they would not bother to enact immunity legislation. Even Congress, armed with the resources of the massive federal budget, has been unwilling to subject the federal government to unlimited tort liability. The prevalence of immunity legislation powerfully suggests that tort immunity confers a political advantage. It follows that tort liability itself must impose some correlative political cost such that elected officials perceive a political advantage in the enactment of immunity legislation.

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permissible attorney's fees, § 11. The federal government ultimately paid \$17.1 million in claims on total losses estimated from \$300 million to several billion dollars. COMM'N ON GOV'T PROCUREMENT, 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 99 (1972).

<sup>182</sup> This is the view of the legislative process ordinarily taken by public-choice theorists, for example, who see political decision-making as a consequence of the interaction of the lobbies with particularly significant stakes in various policy issues. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12–21 (1991).

<sup>183</sup> See Krent, *supra* note 57, at 1545–51; Niles, *supra* note 53, at 1301–05.

<sup>184</sup> See *supra* note 49.

*C. The Impact of Governmental Tort Liability*

Thus, Professor Levinson is wrong to believe that governmental liability has only indeterminate effects. Whatever its defects from the standpoint of corrective justice, governmental tort liability has an instrumental justification; it creates an incentive on the part of officeholders to allocate resources to loss prevention. There should be a clear political incentive to invest in loss prevention at least when the cost of avoiding an injury is small, the likelihood of injury is great, and the impact on the government's budget is likely to be large. Similarly, the Takings Clause's compensation requirement functions as a political restraint on the use of the power of eminent domain. Government will not take property unless the political benefits of the taking exceed the political cost of compensation.

But under the view of political behavior advanced here, Professor Levinson was right to claim that governmental tort liability has no efficiency justification comparable to the role of tort liability in the private sector. In the private sector, tort liability creates an incentive to invest in loss prevention in order to avoid an expected greater liability, discounted to present value. If elected officials were concerned only with maximizing the public resources available to be allocated consistent with their own political preferences, then public officials would be subject to the same incentive. But surely Levinson is right that voters do not use any firm value equivalent for judging the operation of government, and whenever the government chooses to invest in loss prevention, it will experience a political opportunity cost associated with the political benefits that some alternative use of funds would have yielded. Therefore, there is always a political cost to making investments in safety; some other use of the funds, and its attendant political benefits, must be foregone, unless taxes are raised or, if possible, additional debt is incurred, and those options carry political costs as well. If, for example, elected officials invest greater funds in the internal-affairs division of the police department in order to reduce police-related liability, they will have less money available to hire additional officers, unless they are willing to raise taxes and therefore incur an additional set of political costs. Accordingly, there will be substantial political opportunity costs when elected officials forego the opportunity to put more police on the streets, even when they do so for the sake of risk management. The political opportunity cost of spending additional funds on internal affairs may well be perceived to be higher than the political cost of failing to reduce future police-related liability; without knowing a great many things about the political facts on the ground, it is impossible to make confident predictions on this score.

Even aside from political opportunity costs, liability-producing conduct may have political benefits that offset the deterrent effect of

liability. To use Professor Levinson's example, a program of aggressive stop-and-frisk of young males in high-crime areas may increase liability, but it also may pay such handsome political benefits that liability will have no deterrent effect.<sup>185</sup> We can expect deterrence only when the political cost of losing control over litigation-related costs outweighs the political benefits of the program, and that calculation is necessarily indeterminate. Similarly, we can expect exercise of eminent-domain powers as long as the political opportunity costs of paying just compensation do not exceed the political benefits of the condemnation. There is, however, no ready way to monetize political costs and benefits. Thus, governmental tort liability cannot guarantee an "efficient" level of torts, constitutional torts, or takings.

This observation is not meant to be an argument against governmental damages liability. The political costs attendant to governmental liability will operate as a political restraint on governmental torts and takings that exceeds that present in a nonliability regime. At the same time, there is little reason to believe that the government will overinvest in loss prevention, or underinvest in eminent domain. Tort liability gives elected officials an incentive to make only those investments that will likely produce even greater cost savings through reduced liability, but no more. There is little reason to believe that elected officials will reduce their own pool of funds available for politically optimal use by overspending on loss prevention; the political benefits of those investments are speculative, and most of them will likely be realized at some uncertain point in the future, which may well be beyond the next electoral cycle.<sup>186</sup> As for takings, as long as the political benefits of a taking exceed the political costs of compensation, condemnation will occur, and the most socially desirable condemnations are likely to pay the greatest political benefits. Thus, a regime of governmental liability is likely to fail to achieve the level of efficiency thought possible in the private sector, but it will lead to greater investment in loss prevention than will a nonliability regime, without creating any significant risk of overdeterrence.

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<sup>185</sup> See *supra* text accompanying notes 114–15.

<sup>186</sup> Indeed, there is reason to believe that, because of the difficulty in estimating potential tort liability *ex ante*, tort liability generally produces suboptimal investments in safety even in the private sector. See, e.g., John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 V. L. REV. 965, 976–84 (1984); Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185, 2191–98 (1999). This is not to say that government never overinvests in loss prevention. There is increasing evidence that individuals tend to be overly concerned with certain types of relatively small risks. See generally Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685–89 (1999); Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 747–48 (1990). When elected officials respond to these concerns by overinvesting in loss prevention, however, they are responding to political pressure and not the threat of tort liability.

## III. ASSESSING GOVERNMENTAL LIABILITY

Parts I and II endeavor to describe the contours and operation of governmental tort liability. It remains to offer an assessment of a regime of governmental damages liability.

We have seen that governmental tort liability can be expected to encourage elected officials to invest in loss prevention with little likelihood of overdeterrence. That may tempt one to favor governmental liability as a means of reducing welfare losses caused by governmental conduct. Indeed, the law reviews are full of proposals for damages claims that can be brought against the government to reduce the incidence of asserted welfare losses that are either attributable to government or avoidable through greater governmental investment in loss prevention. Recent proposals would require the government to pay damages to pretrial detainees who are ultimately acquitted,<sup>187</sup> those whom the police fail to protect from mob violence,<sup>188</sup> students who are the victims of pregnancy discrimination<sup>189</sup> or obesity harassment,<sup>190</sup> victims of racial profiling,<sup>191</sup> and those who are wrongfully convicted.<sup>192</sup> Scholars have also advocated the abolition of qualified immunity on the grounds that it too often leaves constitutional violations unremedied,<sup>193</sup> the abolition of absolute prosecutorial immunity for the same reason,<sup>194</sup> imposing vicarious liability on municipalities for the constitutional torts of their employees,<sup>195</sup> and permitting awards of presumed and punitive damages

<sup>187</sup> See Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947 (2005).

<sup>188</sup> See Susan S. Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence*, 79 IND. L.J. 177 (2004).

<sup>189</sup> See David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217 (2005).

<sup>190</sup> See Jessica Meyer, *Obesity Harassment in School: Simply "Teasing" Our Way to Unfettered Obesity Discrimination and Stripping Away the Right to Education*, 23 LAW & INEQ. 429 (2005).

<sup>191</sup> See David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001).

<sup>192</sup> See Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35; Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 NOTRE DAME L. REV. 1259 (2005).

<sup>193</sup> See, e.g., Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091, 1101–10; Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 307–33 (1995); Pillard, *supra* note 89, at 91–103; Daniel L. Rotenberg, *Private Remedies for Constitutional Wrongs—A Matter of Perspective, Priority, and Process*, 14 HASTINGS CONST. L.Q. 77, 90 (1986); Rudovsky, *supra* note 143, at 1217–26; Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 257–76 (1986).

<sup>194</sup> See Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53.

<sup>195</sup> See, e.g., SHUCK, *supra* note 106, at 82–121; Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627 (1999); Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 669–88; Kramer & Sykes, *supra* note 111, at 272–96; Harold S. Lewis, Jr., & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 825–48 (1992); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 1000–07 (1989).

against municipalities in order to maximize the deterrent effect of civil liability.<sup>196</sup> Each of these proposals requires the government to assume costs in order to avoid losses experienced by others; consequently, they all have a negative impact on government budgets, regardless of the externalized benefits they may produce—unless one can make the rather implausible claim that these proposals would be so popular that the voters would tolerate an increase in taxes to fund the new expenditures that they necessitate. Yet one cannot find in any of the proposals for new governmental liability any consideration of the consequences that new liabilities will have on government budgeting, or on those who depend on government budgets for the variety of social goods allocated through that process.

