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The jurisprudence of the Third Amendment, which limits the quartering of troops in private homes, effectively consists of just one case: Engblom v. Carey.[1] *But what a case! In addition to showcasing an unjustly neglected corner of our constitutional heritage,* Engblom *demonstrates the troubling effects of a dubious legal doctrine: governmental immunity. Though the court of appeals had held New York officials potentially liable for violating the Third Amendment when they had quartered National Guard troops in the dormitory rooms of striking prison guards, the lower court on remand in* Engblom *denied the plaintiffs a remedy. Why? Because throughout the United States, all levels of government—federal, state, and local—enjoy immunity from civil lawsuits. Courts have moreover extended this privilege from sovereigns to their officials; hence* Engblom*'s refusal to hold New York officials liable for violating the Third Amendment and various common law rights. Few people today worry about the quartering of troops. More people should worry, though, about governmental immunity. Inspired by the sort of royal privileges that the Constitution expressly rejects, and invented by public officials all too eager to exempt themselves from ordinary civil liability, governmental immunity can claim neither an honorable pedigree nor very convincing policy justifications. Like brown M&Ms backstage at a Van Halen concert, the* Engblom *court's refusal to remedy violations of the Third Amendment signals a more serious problem: The doctrine of governmental immunity leaves the victims of wrongdoing by sovereigns and their officials without judicial relief. We would do better to treat the government the way that the common law treats private communities, relying on independent third parties to adjudicate disputes and holding both the community and its agents liable for their wrongs.*

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1. Englom v. Carey, 677 F.2d 957, 957 (2d Cir. 1982).

I. INTRODUCTION: SHOULD GOVERNMENT COURTS REMEDY GOVERNMENT WRONGS?

Never underestimate the Third Amendment. Though a somewhat obscure provision of the Bill of Rights (it regulates the quartering of troops),[2] the Third Amendment has a surprisingly rich and complicated history. Consider how James Madison and company rewrote the draft amendment to subtly increase government powers at the expense of individual rights.[3] Or reflect on the fact that the Third Amendment has been violated many times in the history of the United States but has rarely sparked a challenge or objection.[4]

But the Third Amendment offers more than historical mysteries and surprises; it remains legally significant even today. How we

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2. U.S. CONST. amend. III.

3. Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL OF RIGHTS J. 117, 135–36 (1993).

4. *See id.* at 136–40 (documenting quartering during War of 1812 and Civil War); Tom W. Bell, *"Property" in the Constitution: The View from the Third Amendment*, 20 WM. & MARY BILL OF RIGHTS J. 1243, 1271–72 (2012) (discussing quartering inflicted on Aleutian Islanders during World War II).

interpret "homes" in the amendment can shape the meaning of "property" throughout the Constitution, for instance.[5] And in the miniscule jurisprudence of the Third this paper finds a big fat paradox: Though the government of the United States proclaims its devotion to equality before the law and respect for individual rights, it embraces a doctrine of governmental immunity and denies effective remedies for many grievous wrongs.

This paradox invites a question: Should government courts offer more comprehensive relief for government wrongs? This paper offers as an answers: "Yes and no."

It answers, "Yes," because government judges commit a manifest injustice in exempting themselves, their employer, and their fellow government employees from liability in civil claims. Aggrieved subjects have rioted over lesser things than being denied judicial relief for legal wrongs — things like tea imposts, for instance.[6] And whole colonies have revolted against the idea that a privileged few enjoy immunity to violate everyone else's rights.[7]

This paper answers the question of whether government courts should remedy government wrongs "No" because there has to be a better way. John Locke, author (largely through Tom Paine's reformulation) of the ideas that sparked and sustained the American Revolution, founded his whole theory of government on the hard fact that great woes will "follow from every Man's being Judge in his own Case."[8] A State can provide an objective third party for resolving disputes between third parties. But Locke's very justification for the government argues against letting it judge claims against the government itself.[9]

What Locke's concern about self-judgment suggests, history has amply demonstrated. The development of governmental immunity in

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5. *See id.* at 1274–75 (arguing that violations of the Third Amendment should support takings claims under the Fifth Amendment for compensation for all forms of property — not just real property).

6. Taxes on tea imposed by a non-representational Parliament, for instance. PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 142-43 (Harper Collins 1997).

7. *See, e.g.*, the American War for Independence. *Id.* at 212–67.

8. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 344 (1690) (Cambridge Univ. Press, 2d ed. 1967, Peter Laslett ed.).

9. Notably, given the comparisons below between the liability of public and private parties, critics of private city governments have disparaged them for claiming the power to choose the arbitrators who will resolve their disputes with residents. *See* Persis Taraporevala, *Creating subjects in Lavasa: the private city*, OPENSECURITY (Apr. 16 2013), https://www.opendemocracy.net/opensecurity/persis-taraporevala/crea ting-subjects-in-lavasa-private-city (reporting that residents with disputes against Lavasa Corporation Limited, owner and operator of a private city in India, must have them resolved by an arbitrator chosen by LCL).

the United States originated from bad authority and bald assertion, took root when judges exempted themselves from civil liability, and spread to immunize all manner of governmental bodies and agents.[10] This historical evolution shows all too well what follows when government courts decide the government's exposure to civil litigation: They tend, for predicable public choice reasons, to increase government power at the expense of individual rights.

We can do better. Perhaps the Founders could not think of any forum except government courts for resolving claims against the government. Since that day, however, the private sector has developed excellent procedures for resolving civil disputes. The best practices developed by American and international non-governmental organizations provide a proven alternative to government courts and a more objective forum for resolving private claims against the government. This paper proposes both the abolition of governmental immunity and the use of "citizen courts," framed on world-standard practices, to decide civil suits against sovereigns or their agents.

A brief preview of the material to follow: Section 2 describes what happened in the one case that has seriously grappled with the meaning of the Third Amendment, *Engblom v. Carey*,[11] and explains how differently the defendant officials might have fared had they been private parties litigating at common law. *Engblom* let the officials' ignorance about the Third Amendment exempt them from liability for violating it, a privilege afforded under the doctrine of governmental immunity.[12] Section 3 summarizes the origins, scope, and policy of governmental immunity. It uncovers its disreputable roots, charts its alarming spread, and assesses it as a dubious policy. Section 4 analogizes the role of governmental immunity in the jurisprudence of the Third Amendment to the brown M&Ms that the band Van Halen banned from candy bowls in its backstage hospitality suite. In both cases, small problems triggered warnings of bigger, more important ones.

The way that government courts have treated our Third Amendment rights says much about how it regards our rights more generally, and what it says gives us cause for alarm. The doctrine of governmental immunity exempts sovereigns and their agents from the law of the land, empowering them to invade private rights without facing judicial remedies. Sovereign immunity extends in

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10. *See infra* § 3.1.

11. *See generally* Engblom v. Carey, 677 F.2d 957 (2nd Cir. 1982).

12. Engblom v. Carey, 572 F. Supp. 44, 49 (S.D.N.Y. 1983) (excusing defendants from liability on grounds the "plaintiffs' Third Amendment rights were not 'clearly established' at the time of the events in question.").

whole or part to the 21.8 million employees of state and federal governments in the United States, giving them qualified good faith immunity.[13] The largest and most powerful institutions in our country thus claim to be above the law, exposing themselves to its civil processes only piecemeal if at all and then only as a gracious concession to the people it nominally serves.

Consider the paradox: Exemption from normal civil liability was a characteristic enjoyed by those holding noble titles in English law—titles that the Constitution expressly rejected and forbade.[14] And while nobles once constituted 5% of the English population,[15] government employees now constitute nearly 7% of ours.[16] The law of the United States has come to a strange pass, indeed.

The paper does not leave things there, however. Instead, it concludes with two suggestions: Abolish governmental immunity and resolve private claims against the government in citizen courts structured on the best practices of American and international non-governmental organizations. Perhaps that does not go far enough; perhaps, as in traditional African legal systems, officials should be held *doubly* liable when they violate private rights.[17] For now though, it would suffice to subject sovereigns and their officials to ordinary civil liability and resolve claims against them through independent, fair, and efficient proceedings. If the seemingly insignificant Third Amendment could help us do that, it would qualify as a champion in defense of our liberties.