In fact, governmental liability has important effects on government budgeting that are likely to be concentrated among the most disadvantaged in society. Gerald Frug once remarked on this phenomenon when considering court-ordered remedial plans for public institutions thought to be performing below constitutional standards:

Because government resources are limited and because some commitments of those resources cannot be reduced due to contract or other obligations, the impact of a court's decision falls on a relatively few budget items. The court is in fact allocating the budget away from those items, probably without even knowing what they are. The court's allocation decision is simply that every element of the court decree take precedence over every other competing element in the budget, whatever they may be. The legislature retains no say at all about the comparative value of the item lost to the item required by the court. Thus the value of legislative decisionmaking on budget allocation is undermined, to a greater or lesser degree, depending on the size of the court's demands and the amount of money available.

Some have argued that such judicial intervention in the budget process in favor of prisoners and the mentally ill can be justified because those groups are left out of the normal political decisionmaking processes. Indeed they often are. But the scarce resources allocated by government are largely allocated to people indistinguishable from those affected by the court orders. The mentally ill involuntarily committed to an institution may receive additional services under court order at the expense of those voluntarily committed to the same institution, or those not committed but using outpatient facilities at public hospitals or mental health centers. Prisoners may receive better medical care at the expense of a parolee who seeks it at a public hospital, or they may receive training or addiction services at the expense of the public at large who need identical services. Many beneficiaries of court orders are not entitled to vote, but neither are the children whose access to education, libraries, or welfare benefits might be curtailed to pay for the court order.

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<sup>196</sup> See Rudovsky, *supra* note 143, at 1225.

The allocation of scarce resources by court order is not likely to be fortunate to the powerless; it is already the powerless to whom the state largely directs its resources.<sup>197</sup>

Professor Frug's point has even more force when applied to damages awards against the government—damages awards drain the public treasury in an even more direct fashion than compliance with injunctive decrees. What is more, it is far from clear that social welfare is enhanced by a regime of governmental tort liability. If one assumes that the public's willingness to pay taxes is essentially fixed at any given time, then diverting limited revenues from public uses that may produce greater social welfare gains—infrastructure, education, health care, police, and the host of other welfare-enhancing services that government provides—to the payment of judgments and other litigation expenses could well harm social welfare. After all, the existence of political accountability creates incentives on the part of elected officials to spend public funds in ways that produce relatively broad benefits that will yield a winning coalition at the next election—an incentive that tort plaintiffs and their lawyers lack. Thus, even if one is willing to ignore the distinction between insurance and tort and advocate governmental liability merely on grounds of loss-spreading, it is far from clear that social welfare will be advanced if government resources must be diverted from other uses to what is essentially the provision of publicly funded tort (or takings) insurance, which, of course, can otherwise be purchased in a private market by those concerned about the risk of uncompensated loss.

Finally, and relatedly, governmental tort liability also has a significant impact on two especially large groups of third parties—the taxpayers and the public at large. We have seen that the taxpayers lack meaningful culpability for the tortious conduct of government and are not similarly situated to the owners of a private-sector entity who must shoulder the costs of liability, yet the financial consequences of governmental liability are borne by the taxpayers nevertheless. Moreover, whenever a judge or jury unilaterally directs a commitment of government resources to a particular plaintiff, requiring the imposition of additional taxes or a reordering of budgetary priorities, republican values are compromised. These budgetary effects can have dramatic impacts on those who are dependent on government

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<sup>197</sup> Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 741–42 (1978) (footnotes omitted). As far as I am aware, the rich literature on institutional reform litigation contains no answer to Professor Frug on this point. For a sampling of the literature and its explication of what are seen as the virtues of judicial management of public institutions, see generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); and Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983).

services. After all, government is subject to an array of responsibilities unknown in the private sector. While a private party can reasonably be expected to make all cost-justified investments in safety, private tortfeasors are generally under no duty to protect the public at large from threats not of their own creation.<sup>198</sup> Government, however, has a politically enforceable obligation to protect the public from all threats to its safety and welfare. Accordingly, government faces infinitely more difficult resources-allocation decisions than those confronting the private sector. When a judge or jury exercises control over the allocation of public resources, the consequences may be far more dramatic than in the private sector if the ability of the government to meet the social, economic, security, and other threats the public expects it to confront is compromised by the burden of litigation costs.

Thus, governmental damages liability is problematic, to say the least. With that preface, the various species of governmental liability merit separate consideration.

#### A. Common-Law Torts

##### 1. *The Marginal Utility of Governmental Liability*

We have seen that governmental tort liability can be expected to produce greater governmental investment in loss prevention than a nonliability regime. There is reason to doubt, however, that the marginal gain in loss prevention will be significant.

Aside from the system of tort liability, there is another means for holding the government accountable when it fails to make sufficient efforts to prevent losses fairly attributable to its own activities—the next election. When the government fails to invest sufficient resources in the maintenance of its streets, for example, the issue can arise in the next political campaign regardless of whether vehicle owners are able to bring tort actions to recover damages caused by potholes. Indeed, the political potency of this issue may well be greater if the vehicle owners' losses have gone uncompensated. The existence of such political accountability in government calls into question any regime of common-law tort liability. Further, at least at the local level, there is an especially stringent form of political accountability at work. Because at least some businesses and individuals are able to opt out of the local political process by moving to a different location, and because new businesses and residents are always free to select their desired location, local governments are effectively

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<sup>198</sup> See RESTATEMENT (SECOND) OF TORTS §§ 314–15 (1965).

competing with each other for desirable residents and businesses that can assist in local development.<sup>199</sup> Considerable empirical evidence confirms that local governments compete to provide residents and businesses with a high ratio of services to taxes as a result of these competitive pressures.<sup>200</sup> It follows that, even absent governmental tort liability, if a local government failed to make adequate investments in loss prevention, driving up local insurance rates and increasing the risk of uncompensated loss, then residents and businesses will locate elsewhere, undermining the local tax base and economy. This dynamic creates powerful political incentives to invest in loss prevention that do not depend on the threat of tort liability. Indeed, there is some reason to believe that, even among the states, interjurisdictional competition operates in this same fashion, albeit to a lesser extent.<sup>201</sup>

Accordingly, political accountability gives elected officials an incentive to protect the public's safety—their political vulnerability in such circumstances can be at least as important as the threat of damages liability. To make the point concrete, consider once again *Dalehite*. That case was one of some three hundred arising from the explosion and fire at an ammonium nitrate facility at Texas City, Texas, on April 16 and 17, 1947, seeking in total some \$300 million in damages.<sup>202</sup> As part of a federal program in which facilities that formerly were used to make explosives were converted to the production of fertilizer for occupied Japan, nearly three-thousand tons of ammonium nitrate-based fertilizer were shipped to a warehouse in Texas City and loaded onto two ships.<sup>203</sup> One of the ships caught fire, both exploded, and “much of the city was leveled . . . .”<sup>204</sup> Justice Jackson recounted the fallout from the disaster:

More than 560 persons perished in this holocaust, and some 3,000 were injured. The entire dock area of a thriving port was leveled and property damage ran into the millions of dollars.

This was a man-made disaster; it was in no sense an “act of God.” The fertilizer had been manufactured in government-owned plants at the Government's order and to its specifications. It was being shipped at its direction as part of its program of foreign aid. The disaster was caused by forces set in motion by the Government, completely controlled or

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<sup>199</sup> See, e.g., NISKANEN, *supra* note 164, at 155; PETERSON, *supra* note 149, at 17–38, 71–77; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

<sup>200</sup> See WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 254–69 (1995); Vicki Been, “Exit” as a Constraint on Land Use Exactions: *Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 512–28 (1991).

<sup>201</sup> See Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 5 (1995).

<sup>202</sup> *Dalehite v. United States*, 346 U.S. 15, 17 (1953).

<sup>203</sup> *Id.* at 18–23.

<sup>204</sup> *Id.* at 23.

controllable by it. Its causative factors were far beyond the control or knowledge of the victims; they were not only incapable of contributing to it, but could not even take shelter or flight from it.<sup>205</sup>

The majority concluded that the allegations that the government negligently planned and executed the shipment of unstable fertilizer were barred by the FTCA's immunity for discretionary judgments.<sup>206</sup> In dissent, Justice Jackson argued that the government officials running the program should have foreseen that the fertilizer was unstable and posed an unreasonable threat to the public.<sup>207</sup> Justice Jackson's dissent makes a powerful argument that government officials had recklessly endangered the public—an argument with enormous political potency, whatever its legal merit. Indeed, we have seen that Congress eventually provided statutory compensation for the victims of the Texas City disaster, albeit at a level with less budgetary impact than an award of complete consequential damages.<sup>208</sup> As the events surrounding *Dalehite* illustrate, political forces come powerfully into play when the government endangers the public's safety, even when there is immunity from liability.

Consider another example of more recent vintage. It has been reported that the failures in New Orleans' levee system caused by Hurricane Katrina were the result of easily foreseeable and readily repairable faults in levee construction and maintenance.<sup>209</sup> That may make out a classic case of negligence,<sup>210</sup> but surely no one could think that such a damages action would be necessary to hold public officials accountable for their failure to maintain the levee system properly.<sup>211</sup>

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<sup>205</sup> *Id.* at 48 (Jackson, J., dissenting).

<sup>206</sup> *Id.* at 35–43 (majority opinion).

<sup>207</sup> *Id.* at 50–53 (Jackson, J., dissenting).

<sup>208</sup> See *supra* text accompanying note 181. The legislative history suggests that the primary motive for the relief act was a congressional acknowledgement that the Texas City disaster had been the consequence of government negligence. See H.R. Rep. No. 83-1386, at 32–33 (1954); S. Rep. No. 83-2363, at 3 (1954).

<sup>209</sup> See Bob Marshall, *Doomed to Failure: State Report Says Bad Design Led to 17th Street Canal Breach*, TIMES-PICAYUNE (New Orleans, La.), Nov. 30, 2005, at A-1; John Schwartz, *Army Builders Accept Blame over Flooding*, N.Y. TIMES, June 2, 2006, at A1; John Schwartz, *New Study of Levees Faults Design and Construction*, N.Y. TIMES, May 22, 2006, at A19; Bill Walsh, *Corps Chief Admits to Design Failure*, TIMES-PICAYUNE (New Orleans, La.), Apr. 6, 2006, at A-1.

<sup>210</sup> See Bruce Egger, *Lawyer: Sue Feds on Levee; N.O. Council Responds Eagerly*, TIMES-PICAYUNE (New Orleans, La.), Dec. 2, 2005, at B-1. It appears, however, that the federal government enjoys statutory immunity from liability for water damage caused by levee failures. See 33 U.S.C. § 702c (2000) (“No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . . .”); see also *United States v. James*, 478 U.S. 597, 608 (1986) (“Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from ‘any’ liability associated with flood control.”), *overruled on other grounds by* *Cent. Green Co. v. United States*, 531 U.S. 425 (2001).

<sup>211</sup> The flooding in New Orleans after Hurricane Katrina has provoked a flurry of accusations in an effort to hold those thought to be responsible politically accountable. See, e.g., Frank Donze, *Sea of Levee Board Records Sought: Senate Probe Wants Lengthy Paper Trail*, TIMES-PICAYUNE

Any instance of government bungling that compromises the public's safety is likely to have potent political consequences.

## 2. *The Difficulty of Adjudicating Governmental Liability*

Then there is the problematic nature of adjudicating governmental liability in tort, as Louis Jaffe observed decades ago:

We can assume the hypothesis of a governmental decision which creates a risk that could be considered either unnecessary to achieve the end in view or avoidable by an expenditure deemed reasonable. The difficulties of evaluating such a decision in terms of negligence are notorious. The decision will have rested in part on a technical judgment as to the size of the risk and the need to incur it; in part on a political judgment as to who should bear the indirect costs. A judge or a jury is not well equipped either to make such determinations initially or to review them.<sup>212</sup>

For these reasons, Professor Jaffe defended immunity for discretionary decisions, "if only because, as we have noted, a court cannot undertake to determine whether complex government decisions are 'reasonable.'"<sup>213</sup> Indeed, this is the standard account of discretionary immunity.<sup>214</sup> But Professor Jaffe understated the problem; only in rare tort actions is an evaluation of the manner in which the government has chosen to allocate scarce public resources unnecessary. Take as prosaic an example as the repair of potholes.<sup>215</sup> State and local governments must decide how much money they will allocate to

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(New Orleans, La.), Nov. 30, 2005, at A-1; James Gill, Op-Ed, *Help! Corps Back to the Drawing Board*, TIMES-PICAYUNE (New Orleans, La.), Nov. 9, 2005, at B-7; Jeffrey Meitrodt, *Doubts on Levees Cloud Conference: 40-Mile Fix May Leave Rest of System at Risk*, TIMES-PICAYUNE (New Orleans, La.), Nov. 11, 2005, at A-1; Mark Shleifstein, *Levee Team Runs into Wall: It Reports No Access To Key Records*, Staff, TIMES-PICAYUNE (New Orleans, La.), Oct. 26, 2005, at A-1.

<sup>212</sup> Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 235 (1963).

<sup>213</sup> *Id.* at 237.

<sup>214</sup> See, e.g., *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 813–14 (1984). Considerations of this nature also underlie what many jurisdictions have dubbed the public-duty doctrine, which provides that the government does not have a duty in tort to provide government services, although the doctrine provides no defense to what is thought to be affirmative governmental negligence or misconduct. See DAN B. DOBBS, *THE LAW OF TORTS* §§ 271–72 (2000).

<sup>215</sup> Litigation against government over an alleged failure to report potholes or other defects in public roads is commonplace in the law of governmental torts. See, e.g., *Nishihama v. City & County of S.F.*, 112 Cal. Rptr. 2d 861, 863 (Cal. Ct. App. 2001); *City & County of Denver v. Gonzales*, 17 P.3d 137, 140 (Colo. 2001) (en banc); *Steele v. Town of Stonington*, 622 A.2d 551, 555 (Conn. 1993); *Hanley v. City of Chi.*, 795 N.E.2d 808, 816 (Ill. App. Ct. 2003); *Cooper v. La. State Dep't of Transp. & Dev.*, 885 So. 2d 1211, 1219 (La. Ct. App. 2004); *Minder v. Anoka County*, 677 N.W.2d 479, 487 (Minn. Ct. App. 2004); *Townsend v. State*, 738 P.2d 1274, 1277 (Mont. 1987); *Chatman v. Hall*, 608 A.2d 263, 276 (N.J. 1992), *superseded by statute*, Act of June 23, 1994, Ch. 49, 1994 N.J. Laws 322 (codified at N.J. STAT. ANN. § 59:3-1 (West 1992)); *Lippel v. City of N.Y.*, 722 N.Y.S.2d 511, 512–13 (N.Y. App. Div. 2001).

this function. When sufficient funds are not allocated to locate and repair all potentially dangerous potholes as soon as practicable, the government imposes upon all who use its roads a risk of injury. Still, this is at its heart a discretionary judgment—government must decide how much it can afford to spend on pothole repair in light of its limited resources and the many demands on those resources. The government may be willing to tolerate a higher risk of injury from potholes rather than reduce the resources available for police protection, which may lead to even more serious losses. For these reasons, pothole repair can be characterized as falling within discretionary immunity.<sup>216</sup> Even the method that repair crews use involves a discretionary judgment—they might repair more patches more durably with more labor-intensive methods, but the more time that is spent on each patch, the fewer potholes that can be repaired.<sup>217</sup>

Accordingly, the line between immunized discretion and nonimmunized negligence is wholly indistinct. To illustrate the point, consider *Indian Towing Co. v. United States*.<sup>218</sup> In that case, the Supreme Court held that, although the Coast Guard's decision to provide a lighthouse in aid of navigation was an immunized act of discretion, once it undertook to provide that service and induced reliance on the part of passing ships, it was obligated to keep the lighthouse in good repair.<sup>219</sup> But programs to inspect and repair lighthouses cost money—the more frequent and thorough the inspections, the greater the cost. The Coast Guard must decide how to undertake inspection and repair in light of its limited resources and the many demands placed upon it. It is difficult to understand how a jury could define the Coast Guard's duty of care with respect to its lighthouses without revisiting a host of policy decisions made by Congress in its appropriations and by Coast Guard officials in allocating funds within appropriated limits. Perhaps the Coast Guard abuses its discretion by failing to promptly inspect and maintain lighthouses—although even this much is debatable inasmuch as committing resources in this fashion could leave even more serious hazards to navigation unaddressed—but its resource-allocation decisions, even if misguided, are an immunized discretionary function nevertheless. Thus, although there are perhaps a few government decisions that do not involve any meaningful consideration of how limited resources

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<sup>216</sup> See *Minder*, 677 N.W.2d at 487; *Mitchell v. City of Trenton*, 394 A.2d 886, 888 (N.J. Super. Ct. App. Div. 1978).

<sup>217</sup> See *Wrobel v. City of Chi.*, 742 N.E.2d 401, 406 (Ill. App. Ct. 2000).

<sup>218</sup> 350 U.S. 61 (1955).