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Before launching the substantive discussion to follow, a few observations about taxonomy and terminology of immunity might prove helpful. Though its usage does not contradict standard ones, this paper aims at greater precision than the norm. It thus reserves "governmental immunity" for the most general description of the exemption from civil liability claimed by sovereigns and their officials.[18] The term "sovereign immunity" is used to indicate the

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13. Robert Jesse Willhide, *Annual Survey of Public Employment & Payroll Summary Report*: 2013, United States Census Bureau, http://www2.census.gov/govs/apes/2013_summary_report.pdf.

14. U.S. CONST. art. I, §9, cl. 8.

15. JONATHAN DEWALD, THE EUROPEAN NOBILITY, 1400–1800, 25 (1996).

16. *State & County Quickfacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html (last visited Dec. 3, 2014) (showing 2013 U.S. population of 316, 497, 531).

17. MICHAEL VAN NOTTEN, THE LAW OF THE SOMALIS 37 (Red Sea Press 2005).

18. *Sovereign Immunity*, BLACK'S LAW DICTIONARY (6th ed. 1990), (treating

privilege against civil liability enjoyed by government entities themselves, *qua* legal persons, which most commonly appears in the guise of federal, state, or municipal immunity.[19] "Official immunity" herein refers to the privileges that judges have arrogated from their sovereigns and extended to other of its agents.

Sovereign immunity and official immunity exhaust the two main types of governmental immunity. This paper thus uses "governmental immunity" interchangeably with "sovereign and official immunity." It also describes these immunities as a kind of legal privilege: "A peculiar right, advantage, exemption, power, franchise, or immunity held by a person or class, not generally possessed by others."[20] This usage also accords with Hohfeld's less popular but more rigorous definition of a privilege as the absence of a duty, given that governmental immunity negates the duties of sovereign and their agents to respect others' rights.[21]

II. IMMUNIZED QUARTERING IN CONTRAST WITH AN ORDINARY CASE AT COMMON LAW

Only one case has given the Third Amendment sustained and serious consideration: *Engblom v. Carey*.[22] Happily though, it offers an ideal case to illustrate the impact of governmental immunity. As this section will show, *Engblom* proves instructive not only for what it did to develop the jurisprudence of the Third Amendment but also for what it did *not* do: hold New York or its agents liable for violating the plaintiffs' rights.

Both the state of New York and its officials enjoyed the privilege of governmental immunity in both federal and state courts. The significance of that privilege becomes clear when, as below, we compare the outcome in *Engblom* with the liability a private community and its agents would have faced had they violated agreements with residents, trespassed on their real and personal property, interfered with their mail communications, and quartered vandals and thieves upon them. In a world without governmental

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governmental immunity as coextensive with sovereign immunity).

19. *Id.*

20. *Privilege*, BLACK'S LAW DICTIONARY (6th ed. 1990).

21. Wesley, Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913). Unsurprisingly, the general definition so falls under Hohfeld's definition, though in that guise the legal relation is defined as the correlative of a disability — in this case, a disability that strips those who suffer governmental wrongs of the power to bring suit for judicial remedies. *Id.* at 55.

22. Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982).

immunity, the common law would have given the *Engblom* plaintiffs many rights and remedies against the quartering they suffered. In this, a world with government immunity, the plaintiffs got no legal relief.

A. What Happened in Engblom*?*

Engblom v. Carey represents the first case to subject the Third Amendment to judicial interpretation and the only case to consider remedying instances of unconstitutional quartering.[23] Only one other case, *Custer County Action Ass'n v. Garvey*, appears to have seriously examined the Third Amendment.[24] *Custer* cannot teach us much about governmental immunity, though. The court, having found the Third had not been violated, had no occasion to consider the government's liability.[25] A close study of the historical record reveals several instances of unconstitutional quartering, some quite shockingly cruel.[26] Alas for their victims, and as a sad commentary on public officials' knowledge of and respect for the Third Amendment, those violations never went to trial, much less received judicial interpretation. *Engblom* thus represents well neigh the entirety of Third Amendment jurisprudence.

Engblom arose during a statewide strike by New York prison guards.[27] The plaintiffs, Marianne E. Engblom and Charles E. Palmer, had been living in dorm-like residences at the Mid-Orange Correctional Facility in Warwick, New York, when the prison's superintendent ejected them from the facilities.[28] Soon thereafter, New York officials quartered National Guard troops in the plaintiffs'

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23. *Id.* at 962.

24. Custer Cnty. Action Ass'n. v. Garvey, 256 F.3d 1024 (10th Cir. 2001).

25. *Id.* at 1043 ("We simply do not believe the Framers intended the Third Amendment to be used to prevent the military from regulated, lawful use of airspace above private property without the property owners' consent."). Attentive readers will note the somewhat paradoxical nature of the court's originalist analysis.
Another contender for the honor of having adjudicated the contours of the Third Amendment, *Ramirez de Arellano v. Weinberger*, 568 F. Supp. 1236 (D.D.C. 1983), presented promising facts — the plaintiff complained that U.S. troops had invaded his Honduran ranch and set up a regional training center — but the litigation gave the Third only passing mention before winding through the court system in pursuit of other issues and finally fizzling out. Students of the Third Amendment could only sigh in frustration.

26. *See* Bell, *supra* note 3, at 136–40 (discussing examples of quartering from the War of 1812 and Civil War); *see also* Bell, *supra* note 4, at 1271–72 (discussing quartering inflicted on Aleutian Islanders during World War II).

27. Engblom v. Carey, 522 F. Supp. 57, 59 (S.D.N.Y. 1981).

28. *Id.* at 62.

residences.[29] After suffering alleged trespass, destruction and theft of their personal property, and wrongful denial of access to their mail and weapons, the plaintiffs brought suit seeking damages against the Governor of New York and other state officials.[30] Among the causes of action: violation of the Third Amendment.[31] The defendants moved for summary judgment, which the trial court granted on grounds that the plaintiffs had had insufficiently property-like interests in their residences.[32] Having found that no "house" was at issue, the court held that no violation of the Third was possible.[33]

The court of appeals reversed and remanded.[34] In so doing, the Second Circuit issued three significant holdings about the Third Amendment. First, National Guard troops qualify as "soldiers" within the meaning of the Third Amendment.[35] Second, the Third Amendment binds states because it has been incorporated into the Fourteenth amendment.[36] Third, because the Third Amendment aims to protect a fundamental right to privacy, it applies to all residences "founded on lawful occupation or possession with a legal right to exclude others."[37] For these three holdings, *Engblom v. Carey* represents a milestone—indeed, *the* milestone—of Third Amendment jurisprudence.

B. What Did Not Happen in Engblom*?*

The *Engblom* appellate opinion also proves interesting for what it did *not* say about the Third Amendment. The court did not outline any judicial remedies that victims of unconstitutional quartering might enjoy. Strictly speaking, after all, the court did not find that the plaintiffs suffered a violation of their Third Amendment rights. That remained a question for the lower court to resolve on remand,

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29. *Id.* at 63.

30. *Id.* at 64.

31. *Id.* at 59.

32. *Id.* at 67. The trial court reasoned that "plaintiffs' occupancy was most analogous to possession incident to employment, which carries with it a somewhat lesser bundle of rights than does a tenancy." *Id.* at 67.

33. *Id.* at 66.

34. Engblom v. Carey, 677 F.2d 957, 964 (2d Cir. 1982).

35. *Id.* at 961.

36. *Id.* By citing it in support of a right to privacy, several Supreme Court cases have apparently assumed the incorporation of the Third Amendment: Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Poe v. Ullman, 367 U.S. 497, 522, 549 (1961) (Douglas, J., dissenting); *id.* at 549 (Harlan, J., dissenting).

37. *Engblom*, 677 F.2d at 962.

having been directed by the appellate court as to the proper standard to apply and commanded to hold proceedings "not inconsistent with this opinion."[38]

What did the district court finally say about the Third Amendment? Here again, *Engblom* speaks most loudly through its silence. The lower court on remand never had occasion to interpret the scope of the Third Amendment because it determined, as a preliminary matter, that the defendant officials enjoyed an affirmative defense of qualified good faith immunity.[39] In effect, the court's ignorance of the Third Amendment's scope came to the rescue because the absence of judicial interpretation on the topic meant that "plaintiffs' Third Amendment rights were not 'clearly established' at the time of the events in question."[40] Because the state officials acted without malice, they enjoyed immunity from civil suit even if they violated the plaintiffs' Third Amendment rights.[41]

The *Engblom* plaintiffs alleged not just violations of their Third Amendment rights, but violations of other rights, too.[42] The trial and appellate courts disposed of the First and Second Amendment claims for various technical and, for present purposes irrelevant, reasons.[43] The disposition of the plaintiff's claims under the Fourth, Fifth, and Ninth Amendment, premised on the defendants' alleged destruction and theft of the striking guards' personal property, offers a revealing example, however, of how governmental immunity leaves violations of constitutional and common law rights without judicial remedies.

The trial court held that even if the guards had suffered trespass to and conversion of their chattels, "the qualified good faith immunity defense apparently would protect most of the defendants in the absence of anything more than bare allegation of bad motive or anything approaching such."[44] As with regard to their having violated the Third Amendment, therefore, and thanks again to the doctrine of governmental immunity, the defendant officials' ignorance saved them. And what about those few bad actors who allegedly destroyed and stole the plaintiffs' property? They could hardly plead ignorance, after all. As to them, the district court concluded that "whatever injury occurred was the result of isolated, unauthorized conduct by agents of the State. As such, without having pursued a state remedy for this tortious loss, plaintiffs

38. *Id.* at 966.
39. Engblom v. Carey, 572 F. Supp. 44, 46–49 (S.D.N.Y. 1983).
40. *Id.* at 49.
41. *Id.* at 48–49.
42. *Id.* at 64.
43. *Id.* at 70–71.
44. *Id.* at 72.

cannot be said to have suffered deprivation of property under color of state law *without due process of law*."[45] In other words, because New York's doctrine of governmental immunity made it impossible for the plaintiffs to defend their common law rights against the state or its officials, the federal government likewise refused its aid.

Yet another notable thing that *Engblom* did not do: Address the liability of New York State for the actions of its officials. Why not? Because the plaintiffs didn't even bother suing the state.[46] Anyone familiar with ordinary civil litigation might find that reticence puzzling, given that *respondeat superior* and other doctrines routinely expose employers to liability for the torts of their employees, and given that New York State certainly offered a deeper pocket for paying damages than the named officials. Here again, though, governmental immunity limited the plaintiffs' access to legal remedies.

The state of New York enjoyed sovereign immunity under the 11th Amendment, making naming it as a co-defendant an exercise in futility.[47] Furthermore, states do not qualify as suable entities under § 1983, the statute on which the *Engblom* plaintiffs' built their federal case against the defendant officials.[48] It should thus come as no surprise that they did not bother suing the state of New York in federal court. But why did they not sue the state in state court? Specifically, given that no other state was likely to have jurisdiction, why did the *Englbom* plaintiffs not sue New York in New York's courts?[49]

Because, as in federal courts, sovereign immunity would have made it futile to try to sue New York in its own courts. New York's highest court has proclaimed sovereign immunity as law of its state.[50] By default, then, no one can bring any claim against New York in its own courts. Lawmakers have changed that default in various statutory provisions. The most general such waiver of

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45. *Id.*

46. *Id.* at 57.

47. U.S. CONST. amend. XI; Alabama v. Pugh, 438 U.S. 781, 782 (1978).

48. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989); *Engblom*, 522 F. Supp. at 59.

49. If a state's wrongful acts have extra-territorial effects, however, it may be sued by citizens of another state in their state's courts. Nevada v. Hall, 440 U.S. 410, 426 (1978).

50. Brown v. State, 674 N.E.2d 1129, 1133 (N.Y. 1996). The court offered no case law or other authority for its claim but simply stated baldly: "Under the common law, a State is immune from suit unless it waives its sovereign immunity"; *see also id.* at 1133; Alston v. State, 762 N.E.2d 923, 924 (N.Y. 2001) (citing *Brown* as controlling authority).

immunity, New York's Court of Claims Act, starts out speaking broadly, exposing the state to the same sorts of suits that individuals or corporations generally face in local trial courts, but concludes with a caveat: "provided the claimant complies with the limitations of this article."[51] Those limitations include special and comparatively very brief statutes of limitations for claims against the state. Those who would sue New York for the negligent or intentional wrongs of its officers or employees, for instance, have only 90 days to take legal action.[52] New York law generally gives other tort plaintiffs three years to file suit.[53] Courts as a rule interpret statutes waiving immunity narrowly, moreover, resolving uncertainties in favor of the state.[54]

Even if they had surmounted those barriers to suit, the *Engblom* plaintiffs would have faced other formidable defenses, established by New York courts and enjoyed only by the state and its officials.[55] The defenses exempt government defendants from liability for claims pertaining to the provision of public functions like police or fire protection, the enforcement of statutes, the performance of duties owed to the public at large, or the exercise of policy discretion.[56] These immunities apply absolutely to judicial, quasi-judicial, legislative, or upper-level executive functions, even proofs of malice or unreasonability.[57] The immunity applies to all other exercises of government discretion.[58] Even if the plaintiffs in *Engblom* considered suing the employer of the defendant officers and agents, New York, they must have given up the idea pretty quickly. New York law makes it very hard to sue New York State in New York's courts.

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51. McKinney's Court of Claims Act § 8, NY CT CLMS § 8 (2014).

52. *See, e.g., id.* at § 10(3).

53. McKinney's CPLR § 214 (2014).

54. Long v. State, 852 N.E.2d 1150, 1155 (N.Y. 2006).

55. Though the Court of Claims Act speaks only of the liability of the state of New York, courts have extended the same immunity to New York officials. *See, e.g.*, Tango v. Tulevech, 459 N.E.2d 182, 186 (N.Y. 1983) (noting that public officials, such as the defendant in question, are arguably entitled to immunity under section 1983 title 42 of the United States Code).

56. 15 N.Y. Prac., New York Law of Torts § 17:19 (2014). There remain many complications to this summary, including exceptions arising because the government has a special relationship with the claimant, giving rise to a special duty. *Id.*

57. Arteaga v. State, 527 N.E.2d 1194, 1198 n.2 (N.Y. 1988).

58. *Id.* at 1200.

C. Engblom *Without Governmental Immunity*

To fully appreciate the impact of governmental immunity, we have to consider what would happen in its absence. *Engblom* proves singularly unhelpful in that regard. As discussed above, the doctrine excused courts from even asking whether the defendant officers had, in allegedly trespassing on, destroying, and stealing the plaintiffs' property, as well as in denying them access to their mail and weapons, violated the plaintiffs' rights under the common law and other civil laws of New York.[59] Neither did *Engblom* consider whether New York itself, as the defendants' employer, could be held liable for the wrongs they allegedly committed. Apparently dissuaded by the special defenses that New York enjoys in federal and state law, the plaintiffs chose not to bring suit against the state, itself.[60] In order to reveal the impact of the doctrine of governmental immunity, therefore, this subsection analyzes how *Engblom* might have transpired if New York and its officials had had to face the same liability that private parties would have faced in like circumstances. This subsection asks, in other words: What if New York had faced liability under the common law?[61]

Exploring a hypothetical scenario where New York and its officers do not enjoy governmental immunity proves especially apt given that the plaintiff guards lived on state property, in dormitory housing located on the grounds of the prison where they worked.[62] In that situation, New York and its officials stood relative to the plaintiffs in very much the way that a hotel and its employees stand relative to their guests, or the way that a landlord and its employees stand relative to their tenants. Which offers the closest private equivalent to the situation in *Engblom*? Though *Engblom* struggled to describe what kind of property interest, if any, the plaintiffs held in their residences, it ultimately matters little in terms of substantive liability.[63]

Even if no real property interests were at issue in *Engblom*, the state and its officials would have faced liability for torts to persons and personal property had they not enjoyed governmental immunity.

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59. *See supra* Part 2.2.

60. *See supra* text accompanying notes 33–49.

61. It does not inquire into the liability of private parties under the Third Amendment, which restricts only government action.

62. Engblom v. Carey, 522 F. Supp. 57, 59–60 (S.D.N.Y. 1981).

63. The trial court agonized over the question before deciding that the plaintiffs had no property interest and thus no Third Amendment claim. *Id.* at 66–68. The court of appeals disagreed on both counts. Engblom v. Carey, 677 F.2d 957, 962–64 (2d Cir. 1982).

In the private sector even a licensor, such as a store inviting shoppers onto its premises, faces potential liability if its employees destroy, steal, and wrongfully detain the property of its licensees.[64] Hotels likewise enjoy no general immunity from liability for wrongs committed by their employees against their guests—not, leastwise, sufficient to excuse the trespass to chattels and conversion allegedly committed by the defendants in *Englbom*.[65]

In the common law of New York and elsewhere, an employer can be held liable for the torts of its employees if they act within the scope of their work, such as if the employer directs the employee to detain a customer or guest's goods, or if the employer negligently fails to prevent employee wrongdoing, such as by hiring a known tortfeasor or by failing to supervise potentially dangerous situations.[66] Applied to the facts of *Engblom*, that test would almost certainly expose New York to liability for directing the retention of the plaintiff's mail and weapons. In effect, the state had allegedly made a policy of conversion.