<sup>219</sup> *Id.* at 69.

are to be allocated,<sup>220</sup> any time that a plaintiff contends that a governmental defendant failed to undertake sufficient investment in loss prevention, it is entirely fair to characterize the lawsuit as seeking to impose liability on a policy judgment.<sup>221</sup>

The problem of discretion, in turn, illustrates the anomalous role that courts must assume in assessing governmental tort liability. Most government decisions—how much time to spend training police officers in the use of excessive force, whether and how to investigate allegations of misconduct by public officials, whether to barricade potholes in public streets—involve questions about how to allocate scarce public resources. We have seen that the resources-allocation decisions that the government faces are infinitely more difficult than those confronting the private sector. Yet there is little reason to believe that judges or juries are in any position to pass judgment on those decisions, since such judgments, after all, require consideration of all the demands facing a unit of government with a responsibility to protect the safety and welfare of the entire public. The Appropriations Clause and its state counterparts suggest that it is a uniquely legislative function to decide how public funds are to be allocated.<sup>222</sup> Yet judges and juries effectively exercise that function when they impose tort liability on government.

To be sure, one can argue that tort law should require the government to raise taxes to the point where sufficient funds are spent to provide reasonable protection from all threats, but the threat to republican values would be profound if tort law, rather than the people's elected representatives, took control of tax and loss-prevention policy. Moreover, a decision to levy taxes at the level sufficient to make all investments in loss prevention that a jury might find to be cost justified would itself raise a host of complex issues—for instance, whether increased taxes may adversely affect the business climate or

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<sup>220</sup> An example that the Supreme Court offered of negligence without any meaningful relation to the formulation of public policy or the allocation of public resources is negligent driving by bank regulatory officials. See *United States v. Gaubert*, 499 U.S. 315, 325 n.7 (1991).

<sup>221</sup> It is therefore small wonder that commentators complain that the scope of discretionary immunity is unclear and that it is applied inconsistently. See, e.g., John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. L.J. 223, 225 (1992); David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291, 303 (1988–89); William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1, 2–5 (1993); Bruce A. Peterson & Mark E. Van Der Wiede, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 448 (1997).

<sup>222</sup> See *supra* text accompanying notes 14–20. For a similar argument made in the context of an asserted right to receive government services, see Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982 (1996).

otherwise reduce the attractiveness of the jurisdiction to the point that the tax base will itself erode, jeopardizing the ability of the jurisdiction to afford continued investment in loss protection. And in light of the political constraints on increasing taxes, governmental tort liability could have the perverse result of reducing rather than increasing governmental investment in loss prevention. Resources diverted to litigation costs are unavailable for investment in loss prevention, and, especially in a poorer jurisdiction with a limited tax base, it may be impracticable to increase taxes sufficiently to cover both litigation costs and all other measures that a jury might one day conclude constituted cost-justified investment in loss prevention. Moreover, the financial burden of liability falls on taxpayers who, as we have seen, are essentially innocent third parties with far less ability to “exit” a taxing jurisdiction than a shareholder dissatisfied with corporate risk management has to sell his stock.

These problems have a racial dimension as well. As Richard Thompson Ford has explained, even in a race-neutral legal regime, racial and ethnic groups that have faced discrimination in the past are disproportionately likely to be poor and therefore to reside in older, less desirable communities where housing is relatively inexpensive.<sup>223</sup> These communities will, in turn, more likely experience crumbling infrastructure and a host of other problems that give rise to tort liability, yet their tax bases will make it all the more difficult to finance necessary improvements. Moreover, when the government must use tax revenues to pay judgments and other legal expenses that fall disproportionately on such communities, businesses and high-income taxpayers will experience a declining ratio of government services received to taxes paid and will have a greater incentive to locate elsewhere. The remaining tax base is less able to afford to pay tort judgments and to fund the necessary cost-avoidance measures.

Thus, tort liability is a kind of regressive tax likely to impose greater burdens on poorer communities with lesser ability to fund either the liabilities or the necessary loss-prevention measures. It is accordingly one of a number of factors that can stimulate urban decline and exacerbate problems of racial unfairness.

### 3. *The Weak Case for Governmental Liability*

There is accordingly a strong argument to be made that government loss-prevention policies are best left to the ordinary process of political accountability by which other government policies are assessed, rather than effectively controlled through the vehicle of tort

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<sup>223</sup> See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1849–52 (1994).

litigation. Nevertheless, arguments for governmental tort liability remain.

Political accountability is at best an imperfect means for encouraging government to undertake adequate investment in loss prevention. The advocates of public-choice theory teach that political accountability operates imperfectly because it is generally costly and difficult for the voters to monitor government policy.<sup>224</sup> Surely this observation has particular merit when it comes to investments in loss prevention; it is not very often that government loss-prevention policy dominates a political campaign. We have also seen that a measure of accountability is achieved by the ability of dissatisfied taxpayers and businesses to relocate, but the costs of exit are substantial, leaving taxpayers who must bear the burden of governmental liability with a far from optimal ability to affect government policy.<sup>225</sup> Thus, in a regime of no governmental liability, the remaining restraints on government loss-prevention policy are likely to produce less than optimal results. There is likely to be some marginal benefit from a regime of governmental liability by enhancing government incentives to invest in loss prevention, although it is admittedly difficult to estimate its magnitude.

Accordingly, the case for governmental liability is likely to turn on the marginal benefits in terms of promoting efficient governmental investment in loss prevention offered by a regime of governmental liability. We have seen that many governmental tort immunities operate in areas in which political accountability is likely to be strongest—discretionary decisions, the failure to provide adequate police protection or law enforcement, and the safety of public infrastructure, for example. In areas where elected officials are most likely to be held politically accountable for failing to protect the public, the marginal utility of governmental tort liability is therefore likely to be small. And from the standpoint of corrective justice, when it is reasonable to expect the public to exact its own form of punishment at the next election, it is surely problematic to effectively shift liability onto essentially innocent taxpayers, simultaneously diverting resources from those who may need them far more than the plaintiff does, and who are essentially blameless for the plaintiff's loss, instead

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<sup>224</sup> See, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 146–47 (1997); DENNIS C. MUELLER, PUBLIC CHOICE II: A REVISED EDITION OF *PUBLIC CHOICE* 205–06 (1989); NISKANEN, *supra* note 164, at 135–36.

<sup>225</sup> For a critical discussion of the empirical evidence that both casts doubt on the ability of interjurisdictional competition to produce optimal tax and spending policy while acknowledging that such competition does constrain the behavior of state and local governments in the fashion described by the advocates of this view, see William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 *GEO. L.J.* 201 (1997).

of allocating them to a plaintiff who, in most cases, could have purchased insurance rather than run a risk of uncompensated loss.<sup>226</sup>

Given the impact of tort liability on republican values as well as the price paid by essentially innocent third parties who face higher taxes, reduced government services, or some combination of each as a consequence of tort liability, statutory tort immunity in areas where political accountability is likely to operate effectively is well justified. For similar reasons, caps on recoverable tort damages and the prohibition on punitive damages are equally justifiable. The caps keep some pressure on elected officials to invest in safety, but mitigate the hardship on the public at large when scarce government resources are diverted to the payment of judgments. While the caps mean that some losses will go uncompensated, without them, other critical needs of the public may go unaddressed as well. As Part II.C above explains, governmental tort liability cannot be expected to produce an efficient result; its virtue lies in its ability to produce some degree of political pressure on government to invest in loss prevention. Reasonable limitations on governmental damages liability accomplishes just that result, while mitigating the anomalies that governmental liability can produce.

Discretionary immunity, accompanied by statutory protections on a public employer's vicarious liability for the torts of its employees, is also justifiable in light of the problems that inhere in vicarious employer liability in the public sector. Private firms are liable for the torts of their employees to ensure that they make all cost-justified investments in loss prevention and are liable for losses fairly attributable to their own activities,<sup>227</sup> but we have seen that neither efficiency nor corrective-justice justifications for private-sector liability have satisfactory application in the public sector. Thus, the rule that requires private-sector employers to essentially act as insurers of the tort liability of their employees has no proper application to the public sector. As long as the government adequately trains and supervises its employees—a function for which it is likely to be held politically accountable—the justification for requiring the taxpayers to shoulder the costs of vicarious liability is vanishingly thin.

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<sup>226</sup> To be sure, not everyone can afford insurance, but there is little reason to believe that the likelihood that the uninsured will incur uncompensated losses absent governmental tort liability is greater than the likelihood that the same class of persons will experience reduced benefits through government programs in a regime of liability. The class suing the government in tort is largely random; there is little reason to believe that government tort liability is nearly as redistributive as the government programs that would experience reduced funding in a regime of unlimited liability. The interests of those who cannot afford insurance are unlikely to be advanced by governmental tort liability.