New York's test of employer liability would also have rendered it liable for negligently hiring or supervising those of its employees who allegedly destroyed and stole the property of the *Engblom* plaintiffs. The National Guard troops who had been called to replace the striking guards, were young men away from home and had tense relations with plaintiffs and other guards staying in the dorms. Their employer could have easily foreseen that the destruction of the guards' property or worse might follow from this combustible arrangement. At a minimum, at any rate, and in sharp contrast to the result that sovereign immunity dictated in actuality, New York's liability on charges of negligent supervision would surely have

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64. *Compare* Lacelle v. Hills Dept. Store, 535 N.Y.S. 2d 1014, 1017–18 (City Ct. Watertown, 1988) (holding that a rental store is partially liable for theft of invitee's property on premises by unidentified party), *with* State Farm Ins. Co. v. Central Parking Systems, Inc., 796 N.Y.S.2d 665, 666 (N.Y. App. Div. 2005) (finding the employer was not liable for an employee's act of theft when it occurred outside the scope of employee duties). Note that if an employee acts outside of the scope of employment in committing a tort against an invitee, the employer may yet be liable for negligently hiring or supervising the employee, who would in his or her capacity as a tortfeasor stand with regard to the plaintiff like any other third party. *See, e.g.*, Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983).

65. *But see* Bleam v. Marriott Corp., 655 N.Y.S.2d 566, 567 (N.Y. App. 1997) (discussing New York statutes limiting the liability of a hotel when items were stolen from a guest's room). Many of the New York statutes discussed in Bleam require guests to take reasonable precautions to secure valuables if they want to hold the hotel to liable for thefts. *Id.*

66. Kirkman v. Astoria Gen. Hosp., 611 N.Y.S.2d 615, 616 (N.Y. App. Div. 1994).

survived a motion for summary judgment, relying as they did on contestable facts. The claims might ultimately have garnered the plaintiff's ample damages or a generous settlement, too.

What if New York stood to the *Englbom* plaintiffs like a landlord to its tenants, as the court of appeals strongly hinted it did?[67] The state and its employees would then have faced not only tort claims, as above, but also claims sounding in property and contract, including wrongful ejectment, breach of lease, and trespass to real property.[68] The property-based claims, like those sounding in tort (but not those sounding in contract), would have had the further advantage of making equitable remedies more likely, supposing the facts of the case had made that form of relief suitable.[69] In the actual case, however, the wrongs complained of had ended long before the litigation began, making an injunctions futile.

It proves significant that this assessment of the liability of New York and its employees does not rely on the somewhat peculiar facts of *Englbom*, under which the plaintiffs resembled hotel guests or tenants of the state *qua* hotelier or landlord. Seldom, after all, do those who complain of government wrongdoing live on the sovereign's property. They instead typically live on their own property and either suffer trespass and other government offenses there, as in a classic case of unconstitutional quartering, or on public property elsewhere, as in a routine case of police brutality. As a general matter, therefore, those who would press civil claims against the sovereign or its agents stand relative to them as the residents of a homeowner association, condominium, or cooperative residential association (collectively, "common interest developments") stand relative to the private organization that houses them.

Because common interest developments often rival cities in their size and range of operations,[70] their exposure to civil lawsuits

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67. *Engblom*, 677 F.2d at 964 (reversing grant of summary judgment because plaintiffs may have "had a substantial tenancy interest in their staff housing, and . . . enjoyed significant privacy due to their right to exclude others from what were functionally their homes.").

68. *See, e.g.*, Sunset Cafe, Inc. v. Mett's Surf & Sports Corp., 959 N.Y.S.2d 700, 702 (N.Y. App. Div. 2013) (applying New York law of ejectment and trespass); Owners Corp. v. Israel, 729 N.Y.S. 2d 819, 820 (N.Y. 2nd Dept. 2001) (interpreting lease in breach case brought under New York law).

69. *See* Bowater Paper Co. v. Clinton Paper Corp., 73 N.Y.S.2d 387 (Sup. Ct. Kings Cty. 1947) (discussing standards for equitable relief under New York law).

70. *See* EVAN MCKENZIE, BEYOND PRIVATOPIA: RETHINKING RESIDENTIAL PRIVATE GOVERNMENT 91 (Urban Institute 2011) (relating large size of such common interest developments as Reston, Virginia, with more than 56,000 residents, and Columbia, Maryland, with more than 97,000). The largest residential condominium

provides an especially telling comparison to the exposure of governmental defendants to civil suits. As the analysis immediately above shows, the immunity enjoyed by New York state and its officials neutered what would have otherwise been valid civil claims of the *Engblom* plaintiffs. If a municipal government had been responsible for the trespass, vandalism, conversion and other wrongs alleged in *Engblom*, would it likewise have enjoyed immunity?

It looks very likely that a quartering municipality would have escaped liability. If considered a mere subsidiary of its host state, a municipality simply cloaks itself in its sovereign's immunity. If not, the municipality enjoys the benefit of a widespread doctrine that immunizes municipalities as government bodies for harms resulting from discretionary or routine ministerial actions.[71] The United states Supreme Court has held that the doctrine of *respondeat superior* does not apply in suits brought under § 1983 against government officials, leaving municipalities free from paying damages for wrongs committed by their employees.[72] States may and do continue to subject municipalities to *respondeat superior* under local law.[73] Even still, both the municipality and its employees enjoy the benefit of doctrines that foreclose many civil suits, such as those generally excusing torts committed in the exercise of governmental or discretionary functions, or those excusing negligent performance or nonperformance of a ministerial duty.[74] It thus seems likely that if a municipality and its officials were the defendants in *Engblom*, the extant law of governmental immunity would have excused all but the acts of vandalism and theft allegedly committed against the

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in the United States, Bronx's Co-Op City, has over 50,000 residents in several high-rises. Elsa Brenner, *Everything You Need, in One Giant Package*, N. Y. TIMES, April 6, 2008, *available at* http://www.nytimes.com/2008/04/06/realestate/06live.html. The HOA comprising Highlands Ranch, Colorado, includes over 30,506 homes. *Residents*, HIGHLAND RANCH COMMUNICATION ASSOCIATION, http://hrcaonline.org/Property-Owners/Residents (describing it as "the largest homeowners association in the United States"); *HRCA Facts*, HIGHLAND RANCH COMMUNICATION ASSOCIATION, http://hrcaonline.org/Area-Resources/Highlands-Ranch/Facts (claiming to have 95,183 residents and 30,493 homes).

71. *See, e.g.*, McLean v. New York, 905 N.E.2d 1167, 1173–74 (N.Y. 2009) ("Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general.").

72. Monell v. Dep. of Soc. Serv. of New York, 436 U.S. 658, 691 (1978).

73. *See, e.g.*, Oyague v. The Inc. Vill. of Malverne, No. 19159/93, 2008 WL 135205, at *3 (N.Y. Sup. Ct. Jan. 2, 2008) (ruling that immunity under § 1983 did not foreclose holding municipality liable under *respondeat superior* under state law).

74. 18 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.77 (3d ed. 2011).

plaintiffs' personal property, and that the city would not be held liable under *respondeat superior* for those torts, but rather, if at all, under theories of negligent hiring or supervision of the defendant employees.

Would a similarly situated private defendant have enjoyed similar immunity? To find out, let us suppose that *Engblom* had happened not in a state prison but in a large condominium association, and that the claims arose not from the quartering of troops but from the trespass of a private security guard. Suppose, for instance, that the guard strayed from a community sidewalk onto a private patio and there invaded the plaintiffs' privacy by peering into their bedroom. Suppose further that the guard, though not authorized to ogle the activities of residents in their homes, had trespassed on the patio area under orders to "investigate all suspicious noises from building interiors from the nearest accessible window or door."[75]

This privatized version of *Engblom* preserves the legal structure of the case, substituting the condominium association for the state of New York, the guard for the National Guard troops, the association's officers for the Governor and defendant officials, trespass for quartering, and violation of privacy rights for vandalism and theft. These offenses, while actionable, hardly rise to the level of those alleged in *Engblom*. And yet it looks very likely that the hypothetical condominium association and its employees would, in contrast to New York or its officers, have faced liability.