<sup>227</sup> See *supra* text accompanying notes 102, 104.

## B. Constitutional Torts

### 1. *The Irrelevance of Political Accountability*

We have seen that the process of political accountability weakens the case for governmental liability in common-law tort. The same is not true for constitutional torts. In that context, the case for substituting political accountability for a regime of tort liability disappears.

Inherent in the concept of a constitutional right is that its protection does not depend on the political acceptance of the right at stake. Thus, political accountability is an unacceptable method for securing constitutional rights; the Constitution protects even the unpopular or politically inexpedient.<sup>228</sup> Accordingly, discretionary and other categorical immunities are inappropriate for constitutional torts; a law of constitutional torts must place pressure on the government to conform all of its conduct to the Constitution. That does not imply, however, that damages are always properly awarded for a constitutional violation. Once one understands that the primary virtue of damages awards against the government is to create a political incentive to undertake loss prevention, there is ample room for damages-limiting doctrines that protect the interests of the taxpayers and avoid unwarranted reallocation of scarce public resources.

### 2. *Qualified Immunity and Vicarious Employer Liability*

Part I.B.3 above explains that, given the reality of indemnification, the stated justification for qualified immunity—avoiding overdeterrence of individual public officials—is unpersuasive. That conclusion does not mean, however, that qualified immunity serves no legitimate function. When qualified immunity is viewed from the standpoint of a public employer—the party that bears the economic burden of liability—this doctrine has a compelling justification. Indeed, viewing qualified immunity from the standpoint of the public employer lends considerable coherence to this doctrine.

Qualified immunity shields officials from liability unless they violate clearly established law.<sup>229</sup> Accordingly, qualified immunity limits the resources that the government must devote to training and supervision of public officials. Public employers need only undertake to secure compliance with established legal rules; they need not endeavor to train and supervise employees to make more difficult legal

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<sup>228</sup> Although some advocates of popular constitutionalism take a different view, *see, e.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154–94 (1999), for present purposes it should suffice to observe that their view represents a substantial departure from our current constitutional regime, *see id.* at 175–76.

<sup>229</sup> *See supra* text accompanying notes 67–68.

judgments. Given the expense and uncertain efficacy of training and supervision directed at unsettled questions of constitutional law, it is doubtful that the diversion of scarce public resources from other public purposes toward endeavoring to minimize errors in these unsettled areas of law—or toward the payment of judgments and other legal costs when a court concludes that a public official has erred in such a context—is justifiable.

Consider *Wilson v. Layne*,<sup>230</sup> in which the Court, after holding that the Fourth Amendment forbids law enforcement officers from permitting reporters to accompany them as they execute a search warrant for a residence,<sup>231</sup> nevertheless granted the officers qualified immunity, noting that Fourth Amendment law on this point was undeveloped when the search at issue occurred and the then-extant policies of the two law enforcement agencies involved in the case appeared to permit reporters to accompany officers executing a warrant.<sup>232</sup> Surely there is no point in holding officers liable for adhering to office policy. In the absence of any claim against the employees' supervisors alleging that they had caused the violation by providing unreasonable training and supervision, liability cannot be expected to reduce the incidence of constitutional violations. *Wilson* illustrates how qualified immunity operates to evaluate the manner in which public officials have been supervised.

Or consider the decision in *Brosseau v. Haugen*.<sup>233</sup> In that case, a police officer shot Haugen, who was wanted on an outstanding felony warrant, after he had eluded police seeking to execute the warrant, made his way to his Jeep, and then began to drive off despite the officer's repeated orders to stop.<sup>234</sup> The Court granted the officer qualified immunity on the ground that no clear rule had emerged about whether the Constitution permits an officer "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."<sup>235</sup> Justice Stevens, in dissent, nevertheless made a compelling case that the officer's conduct was unreasonable; Haugen had not committed a violent crime or threatened the officer, and there was no evidence that he intended to drive off recklessly or otherwise endanger bystanders.<sup>236</sup> Justice Stevens acknowledged, however, that there was some risk that Brosseau might have injured someone as he drove off, and therefore that there was "uncertainty about how a reasonable officer making

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<sup>230</sup> 526 U.S. 603 (1999).

<sup>231</sup> *Id.* at 611–13.

<sup>232</sup> *Id.* at 615–18.

<sup>233</sup> 543 U.S. 194 (2004) (per curiam).

<sup>234</sup> *Id.* at 194–97.

<sup>235</sup> *Id.* at 200.

<sup>236</sup> *See id.* at 202–07 (Stevens, J., dissenting).

the split-second decision to use deadly force would have assessed the foreseeability of a serious accident . . . .”<sup>237</sup> But in this context, it is doubtful that any greater investment in training and supervision of officers could have prevented a constitutional violation. The applicable constitutional rule is that a fleeing felon can be shot only when there is “probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others . . . .”<sup>238</sup> It is surely reasonable to expect public employers to train law enforcement officers to know this rule, but it is unclear that additional training and supervision will enhance the likelihood that the officer will act correctly when making a split-second decision about whether a fleeing felon is likely to endanger someone else. A significant error rate is inherent in split-second police judgments, and when a law enforcement agency has invested all resources that are reasonably warranted in training and supervision with respect to constitutional requirements, the case for awarding damages does not persuade; the damages award will not likely reduce the rate of constitutional violations, but it would divert public resources that could be invested far more efficaciously in other types of public goods, including loss prevention.<sup>239</sup>

Qualified immunity therefore properly shields public officials from liability in cases where the public employer has made reasonable investments in securing compliance with the Constitution. Qualified immunity places the burden on the employer-indemnitor to monitor its employees with respect to clearly established law, the context in which monitoring is most likely to be cost-effective. While phrased as a protection for public employees, qualified immunity, as it operates, judges the reasonableness of the employer’s conduct by giving it an incentive to reduce constitutional injuries where the law is settled and the costs of monitoring are therefore reasonable. Municipal liability is also appropriate when based on a culpable municipal policy; once again, liability is properly premised on the government’s own failure to take sufficient measures to ensure compliance with the Constitution.<sup>240</sup> There is, however, little justification for in-

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<sup>237</sup> *Id.* at 206. Believing such police decisions to present fact-specific issues, Justice Stevens maintained that the case should be tried. *See id.* at 205–08.

<sup>238</sup> *Id.* at 197–98 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

<sup>239</sup> Even before *Brosseau*, the Court had held that qualified immunity protects officials even when they are applying relatively settled legal standards but nevertheless are required to make difficult judgments as applied to the particular facts confronting the official. *See Saucier v. Katz*, 533 U.S. 194, 197 (2001); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

<sup>240</sup> *See supra* text accompanying note 81. I have no quarrel with Justice Breyer’s observation that there is little point to imposing different liability rules for municipalities and municipal employees inasmuch as the former usually indemnify the latter. *See Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting). But because virtually all constitutional tort liability in reality resides with employers, qualified immunity serves the same function as the

sisting on a greater allocation of public resources to loss prevention when the ability to reduce constitutional violations with respect to unsettled law or unclear legal obligations is itself open to great doubt.<sup>241</sup> In the face of unsettled legal obligations, the most likely effect of imposing liability is to require a public employer to provide what amounts to constitutional-tort insurance. We have seen, however, that a regime of vicarious employer liability has little justification in the public sector, where tort law cannot hope to produce the efficient level of investment in loss prevention that is the objective of respondeat superior.<sup>242</sup> Thus, constitutional tort liability produces political pressure on government to conform its conduct to the Constitution, while qualified immunity and limited employer liability bar

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requirement of a culpable policy by limiting liability to cases in which the employer failed to take reasonable measures to avoid constitutional violations. This approach suggests that state and federal governments should face policy liability for constitutional torts—a result nevertheless forbidden by sovereign immunity—and that municipal liability might properly be based on negligence rather than deliberate indifference. But it is unclear whether these limitations on governmental liability have much practical significance inasmuch as a public employee can generally be named as a defendant in a constitutional tort action, even when the employer is immune or otherwise not liable, and the defense of qualified immunity limits liability to cases involving fairly culpable employers. For a similar argument that qualified immunity makes constitutional tort liability properly turn on culpability, see Jeffries, *supra* note 55, at 54–59. Indeed, one could argue that policy liability for local governments should be abolished; given the unavailability of qualified immunity, even a municipal policy that represents a reasonable effort to construe uncertain constitutional obligations, such as the policies considered in *Wilson v. Layne*, could result in damages liability.