Common interest developments and their agents enjoy nothing like the immunity enjoyed by sovereigns and their officials. Rather, they face civil lawsuits on the same footing as any generic natural or legal person. Consider the following contrasts between public and private forms of government:

- While a city's residents can only dream of bringing suit to have their city fix potholes, members of condominiums can and do sue their condominium associations for negligent maintenance of common areas.[76]

- Unlike sovereigns immunized from liability in *respondeat superior*, common interest developments have "the same responsibility as any other employer and will be liable for torts committed by its agents or servants in the course of their duties."[77]

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75. I thank Lawrence Rosenthal for helping me craft this hypothetical.

76. White v. Cox, 95 Cal. Rptr. 259, 263 (Ct. App. 1971).

77. HOME OWNER ASSOCIATIONS AND PLANNED UNIT DEVELOPMENTS LAW AND

- Government courts refuse to hold police liable, even for refusing to render aid to citizens in distress,[78] yet hold private communities liable for third-party criminal conduct.[79]

- As *Engblom* demonstrates, whereas even the plain language of a government's founding documents does not in practice suffice to protect civil liberties, the residents of common interest developments find courts willing and able to enforce the legal obligations set forth in the servitudes, leases, and other agreements constituting their community.[80]

- While citizens impotently fantasize about suing dishonest or incompetent officials for breach of duty, the residents of common interest developments can sue those who run their communities on the same grounds that shareholders can sue the directors who run their jointly owned corporation, rendering board members personally liable for self-dealing or for clearly uninformed or incompetent management.[81]

Taken together, these many differences between the immunity from liability enjoyed by governmental authorities and the run-of-the-mill exposure to liability suffered by common interest developments make it very likely that the defendants in our privatized *Engblom* hypothetical — both the association and its employee—would have faced a significant risk of judicially ordered remedies for trespass, breach of agreement, invasion of privacy, negligence, and other civil claims.[82] Recent developments bear out that assessment; common interest developments have faced so much civil liability in recent years that some commentators fear for their continued viability.[83]

PRACTICE, § 10.22[3] (2d ed. 2014).

78. Riss v. New York, 240 N.E.2d 860, 861 (N.Y. 1968).

79. HOME OWNER ASSOCIATIONS AND PLANNED UNIT DEVELOPMENTS LAW AND PRACTICE, *supra* note 77, § 10.22[3].

80. *Id.* at § 8.12.

81. MCKENZIE, *supra* note 70, at 14–15, 91 (describing application of business judgment rule to common interest developments and allocation of liability); EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 132 (1994) (explaining that boards get sued "for negligence, breach of their fiduciary duty to the members, abuse of authority, and [] under some theory of quasi-governmental liability, such as alleged violations of constitutional rights.") (footnote omitted).

82. *See id.* at 160–62 (describing extent of liability of common interest developments under California common law).

83. *See* MCKENZIE, *supra* note 70, at 92 ("[W]e see isolated examples of association collapse rather than widespread failure; but if steps are not taken to

At the same time that private communities face civil liability without the benefits of governmental immunity, they must live up to an increasing number of restrictions, such as those arising under the First and Fourteenth Amendments, originally created to restrain public bodies.[84] Common interest developments have struggled to ease the legal burdens imposed on them by lobbying for special legislative protections, an effort that in California has resulted in board members enjoying something akin to the immunity enjoyed by municipal officials.[85] Absent those sorts of special statutory privileges, however, as the analysis in this subsection has demonstrated, private communities and their agents face much greater risk of civil liability for wrongful action than what sovereigns and their officials face in like circumstances. Compared to private parties, governments have it good when they do bad.

III. WHY HAVE GOVERNMENTAL IMMUNITY?

The doctrine of governmental immunity reaches far and wide, exempting powerful institutions and millions of people from some or all liability for violating common law or constitutional rights. So extraordinary a privilege cries out for justification. This section briefly reviews how governmental immunity entered the law of the United States and what commentators say about the doctrine today. The effort does more to explain governmental immunity than to excuse it.

Engblom v. Carey demonstrated on a small scale what holds true on a much larger one. Citizens and residents of the United States suffer greater exposure to civil liability and fewer remedies for violations of their own rights than do public parties.[86] Those who enjoy the privileges of governmental immunity include a wide range of federal and state institutions, from the most powerful sovereign known to history to municipal wastewater treatment districts, and

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ensure sufficient . . . liability insurance . . . increasing numbers of associations may fail.").

84. *See, e.g.*, Laguna Publishing Co. v. Golden Rain Foundation of Laguna Hills, 182 Cal. Rptr. 813, 829 (Cal. Ct. App. 1982) (holding that private community sufficiently similar to a municipality to trigger application of constitutional free speech and free press rights), *disapproved of on other grounds by* Katzberg v. Regents of Univ. of California, 29 Cal. 4th 300, 58 P.3d 339 (2002).

85. MCKENZIE, *supra* note 70, at 162 (describing origins and results of common interest development lobbying in California). So far, legislators have not reduced the liability of the private communities themselves. *Id.*

86. Engblom v. Carey, 572 F. Supp. 44, 48–49 (S.D.N.Y 1983).

some 21.8 million employees (about 7% of the national population).[87] Why do private parties suffer the disadvantages of this two-tier system of justice?

The expense and indignity that governmental immunity imposes on us might make sense if it qualified as a necessary evil. But that seems unlikely; governments abroad do well enough without it.[88] Governmental immunity bears little of the honor bestowed on well-founded precedents or wise public policy, and moreover bears much of the taint of self-service. Sovereign immunity and its direct offspring, official immunity, incentivize ignorance and make private individuals bear the brunt of wrongs committed in pursuit of the public good. Neither history, nor efficiency, nor equity can justify governmental immunity. We can best explain it as a public choice tragedy, the predictable result of letting government agents judge government wrongs.

This section offers a critical assessment of governmental immunity. Subsection 3A summarizes the origin and growth of governmental immunity in the law of the United States. Subsection 3B reviews the legal and policy arguments for and against governmental immunity, finding the latter to outweigh the former. By way of clarification, as well as to provide a parallel example of the public choice pressures that explain governmental immunity, subsection 3B contrasts it with the functionally similar doctrine of taxpayer standing.

A. The Origin and Growth of Governmental Immunity in U.S. Law

Exactly how a general presumption of governmental immunity wormed its way into the law of the United States may remain "one of the mysteries of legal evolution," but it gives every appearance of proceeding under cover of ignorance if not bad faith.[89] "Obscurity and uncertainty" shroud the origins of the doctrine.[90] Commentators find "the case for immunity [] inconclusive and unpersuasive on historical grounds,"[91] blaming its reception in the United States "on a pervasive misunderstanding of English legal history and a

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87. *See supra* notes 2–21 and accompanying text.

88. Denise Gilman, *Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591, 636–37 (2007).

89. Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924).

90. George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 477 (1953).

91. Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S. CAR. L. REV. 201, 204 (1980) (speaking of judicial immunity).

convenient disinclination to consider the distinctive history and political philosophy that underlies the federal government."[92]

Edwin M. Borchard, a seminal scholar of governmental immunity in the United States, summed up its ignominious history this way: "The reason for this long-continued and growing injustice in Anglo-American law rests, of course, upon a medieval English theory that 'the King can do no wrong,' which without sufficient understanding was introduced with the common law into this country, and has survived mainly by reason of its antiquity."[93] Despite springing from somewhat dubious seed, governmental immunity has spread throughout the law of the United States, exempting all types of sovereigns and officials from ordinary civil liability.

The Founders took care to spell out one very narrow kind of governmental immunity in the Constitution's Speech and Debate Clause. It provides that legislators "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."[94]

The interpretive principle of *expressio unius* suggests that by providing an exemption from civil liability solely in one small area, the Founders meant to leave the government and its officials subject to ordinary civil liability in all other respects.[95] And indeed, nowhere else does the Constitution provide immunity to the government or its agents.[96]

Other provisions of the Constitution likewise suggest that the Founders did not assume that sovereigns or their officials could escape ordinary civil liability.[97] In defining the scope of the Senate's impeachment power, for instance, which reaches all executive and judicial officers,[98] the Constitution provides that "the Party convicted shall nevertheless be liable and subject to Indictment,

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92. Donald Doernberg, *Taking Supremacy Seriously: The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443, 443 (2011).