<sup>241</sup> Some claim that qualified immunity hinders the development of constitutional law because plaintiffs may be denied recovery in cases such as *Wilson* in which they press a novel constitutional claim. See, e.g., Brown, *supra* note 193, at 1101–10. But the empirical case that qualified immunity has stunted the development of constitutional law has yet to be made. Despite qualified immunity, new constitutional law grows from cases seeking injunctive relief and attacking municipal policies, as well as in criminal litigation and in cases like *Wilson* itself. Moreover, the development of constitutional law is facilitated by the Court's practice of reaching the merits before considering whether a damages award is defeated by qualified immunity. See *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998). See generally John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403 (1999) (defending the practice of reaching the merits even in actions barred by qualified immunity). I am unaware of any empirical evidence that the doctrine of qualified immunity has operated to inhibit the development of constitutional law.

<sup>242</sup> Accordingly, although I disagree with much of the Court's reasoning, in my view the Court correctly denied private firms managing public prisons qualified immunity in *Richardson v. McKnight*, 521 U.S. 399 (1997). A private firm is subject to market discipline and therefore should internalize the costs of its employees' misconduct so that the firm's services are priced to enable it to engage in cost-justified loss prevention. A publicly run prison, in contrast, is subject to political and not market discipline, and therefore should not face constitutional tort liability when it undertakes reasonable efforts to achieve compliance with constitutional norms. *Richardson* is a close case, however, because public contractors have a degree of political accountability; they must fear losing their contracts if their performances produce adverse political fallout.

awards of damages in contexts where liability is unlikely to reduce the incidence of constitutional violations.

### 3. *Measure of Damages*

These same considerations support the refusal to base constitutional tort damages on the presumed or inherent value of constitutional rights.<sup>243</sup> Aside from the difficulty of identifying a nonarbitrary basis to measure the abstract value of a constitutional right, imposing this type of liability would be unacceptably likely to overdeter; presumed damages awards inevitably place pressure on the government to engage in even non-cost-justified loss-prevention measures. It would be far better to achieve deterrence through a regime of punitive damages collectable from individual wrongdoers than through awarding a form of presumed damages that is ultimately paid by the taxpaying public. Indeed, it was my experience in municipal government that nothing terrified my clients more than the possibility of an award of punitive damages, for which they could not be indemnified. When I wanted to impress upon an official, even at the highest levels of municipal government, the magnitude of legal risk inhering in a particular course of action, nothing worked better than a discussion of punitive damages. Given the costs that governmental liability imposes on essentially innocent third parties, punitive damages paid by the actual wrongdoer are far preferable to a regime of presumed compensatory damages that would inevitably be punitive in effect.<sup>244</sup> Indeed, the Supreme Court has made just this point as it rejected the availability of punitive damages against municipalities under Section 1983.<sup>245</sup> Moreover, punitive damages represent the ideal solution for officials who are willing to countenance or even encourage constitutional violations because of the political benefits they yield. Punitive damages are thought warranted in the private sector when compensatory awards are likely to give defendants insufficient incentives to avoid tortious behavior;<sup>246</sup> in the public sector, punitive damages are warranted when compensatory awards may provide officials with in-

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<sup>243</sup> See *supra* text accompanying note 65.

<sup>244</sup> Although the Supreme Court has yet to decide the question, the emerging consensus in the lower courts is that punitive damages may be awarded for a constitutional tort even in the absence of compensatory damages. See, e.g., Kelly Koenig Levi, *Allowing a Title VII Punitive Damages Award Without an Accompanying Compensatory or Nominal Award: Further Unifying Federal Civil Rights Law*, 89 KY. L.J. 581, 595 (2000–01).

<sup>245</sup> See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269–70 (1981).

<sup>246</sup> See, e.g., Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1144–48 (1989); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 77–78 (1982); Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 11–12 (1990); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 423 (1998).

sufficient political incentive to comply with the Constitution. Punitive damages are appropriate when compensatory damages will underdeter, and therefore punitive damages are properly awarded in cases in which compensatory damages do not overcome a political incentive to violate the Constitution.<sup>247</sup>

#### 4. *Statutory Limitations on Damages*

The *Bivens* line of cases suggests that damages liability for constitutional torts is constitutionally compelled, at least absent a satisfactory alternative remedy or the presence of special factors, since a constitutional right without a correlative remedy is no right at all.<sup>248</sup> The Court has provided little guidance, however, as to what constitutes an adequate alternative remedy.<sup>249</sup> It follows from the view advanced here that an adequate remedy should ordinarily involve a financial consequence for a constitutional violation to ensure that it imposes a

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<sup>247</sup> The clear majority of states do not authorize indemnification of public employees for egregious misconduct or punitive damages. See statutes cited *supra* note 51. Moreover, although most courts that have considered this question have ruled that federal law permits indemnification of public employees for punitive damages, see Schwartz, *supra* note 89, at 1219–23, it may well be that, on the view advanced here that the purpose of a punitive-damages award is to negate political incentives to commit (or at least tolerate) constitutional violations without imposing costs on essentially innocent third parties—the taxpayers and those dependent on public services—federal law preempts state laws permitting indemnification for constitutional-tort punitive-damage awards. If federal law is properly understood to have as its objective the creation of an individual-employee incentive to avoid constitutional violations through placing their personal assets at risk, then state indemnity statutes would be inconsistent with this federal objective and would therefore be preempted. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>248</sup> See *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 72–74 (2001); *Mitchell v. Forsythe*, 472 U.S. 511, 522–23 (1985); *Carlson v. Green*, 446 U.S. 14, 18–25 (1980); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395–97 (1971).

<sup>249</sup> See generally, e.g., Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 329–36 (1995) (discussing the nature of the remedy for constitutional violations by federal officials and concluding that in some cases courts may choose among remedies); George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs: Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263, 269–74 (1989) (noting that the Court has concluded that other remedies for federal constitutional violations given by Congress can preclude any right to damages); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1747–49 (2001) (discussing the necessity to think through the structural rules that exist in our jurisprudence as the pressures to apply them increase in complex litigation); Betsy J. Grey, *Preemption of Bivens Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L.Q. 1087, 1089–97 (1992) (reviewing the evolution of the Court's acceptance of congressional remedies as an alternative to damage remedies for constitutional violations by federal officers); Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1138–45 (1989) (discussing alternative remedies to damages); Note, *Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251, 1258–60 (1988) (advocating a constitutional requirement of effective remedies to vindicate rights).

political price. On this view, the decision in *Schweiker v. Chilicky*,<sup>250</sup> at first blush, seems problematic. In that case, the Court rejected a *Bivens* claim for consequential damages caused by wrongful denial of disability benefits on the ground that Congress had authorized no more than an award of retroactive benefits in the disability-benefits provisions of the Social Security Act.<sup>251</sup> As a result, there was no budgetary impact associated with a constitutional violation, which is seemingly at odds with the view advanced here. But as I have endeavored to demonstrate, public-sector liability rules should be sensitive to the impact of liability on third parties and the provision of government services. These considerations offer a defense for *Chilicky*.

The constitutional violation alleged in *Chilicky* was that administrators had deprived the plaintiffs of property without due process of law by manipulating the disability review process to wrongfully terminate benefits in order to reduce the cost of the program.<sup>252</sup> The statutory remedy of retroactive benefits, however, prevented administrators from achieving the budgetary reductions they desired.<sup>253</sup> For that reason, the remedy deprived them of the political benefit they sought in reducing expenditures on an evidently disfavored constituency. A statutory remedy that deprives administrators of the political benefits they seek from violating the law may well be sufficient to sustain the adequacy of that remedy—especially when coupled with the availability of punitive damages against individual officials responsible for weakening the integrity of the program. Aside from that, the alleged misconduct involved undermining a congressional intent to provide the benefits at issue; the violation was therefore subject to what was likely to be effective political scrutiny. Indeed, by the time the case reached the Court, Congress had already overhauled the program to eliminate perceived abuses.<sup>254</sup> Moreover, the Court was undoubtedly right to concern itself with the potential for budgetary disruption caused by the threat of unlimited liability for officials who are likely to require indemnification.<sup>255</sup> If unlimited damages were available for a wrongful denial of disability benefits, the federal disability program could become so expensive that political support for it would ebb. This would hardly strike a blow for the disabled or others dependent on government aid.

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<sup>250</sup> 487 U.S. 412 (1988).

<sup>251</sup> *Id.* at 424–29.

<sup>252</sup> *Id.* at 415–20.

<sup>253</sup> *See id.* at 417–18.

<sup>254</sup> *Id.* at 415–17.

<sup>255</sup> *Id.* at 425.