93. Borchard, *supra* note 89, at 2 (footnote omitted).

94. U.S. CONST. art. I, § 6, cl. 1.

95. Doernberg, *supra* note 92, at 455.

96. Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 523 (2003).

97. Doernberg, *supra* note 92, at 455–56.

98. U.S. CONST. art. I, § 3, cl. 6 (establishing Senate's impeachment power); *id.* art. II, § 4 (naming parties subject to impeachment).

Trial, Judgment and Punishment, according to Law."[99] Suffering impeachment by the Senate, in other words, does not foreclose liability to private parties. The Constitution forbids the United States from granting any "Title of Nobility"[100]—a grant characterized by the privilege of violating commoners' rights without suffering liability to them.[101] More generally, the Constitution provides that it "shall be the supreme Law of the Land"—something that could hardly hold true if the government or its officials could violate the Constitution without suffering the same legal strictures that the rest of us face.[102] So straightforward a reading of the Constitution has evidently not prevailed in United States law, however.

Although the Supreme Court derogated governmental immunity at a time when the Founders remained in living memory, it later gave judges immunity from civil suit, establishing a precedent that spread throughout the law.[103] The 1793 case of *Chisholm v. Georgia* held that a citizen of one state could maintain a suit against another state's government; sovereign immunity offered no exemption from civil liability.[104] The states rushed to ratify the Eleventh Amendment soon thereafter, giving themselves immunity from paying the onerous debts they had incurred during the War of Independence.[105] Notably, it took a constitutional amendment to privilege sovereigns against civil liability in that instance. Soon thereafter, governmental immunity began to creep less ostentatiously into the law of the United States, through rare and scattered cases.

The process of crafting governmental immunity began by hints, found voice in *dictum*, and was born by judicial pronouncement. In holding that the government could be subject to suit only by its own

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99. *Id.* at art. I, § 3, cl. 7. The impeachment power does not reach legislators, who instead face expulsion under the rules of each house. *Id.* at art. I, § 5, cl. 2.

100. *Id.* at art. I, § 9, cl. 8.

101. M. L. BUSH, NOBLE PRIVILEGE 66 (1983) (explaining that their privileges "not only safeguarded nobles from the normal court procedures but also awarded them the use of procedures closed to commoners").

102. U.S. CONST. art. VI, cl. 2. For an extended rumination on the facial conflict between governmental immunity and the Supremacy Clause, see Doernberg, *supra* note 92, at 464 ("[I]mmunities upset the hierarchy the Supremacy Clause establishes."); *see also* Rodolphe J.A. de Seife, *The King Is Dead, Long Live the King! The Court-Created American Concept of Immunity: The Negation of Equality and Accountability Under Law*, 24 HOFSTRA L. REV. 981, 984–86 (1996) (explaining that the concept of immunity is contrary to the Constitution).

103. de Seife, *supra* note 102, at 986.

104. 2 U.S. (2 Dall.) 419, 420, 422–23 (1793).

105. U.S. CONST. amend. XI.

consent, in the 1821 case of *Cohens v. Virginia*, the Supreme Court strongly implied that the government could *not* be sued if it did *not* consent.[106] Chief Justice Marshall ventured beyond the holding, asserting that "a sovereign independent State is not suable, except by its own consent" and that the "general proposition will not be controverted."[107]

The Court cited no authority for the proposition; it provided its own. Moreover, it did so unnecessarily. The Court ultimately held that Virginia had consented to submit to the jurisdiction of federal courts when it ratified the Constitution.[108] Sovereign immunity adds nothing to that holding and wrongfully forecloses the possibility that Virginia was not immune from its own civil law in its own courts. Marshall thus did not need to invent governmental immunity, but invent it he did.

Marshall could not have found the doctrine of governmental immunity in English law, where individuals could in fact win relief for private claims brought against the crown or its agents.[109] As Professor Donald L. Doernberg put it, with fitting irony, "[T]he American form of sovereign immunity created a system of official accountability even less protective of individual rights vis-à-vis government than the English system the colonists had thrown off because it denied them those rights."[110] Despite Mashall's somewhat creative approach to the doctrine, by 1882, the Supreme Court could cite his *dictum* in *Cohens* as the genesis of governmental immunity in the law of the United States, explaining, perhaps with a hint of apology, that "the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."[111]

Just as sovereign immunity took root in the law of the United States by some combination of misapprehension and judicial invention, so did the privilege of immunity spread from the sovereign to its officials. The process began with government judges exempting themselves from the jurisdiction of government courts,

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106. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 380 (1821).

107. *Id.*

108. *Id.* ("If . . . it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.").

109. *See* Doernberg, *supra* note 92, at 445–48, 453–54 (although the King was untouchable, his royal property was not).

110. *Id.* at 451 (footnote omitted).

111. United States v. Lee, 106 U.S. 196, 207 (1882).

based on a misstatement of English law.[112] Today, tens of thousands of federal and state officials enjoy complete or partial immunity from ordinary civil processes.

Over a century ago, in *Bradley v. Fisher*, the Supreme Court asserted that the immunity of judges from civil suits relating to abuse of authority "has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country."[113] In that, the Court erred. English law generally presumed judicial liability, in fact, and American decisions had throughout the nineteenth century exhibited a mixture of judicial immunity and liability.[114]

English law recognized one exception to the presumption of judicial non-immunity: a judge of a court of record was liable for wrongful acts only if he committed them outside the scope of his authority.[115] All other judges faced liability for all their wrongful acts, committed under color of authority or otherwise.[116] Why did judges of courts of record get special treatment? Because the King asserted that his word concerning events that took place in his presence was indisputable, and he extended that privilege to his judges.[117] Judicial immunity thus sprang from sovereign immunity.

Though state courts had shown diverse approaches to the question of judicial immunity, *Bradley* set the theme for U.S. law thereafter, establishing a presumption of immunity for all judicial acts except those clearly outside the court's jurisdiction.[118] Judges later extended their own immunity to a wide range of their fellow governmental employees, such as prosecutors and administrative functionaries engaging in quasi-judicial acts.[119] Courts have even

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112. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871) ("For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.").

113. *Id.*

114. Feinman & Cohen, *supra* note 91, at 203–04.

115. *Id.* at 210.

116. *Id.*

117. *Id.* at 206.

118. Stump v. Sparkman, 435 U.S. 349, 355–57 (1978).

119. *See, e.g.*, Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (describing scope of absolute immunity afforded to prosecutors); Butz v. Economou, 438 U.S. 478, 512–13 (1978) (extending absolute immunity to executive branch administrators performing adjudicative functions); Rottkamp v. Young, 205 N.E.2d 866, 867–68 (N.Y. 1965) (Burke, J., dissenting) (the majority affording building inspector absolute immunity under New York law); Frank J. Menetreza, *Lawless Law Enforcement: The Judicial Invention of Absolute Immunity for Police and Prosecutors in California*, 49 SANTA CLARA L. REV. 393 (2009) (describing and criticizing scope of absolute immunity in

extended the privilege to private arbitrators, protecting them from civil claims of wrongful judging.[120] (Notably, from a public choice perspective, retired government judges constitute a comparatively high percentage of private arbitrators.[121])

Bradley paints a telling portrait of the machinations of self-interest: As soon as they faced suits for failure to fulfill the obligations of their offices, judges in the United States held themselves immune as a class from the same civil liability that they imposed on others.[122] *Bradley* did not skimp on the privilege either, instead holding that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."[123] The case proved controversial, denounced by commentators as "reflecting judicial misunderstanding of both what the law was and how and why it developed."[124] But it proved effective, establishing a channel by which the sovereign immunity created in *Cohens* might flow to the benefit of the sovereign's officials.

Today, all manner of sovereigns and officials enjoy complete or partial immunity from ordinary civil processes. "Sovereign immunity" appears most commonly in the guise of the privilege against civil liability claimed by default by federal, state, and municipal institutions.[125] Courts have extended sovereign immunity to public bodies as small and diverse as school districts,[126] airport corporations,[127] and wastewater management operations.[128]

California law).

120. *See* JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 24.51 (3rd ed. 2005 & Supp. 2014) ("Because arbitrators perform a function analogous to that of a court . . . arbitrators [] traditionally have enjoyed immunity from civil suits for damages for judicial acts done in the course of arriving at an arbitration award.").

121. *See* Craig Sander, *Retired Judges Popular as Private Arbitrators*, NEW HAMPSHIRE BAR NEWS (May 14, 2010), http://www.nhbar.org/publications/display-news-issue.asp?id=5554 (discussing that in New Hampshire many retired judges hire themselves out as private arbitrators).