For similar reasons, statutory damages caps like those many states have enacted for common-law torts are defensible. We have seen that reasonable damages caps preserve political pressure on government to conform its conduct to the law but mitigate the anomalies associated with governmental damages liability. *Bush v. Lucas*<sup>256</sup> provides an example: the Court rejected a *Bivens* action in light of the availability of statutory civil-service remedies that granted the successful plaintiffs retroactive seniority and backpay.<sup>257</sup> Since backpay and retroactive seniority mean that the government, in effect, must pay an employee for not working, there is a significant political cost to these remedies that should sustain their adequacy. At a minimum, an inquiry into the political efficacy of a statutory remedy will usefully guide an assessment of its adequacy.

Thus, a focus on the political costs associated with statutory limitations on constitutional tort damages provides a useful vehicle for evaluating their adequacy in light of *Bivens*'s objective of ensuring that constitutional rights have correlative remedies. A regime of limited liability that nevertheless imposes a sufficient political price to minimize the likelihood of constitutional violations should be sustained.

### C. Takings

#### 1. *The Role of Compensation in Limiting Overuse of Eminent Domain*

We have seen that the function of the constitutional requirement of compensation is to impose political restraint on the power of eminent domain. The upshot of the compensation requirement is that government will not exercise its power of eminent domain except when the political benefits of condemnation exceed the political cost of compensation. Consideration of the political operation of a regime in which a governmental taking did not require compensation makes the point.

Absent a constitutional requirement of compensation, property owners could protect their investments by securing takings insurance, and the rising cost of takings insurance that would result from overuse of condemnation could create a political restraint on elected officials.<sup>258</sup> But it is unclear how effectively insurance rates would check

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<sup>256</sup> 462 U.S. 367 (1983).

<sup>257</sup> *Id.* at 388–89.

<sup>258</sup> The availability of insurance and the political impact of high insurance rates caused by promiscuous use of eminent domain has caused some to argue that the compensation requirement is unjustified. See Steven P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451 (2003); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 602–06 (1986).

governmental overuse of condemnation. After all, the cost of insurance is hardly the only issue on which the public judges politicians, and we have seen that political accountability operates imperfectly. The requirement of compensation, in contrast, imposes far more direct political discipline on the use of eminent domain. The government must budget for compensation and incur the political opportunity costs associated with its payment.<sup>259</sup> Indeed, the compensation requirement imposes a far more direct political restraint than does ordinary tort liability. The incentive to invest in loss prevention created by common-law or constitutional tort liability is muted by the difficulty of predicting future liabilities and the extent to which they will be reduced by investment in loss-prevention measures.<sup>260</sup> The compensation requirement affects government budgets in a far more immediate and predictable fashion—compensation is required for every taking, compensation must generally be paid at the time of the taking, and its cost is readily determinable through appraisal.<sup>261</sup> Thus the political impact of compensation is unusually direct, immediate, and predictable.

## 2. *The Public-Use Inquiry*

The preceding discussion suggests that the Supreme Court correctly defers to the judgment of elected officials when deciding

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<sup>259</sup> Although they have not linked the observation to a theory of political behavior like the one advanced above, commentators have observed that the budgetary impact of compensation will restrain the use of eminent domain. See, e.g., FISCHEL, *supra* note 200, at 73–75; Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 77–81 (1986). Professor Fischel, however, has argued that this discipline is undermined when another unit of government in significant part finances eminent domain, such as when a municipal government uses a federal grant to cover the cost of condemnation. William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 943–46. Professor Fischel, however, overlooks political opportunity costs, not only for local officials when they use their political capital to lobby for federal funding of eminent-domain costs as opposed to some other project, but also for members of Congress when they allocate scarce public resources.

<sup>260</sup> See *supra* note 186.

<sup>261</sup> It has long been settled that the Constitution forbids a taking when compensation is not paid in advance, unless the property owner has available a means of obtaining compensation with reasonable certainty and without unreasonable delay. See *Bragg v. Weaver*, 251 U.S. 57, 62 (1919); 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8.05(2) (2006). And aside from this constitutional requirement, under federal law, title does not pass until compensation has been paid. See *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 11–13 (1984). Also, for federal condemnations or state or local condemnations that receive federal financial assistance, the condemner cannot take possession unless it has paid the agreed purchase price or deposited with the court an amount not less than the compensation specified in an approved appraisal or the amount awarded in a condemnation proceeding. See 42 U.S.C. § 4651(4) (2000). Under the Takings Clause itself, if the government takes property before compensation is paid, it is liable for prejudgment interest on the requisite compensation. See *Kirby Forest Indus.*, 467 U.S. at 10–11.

whether a taking is for a “public use” within the meaning of the Takings Clause—even when property is condemned for the purpose of transferring it to a private party to promote economic development as in *Kelo v. City of New London*.<sup>262</sup>

The Takings Clause’s public-use requirement is, at best, ambiguous. Almost no one believes that a taking for “public use” occurs only when the public will physically traverse the condemned property—such reasoning would prohibit takings in order to build prisons, military bases, or other facilities not open to the public. Instead, even the most vigorous advocates of restricting eminent domain resist this view and acknowledge that the public can “use” a facility within the meaning of the Takings Clause, even when it is not generally open to the public, as long as the public receives some sort of benefit from governmental ownership of the property.<sup>263</sup> Once this type of indirect and metaphorical public use is accepted as consistent with the constitutional text, however, it becomes difficult to draw lines. In some sense the public “uses” the benefits of redevelopment that lowers crime and generates new tax revenues just as it “uses” prisons and military bases.<sup>264</sup> Nor can the question of public use plausibly turn on whether the government holds title to the property after its condemnation. The public makes the same metaphorical “use” of toll roads or utilities that have been acquired by condemnation whether they are publicly or privately owned.<sup>265</sup> For this reason, the opponents of condemnation for the benefit of a private party are forced to advocate all sorts of complicated tests to decide whether a particular condemnation for the purpose of eventual transfer to a private party is for a public use in the constitutional sense.<sup>266</sup> Litigation governed by

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<sup>262</sup> 545 U.S. 469 (2005); see also *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (approving the taking of land from an oligopolist for redistribution); *Berman v. Parker*, 348 U.S. 26, 35–36 (1954) (approving a taking for the purpose of slum clearance and private redevelopment).

<sup>263</sup> See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 167–68 (1985).

<sup>264</sup> For an argument about the difficulty of drawing principled distinctions in this area, see Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 *GEO. WASH. L. REV.* 355, 369–74 (1983).

<sup>265</sup> The use of eminent domain to acquire property for use by a privately owned utility is well settled. See, e.g., *Hendersonville Light & Power Co. v. Blue Ridge Interurban Ry. Co.*, 243 U.S. 563, 568–70 (1917) (approving taking of property for construction of a dam operated by a utility company); *Mt. Vernon–Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32–33 (1916) (sanctioning a public taking of property to enable a power company to build a dam).

<sup>266</sup> See, e.g., *Kelo*, 545 U.S. at 497–502 (O’Connor, J., dissenting) (permitting condemnation for the benefit of a private party when the property will be available for the public’s use or when the existing property inflicts an affirmative harm defined broadly to include blight or oligopoly); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 781–83 (Mich. 2004) (en banc) (holding that a condemnation is for public use when it is a public necessity, when a private party receiving property is still accountable to the public, or when the land is selected on the basis of a pub-

such standards would necessarily be complex, expensive, and prone to error.

Nor does inquiry into the original meaning of the Takings Clause resolve the confusion. A case can be made that the Clause was intended to forbid condemnation for use by a private party,<sup>267</sup> but there is also a strong case to be made that such condemnations are consistent with the original meaning of eminent domain, based on the historical evidence that condemnation by or for the benefit of private parties was considered permissible when those parties provided a utility-type service that was considered to be of benefit to the public at large.<sup>268</sup> Inquiry into original meaning is further complicated by the fact that the Takings Clause does not literally prohibit takings thought not to be for “public use”; instead it treats the existence of “public use” as a trigger for compensation. Thus, it is plausible to read the Takings Clause as doing no more than identifying a type of taking for which compensation is required (a taking for “public use”), while other kinds of takings of property by the government, such as taking by tort, taxation, or police-power regulation, were not forbidden but merely excluded from the compensation requirement.<sup>269</sup> Indeed, unfamiliar though this argument is to many, it is largely uncontroversial. No one thinks that the Takings Clause applies to all takings of private property by the government; no one argues, for example, that the government must make compensation when it takes property through criminal fines or forfeiture.<sup>270</sup> Thus, it is unclear that the Takings Clause should be read to forbid takings that are not for a “public use.”