122. Bradley v. Fisher, 80 U.S. 335, 347 (1871).

123. *Id.*

124. Feinman & Cohen, *supra* note 91, at 203.

125. BLACK'S LAW DICTIONARY, 1396 (6th ed.1990).

126. Barrett v. Bd. of Educ. of Johnston Cnty., N.C., 13 F. Supp. 3d 502, 514 (E.D.N.C. 2014); Yanero v. Davis, 65 S.W.3d 510, 527 (Ky. 2001) (contrasting between sovereign and governmental immunity).

127. *See In re* Air Crash at Lexington, Ky., Aug. 27, 2006, No. 5:06-cv-316-KSF, 32 AVI 15, 790, 2007 WL 8304726 (C.C.H.) (E.D. Ky. Nov. 26, 2007) (holding that a county airport corporation was entitled to sovereign immunity because it existed to perform governmental functions).

Government entities can and often do waive their presumptive immunity in whole or in part, as the federal government did in waiving its non-tort action immunity in the Tucker Act,[129] and its tort immunity in the Federal Tort Claims Act[130] But a private party's right to sue the government remains a matter of legislative discretion; courts will not enforce it absent statutory authorization.[131]

Largely barred from suing sovereigns for violations of their rights, plaintiffs have resorted to suing officials personally through *Bivens* actions (for federal officials)[132] or § 1983 actions (for state or local ones).[133] These suits have limited effect. Legislators, judges, and high-level executive officers enjoy absolute immunity from civil suit, exempting them even from allegations of unreasonable or malicious action.[134] Lower level officials enjoy qualified good faith immunity, shielding them "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[135] All these privileges operate not merely as defenses to liability, but as immunities to suit, allowing dismissal of litigation at the earliest possible stage.[136]

How can we summarize the long and complicated development of governmental immunity in the law of the United States? Though the Founders evidently took a dim view of putting the government or its agents above the law, their revolutionary ideals soon fell out of favor. From an unsupported *dictum*, sovereign immunity grew case by case into an unquestioned doctrine. Insofar as the privileges that English law afforded to royalty had any application to an independent America—a dubious proposition at best—they were misunderstood or misconstrued. Nonetheless, governmental immunity now completely or partially exempts a wide range of sovereigns and

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128. PYCA Ind., Inc. v. Harrison Cnty. Waste Water Mgmt. Dist., 81 F.3d 1412, 1419 (5th Cir. 1996).

129. 28 U.S.C. § 1346(a)(2) (2012).

130. 28 U.S.C. § 1346(b) (2012).

131. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 380 (1821).

132. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

133. 42 U.S.C. § 1983 (2012).

134. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (describing federal law); Arteaga v. New York, 527 N.E.2d 1194, 1195–96 (N.Y. 1988) (describing New York law).

135. *Harlow*, 457 U.S. at 818.

136. Scott v. Harris, 550 U.S. 372, 376 n.2 (2007).

officials from liability for violating others' constitutional and common law rights.

B. Governmental Immunity, Pro & (Mostly) Con

A long and distinguished line of academic commentators has disparaged governmental immunity, often in tones of incredulity, dismay, and outrage. They have condemned it as "the antithesis of government by consent"[137] complained that it "turns human rights protection on its head, protecting the government against the citizenry rather than the reverse,"[138] and worried about "the adverse effects of sovereign immunity on courts' capacities to provide individual justice."[139] Commentators have called it "a repugnant doctrine, at odds with the most basic precepts of the American Constitution"[140] and an "unwanted and unjust concept."[141] They have bluntly concluded that it "must go."[142]

Akhil Reed Amar thundered that in creating and sustaining governmental immunity, the Supreme Court "misinterpreted the Federalist Constitution's text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth."[143] Donald L. Doernberg devoted an entire book to arguing that sovereign immunity does not comport with the rule of law and violates the Lockean principles on which the United States was founded.[144] Some authority weighs in favor of the governmental immunity of course — academia would be a poorer place without such dissent — but even its most staunch defender chides the doctrine for a lack of "coherent justification."[145] Many more commentators regard it with skepticism if not scorn.

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137. Doernberg, *supra* note 92, at 447.

138. Gilman, *supra* note 88, at 624.

139. Jackson, *supra* note 96, at 522.

140. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN L. REV. 1201, 1223 (2001).

141. Pugh, *supra* note 90, at 476.

142. Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 383 (1969).

143. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1466 (1987).

144. DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW (Caroline Academic Press 2005).

145. Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 799 (2007); *see also,* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002) (defending the doctrine on originalist grounds); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 497 (2001) (also

Doubtless because it represents established law in the United States, judges have not criticized governmental immunity with anything like the same passion. The Supreme Court has noted the legislative branch's "disfavor of the doctrine of governmental immunity from suit," as evidenced by the passage of laws waiving the privilege, and has followed the lead of lawmakers by construing such waivers liberally.[146] Dissenting from what he regarded as a deviation from that policy, Justice Stevens went further still, decrying governmental immunity as "nothing but a judge-made rule" and "a persistent threat to the impartial administration of justice . . . ."[147] For the most part, however, government judges find little to criticize in governmental immunity. (But then again, it bears noting that the doctrine directly benefits judges by protecting them from civil lawsuits.)

The first subsection below considers the leading argument for governmental immunity—that it protects public servants from the distractions of private litigation— nd offers a counterargument from hypocrisy. The second subsection considers a new argument against the qualified good faith immunity enjoyed by most government employees: it violates principles of retroactivity. The third subsection assesses Professor Lawrence Rosenthal's defense of the current immunity doctrine. Though this review of the arguments for and against governmental immunity hardly serves as a final judgment, it casts grave doubt on the equity and efficiency of governmental immunity.

1. The Risk of Private Lawsuits Interfering with Public Obligations

How do government judges justify governmental immunity? Apart from whatever authority long acceptance of dubious claims, such as those made in *Cohens* and *Bradley* can afford,[148] they tend to explain governmental authority as essential to prevent public business from undue interference. As the Supreme Court explained

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assuming the originalist view of sovereign immunity); Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1234–35 (2001) (defending sovereign immunity as curb on government expenditures); Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1534–39 (1992) (defending sovereign immunity on separation of power grounds).

146. Fed. Hous. Auth. v. Burr, 309 U.S. 242, 245 (1940) (citing Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381 (1939)).

147. United States v. Nordic Village Inc., 503 U.S. 30, 43 (1992) (Stevens, J., dissenting). Justice Blackmun joined in the dissent.

148. *See supra* notes 89–136 and accompanying text (discussing the named cases).

in *Harlow v. Fitzgerald*, "public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability."[149] The Court has voiced particular concern for the immunity of the president because "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government."[150]

Note how this defense of governmental immunity implicitly condemns our civil justice system. It presumes that if private plaintiffs could sue governmental institutions and agents the costs imposed on defendants, and thus indirectly imposed on the public, would outweigh the net benefits. Federal and state governments in the United States have important obligations, no doubt, and civil litigation can prove distracting (even when most of the work can be fobbed off on government attorneys), but governments abroad seem to manage similar stresses without undue difficulty, as do private institutions and individuals throughout our society. Common interest communities can rival cities in size, and often surpass them in quality, without enjoying the privilege of immunity. And how can a government bureaucrat claim a more urgent need to escape civil liability and get back to work than a private hospital or doctor?

This counterargument to the claim that private lawsuits risk distracting important government operations sounds in hypocrisy but does not rely on it. The problem with the doctrine of governmental immunity is not so much the ugly contradiction of recreating the privileges of royalty in a constitutional republic founded on the principle of protecting individual rights under equality of law as it does the practical effect of exempting sovereigns and their agents from ordinary civil liability. Private organizations "eat their own dogfood" for good reason; consuming what you offer the public gives you a keen appreciation of your failings and a strong incentive to do better. Because it dampens an important feedback loop, governmental immunity leads to governmental impunity.

2. Governmental Immunity Violates the Retroactivity Doctrine

The outcome on remand in *Engblom v. Carey*, though consistent with the doctrine of governmental immunity as enunciated in other and higher courts, stands in stark contrast to another doctrine: retroactivity.[151] In a typical common law case, the court applies its

149. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

150. Nixon v. Fitzgerald, 457 U.S. 731, 751 (1982). The Court also voiced concern about the separation of powers, but admitted that would not stop it from disciplining the Executive in appropriate cases. *Id.* at 753–54.