Given the many difficulties with assessing the meaning and import of the public-use requirement, the opponents of takings for purposes

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lic concern); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 987–92 (advocating an inquiry into whether condemnation places an undue burden on the interests of property owners); Garnett, *supra* note 142, at 963–82 (advocating inquiry into nexus and proportionality between condemnation and purported use to determine if use of eminent domain is appropriate).

<sup>267</sup> See *Kelo*, 545 U.S. at 506–14 (Thomas, J., dissenting); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 892–900.

<sup>268</sup> See, e.g., Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204–12 (1978); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POLY 491, 500–10 (2006); Buckner F. Melton, Jr., *Eminent Domain, “Public Use,” and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59, 68–80 (1996).

<sup>269</sup> See Matthew P. Harrington, *“Public Use” and the Original Understanding of the So-Called “Takings” Clause*, 53 HASTINGS L.J. 1245, 1278–301 (2002); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1119–24 (1993).

<sup>270</sup> The Supreme Court, for example, has explained that the government is not “required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.” *Bennis v. Michigan*, 516 U.S. 442, 452 (1996).

of private redevelopment generally make their case by arguing that such takings are unacceptably likely to amount to no more than a transfer of wealth to a politically favored private party.<sup>271</sup> Of course, the Takings Clause does not prohibit a taking merely because private parties will derive benefit from the taking—elected officials presumably undertake eminent domain nearly always because it will benefit at least some of their constituents. The constitutional text requires that the taking be for “public use,” not that it fail to benefit private parties. And once a metaphorical “public use” of property not physically open to the public is accepted as triggering the compensation requirement, the theory advanced here suggests that takings will nearly always satisfy the metaphorical test. It is unlikely that elected officials would choose to deploy scarce government resources in a fashion that yields no benefit to anyone but the developer. The theory of political behavior advanced above suggests that the allocation of scarce public resources will be aimed at assembling winning electoral coalitions—not mere transfers of public wealth to favored parties. If an elected official allocates resources for no reason other than to benefit a favored private interest, the likelihood of retribution in the next election should be, at least for most elected officials, unacceptably high, and the political opportunity costs of utilizing the money spent on condemnation in such a politically disadvantageous manner would be enormous.

Accordingly, the theory advanced here argues for deference to political judgments about condemnation. The Supreme Court ordinarily defers to legislative decisions in the area of social and economic policy because the process of political accountability is considered the most reliable method for rectifying improvident decision-making.<sup>272</sup> There is little reason to doubt the applicability of this insight when it comes to eminent domain. Indeed, as we have seen, the compensation requirement imposes political discipline well in excess of that usually operating in the political arena. If, as I have argued, the pur-

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<sup>271</sup> See, e.g., EPSTEIN, *supra* note 263, at 169–70; Cohen, *supra* note 268, at 543–50; Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 287–88 (2000); Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 206–09 (2006); Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 34–41 (2006); Donald J. Kochan, *“Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 69–72 (1998); Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1006–09.

<sup>272</sup> As the Court has put it, “[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

pose of the compensation requirement is to impose political discipline on the exercise of the power of eminent domain, then that purpose is satisfied regardless of whether the taking is for purposes of private redevelopment—the political discipline itself is the best guarantee that the taking will serve the public at large.

Moreover, the political discipline imposed by the compensation requirement is far more likely to result in reliable determinations about the public benefits expected from a redevelopment project than a regime of intensive judicial review. After all, we can expect elected officials to be more likely to have relevant expertise on what is essentially a policy (and not a legal) question about what benefits will flow from a proposed redevelopment project—and far more incentive to identify only those projects likely to yield sufficiently widespread benefits to have political utility in upcoming elections.

### 3. *The Standard for Just Compensation*

We have seen that the constitutional requirement of compensation cannot be expected to produce only cost-justified takings of private property because the political costs of paying the requisite compensation cannot readily be monetized. Thus, those who advocate any number of nicely calibrated adjustments in the level of compensation in order to achieve greater efficiency in condemnation are engaged in a hopeless endeavor.<sup>273</sup> One can debate what level of compensation is “just” from the standpoint of the property owner, but because the political costs of compensation cannot readily be monetized, there is no ready way to use the standard of compensation to achieve an “efficient” level of takings. Similarly, in attempting to assess the “just” level of compensation, one cannot focus exclusively on the interests of the property owner. As we have seen, the interests of a variety of third parties are at stake when the government is required to make compensation. While the theory of governmental damages liability advanced here does not argue for any particular standard of compensation, it does suggest that a “just” outcome cannot be reached if the interests of the taxpayers and those who are dependent on government-funded services are not also taken into account.<sup>274</sup>

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<sup>273</sup> The ordinary measure of just compensation is the fair market value of the parcel at the time of the taking. *See, e.g.*, *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984). For a recent survey of the academic debate over the appropriate standard for just compensation, see Serkin, *supra* note 142, at 687–703.

<sup>274</sup> A comprehensive discussion of the appropriate benchmark for just compensation is well beyond the scope of this Article, but it is worth noting the claim that the current standard of fair market value provides undercompensation because owners frequently place subjective value

In one respect, however, the theory advanced here has significant implications for the measure of compensation. As we have seen, the function of the Takings Clause is to place a political restraint on the use of eminent domain. Accordingly, the measure of “just compensation” when property is condemned for the purposes of transfer to a private party should differ from the compensation owed for property that the government acquires for its own use.<sup>275</sup>

The condemning authority, when it assembles a large parcel for conveyance to a developer, may receive a price in excess of its costs of acquiring individual parcels; a large parcel invites a variety of intensive commercial or industrial uses that may possess far greater value than the price paid for the individual parcels from which it was assembled.<sup>276</sup> Indeed, the need to assemble large parcels coupled with the holdout problems caused by the owners of individual parcels is one of the primary justifications for eminent domain.<sup>277</sup> In such cases, by offsetting its acquisition costs as it resells the property, the condemning authority mitigates the budgetary impact of condemnation; it could even turn a profit. In this fashion, the political check on overuse of eminent domain created by the compensation requirement is undermined. But when one understands the just-compensation requirement in terms of the political cost that the Takings Clause requires to be exacted in connection with condemnation, it follows that the requisite “just compensation” should include the premium that the government has or may obtain through a redevelopment project. This scheme would properly preserve the political restraint imposed by the compensation requirement. And if, as I have argued, the compensation requirement is properly understood as a political restraint on takings, then it is essential that government not dilute this political restraint by turning eminent domain into

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on retaining their property not valued by the market. See, e.g., Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 591 (1995); Fennell, *supra* note 266, at 962–67. The theory advanced here, however, urges consideration of the interests of third parties that are affected by governmental damages liability, and in that connection it is equally worth noting that a measure of compensation that includes a subjective component would encourage strategic behavior and produce substantial transaction costs as subjective valuation is litigated. Political accountability should also reduce undercompensation because of the political costs associated with what could be perceived as governmental overreaching. Moreover, if undercompensation were a systemic problem, we should then expect the private market to offer takings insurance. The fact that no such market has appeared is at least some indication that complaints about undercompensation are exaggerated. For an empirical case that undercompensation concerns are overstated, see Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006).

<sup>275</sup> In *Kelo*, the Court noted but reserved decision on the question of what the appropriate measure of just compensation should be in cases involving condemnation for redevelopment by a private party. See *Kelo v. City of New London*, 545 U.S. 469, 489 n.21 (2005).

<sup>276</sup> See James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 872–73.

<sup>277</sup> See, e.g., POSNER, *supra* note 94, at 56–57; Merrill, *supra* note 259, at 74–77.

what could amount to a revenue center.

#### CONCLUSION

Government responds to political, not market, signals. It should therefore come as no surprise that economic theory offers limited insight into governmental tort liability. And because government externalizes its costs, corrective justice also offers little insight into governmental tort liability. Government operates in a political context, and accordingly governmental tort liability is best understood in political terms. The Supreme Court endeavored to offer such a theory in *Richardson v. McKnight*, but its account was seriously deficient.

My ambition is to argue the case for and against governmental tort liability with equal vigor. Tort liability imposes a serious cost on elected officials intent on deploying public resources to maximum political advantage. The fashionable academic skepticism about the efficacy of governmental tort liability is therefore quite misguided. But governmental tort liability also imposes a cost on innocent parties—not just the taxpayers, but also on the most vulnerable among us who are generally in greatest need of government assistance and most likely to lose out when public resources are diverted to the defense of litigation and the payment of judgments. An attractive account of governmental tort liability must pay close attention to both of these costs. Tort liability properly restrains governmental misconduct; but too much of a good thing usually becomes a bad thing, and tort liability is no exception. In an attractive and just regime of governmental tort liability, well-tailored immunity rules are no less essential than a measure of liability itself.