151. Engblom v. Carey, 572 F. Supp. 44, 45 (S.D.N.Y. 1985). I thank Dean Tom

judgment with full force to the parties before it.[152] Having once enunciated the applicable legal standard, the court does not excuse the defendant for failing to foresee its judgment.[153] The court instead applies its ruling to the present parties, parties in other pending cases, and to similarly situated parties from the time of judgment onward.[154]

In contrast, many executive officials enjoy the shelter of qualified good faith immunity.[155] This form of immunity in effect lets wrongdoing officials have their first bite of the liability apple for free, excusing them to violate rights one time without suffering judicial sanction. *Engblom* typifies the phenomenon. On remand from a decision holding that they may have violated the Third Amendment, the lower court excused the public officials from liability because the "plaintiffs' Third Amendment rights were not 'clearly established' at the time of the events in question."[156] If they were to quarter National Guard troops in workers' dorm rooms a second time, some of the defendant officials in *Engblom* would presumably face civil liability (the high-level officials who actually order the quartering would, however, continue to enjoy absolute immunity).[157] The first time they violated the Third Amendment, however, they got off the hook.

Engblom and other applications of qualified immunity have the unhappy effect of incentivizing official ignorance about the scope of the legal rights enjoyed by citizens and residents. What officials do not know can save them. Sovereigns can only go so far in leaving their employees uninformed about subtleties of the law, of course; officials cannot justify knowing less about the law than average folk do. But qualified immunity gives government officials less reason to study the law, and gives others' rights wider berth than private

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Campbell for bringing this contradiction to my attention.

152. *See* Linkletter v. Walker, 381 U.S. 618, 622 (1965) ("At common law there was no authority for the proposition that judicial decisions made law only for the future.").

153. The common law traditionally did not even bar courts from applying judgments retroactively, though *res judicata* in practice left only defendants on direct review subject to new rules. L. Anita Richardson & Leonard B. Mandell, *Fairness Over Fortuity: Retroactivity Revisited and Revised*, 1989 UTAH L. REV. 11, 13–14 n.8 (1989).

154. Paul E. McGreal, *Back to the Future: The Supreme Court's Retroactivity Jurisprudence*, 15 HARV. J.L. & PUB. POL'Y 595, 597 (1992).

155. Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982). Executive officials exercising complex discretionary functions, as well as officials exercising legislative or judicial functions, enjoy absolute immunity. *Id.* at 807.

156. *Engblom*, 572 F. Supp. at 49.

157. *Harlow*, 457 U.S. at 807.

parties have in doubtful cases. Private defendants, after all, do not get one free shot at violating others' rights.

With regard to retroactivity as with regard to other areas, therefore, governmental immunity contradicts more general and traditional legal principles. Holding all else equal, this deviancy from ordinary civil liability makes government officials care less about respecting rights than private parties do, a troubling policy. While this may not be the most troubling aspect of the doctrine of governmental immunity, neither should it go unmarked.

3. Comments on Rosenthal's Defense of Governmental Immunity

Professor Lawrence Rosenthal offers the latest and most sophisticated defense of the current law pertaining to government tort liability.[158] His analysis begins with the observation, earned from first-hand experience, which governments respond not to economic incentives but to political ones.[159] More precisely, Rosenthal observes that political actors regard economic factors as merely a means to the ultimate goal of winning and preserving power. Politicians thus generally dislike civil liability because it "reduces the resources available for allocation," whether through public benefits or lower taxes.[160] Theory suggests that as a consequence of this economic effect on their political power, officeholders will try to reduce government tort liability.[161] "There is likely to be some marginal benefit from a regime of governmental liability by enhancing government incentives to invest in loss prevention," admits Rosenthal.[162] Still, he thinks we need politics to finish the job.

Rosenthal cautions that theory does not always survive in the rough-and-tumble of the real world. In actual practice, he argues, the loose connection between economics and politics makes civil suits inapposite for incentivizing governments to pursue optimal loss prevention policies in some areas, and in those areas we should count on political processes to discourage wrongdoing.[163] When he surveys extant law, Rosenthal finds that it largely comports with

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158. Rosenthal, *supra* note 145. Rosenthal's trenchant critiques of prior defenses of the doctrine of governmental immunity, *see id.* at 801–03, 814–15, obviate the need to afford them equal scrutiny.

159. *Id.* at 831.

160. *Id.* at 832.

161. *Id.* at 842.

162. *Id.* at 854. The quote continues, "although it is admittedly difficult to estimate its magnitude." *Id.*

163. *Id.* at 855.

what his model predicts: "[G]overnmental 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."[164] Rosenthal defends governmental immunity as a way to match the best mechanism with the particular policy problem. The economic impact of ordinary civil liability may suffice to give private parties adequate incentives to reduce wrongdoing, on that view, but political institutions respond better to political pressure.

Rosenthal's clear-eyed view of why political actors respond to the economic pressures of civil liability—because it reduces the funds they can use to win power—comports entirely with the explanation offered in these pages for the rise and spread of governmental immunity. Political actors do not like the prospect of civil liability. They can respond by favoring policies that reduce government wrongdoing or policies that afford immunity. Though those policies have very different effects on the public, from the point of view of political actors, they both reduce civil liability.

Rosenthal's model suggests that, for any given public service, some mix of governmental liability and governmental immunity will provide the optimal mechanism for incentivizing an efficient level of investment in reducing governmental wrongdoing. Sometimes, as with judges, legislators, and high executives, the law of the United States affords absolute immunity from civil liability. Rosenthal smiles on that, evidently reasoning that political mechanisms will suffice to prevent abuse of office by senators, presidents, and other powerful governmental employees. Rosenthal also more or less approves of the way the law subjects lower officials to qualified good faith immunity, reasoning that elections and other political processes would not suffice to discourage wrongdoing by police officers, prison guards, and the like; they need to face the threat of money damages, too.[165]

Rosenthal identifies two factors that correct government wrongdoing: the economic costs of civil liability and the political costs of public protest.[166] He argues that in the law of governmental immunity, these two factors tend to see-saw depending on their relative efficacy in the given circumstances.[167] Perhaps that accurately describes the law at present, perhaps not. We might in particular wonder whether political pressures really do suffice to

164. *Id.* at 854.
165. *Id.* at 832.
166. *Id.* at 832–41.
167. *Id.*

prevent presidents, legislators, and (yes, even) judges from violating others' rights.[168] Perhaps a little bit of civil liability would help to remind them of the law. More generally, we might wonder whether political processes *ever* do a very good job of discouraging civil wrongdoing. Government is not renowned for its efficacy, after all.[169]

But those amount to mere quibbles. The real question is: Why should we have to choose between economic and political correctives to wrongdoing? Why not both? We already live a world where civil liability and public protest combine to keep powerful institutions and their employees from violating others' rights. Those are the incentives that for-profit businesses, churches, and other non-governmental entities face every day.

If a manufacturer designs an automobile negligently, for example, wrongfully causing injury and death, it faces not just a very expensive tort judgment but also a public relations disaster.[170] Citizens vote with ballots; consumers vote with dollars. Both mechanisms give voice to public opinion. Both have very real effect. If the two differ in any important regard, it is in their relative efficacy. Elections track public opinion with much less speed and accuracy than markets do.

Private lawsuits and public protests together remind businesses, churches, individuals, and non-governmental entities to respect others' rights. This system of double safeguards, if not perfect, seems to work pretty well. If anything, despite its redundancy, it arguably leaves too much wrongdoing uncorrected.

Why do governments, which exercise life and death powers, not face at least as great a disincentive to wrongdoing? It is no answer to claim that governments should face less liability because they generate positive externalities enjoyed by the public at large; so do non-governmental entities. Consider, for instance, what a new business adds to a city in terms of employment, valuable goods or services, development of local culture, curbside aesthetics, and so forth. Then, too, any adequate account of government externalities must include negative externalities. We already give non-governmental entities that kind of scrutiny, as when we fault power plants for polluting. But governments exhibit their own kind of

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168. *See, e.g.*, United States v. Ciavarella, 716 F.3d 705, 713 (3rd Cir. 2013) (describing Judge Mark Ciavarella's conviction for participation in a "kids for cash" scheme).

169. *See generally* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (Princeton Univ. Press 2007).

170. *See* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757 (4th Dist. 1981) (relating background of Ford Pinto case).

pollution, as when the abuse of police power results in the oppression of entire communities.[171]

Governments, like all institutions, generate a mix of positive and negative externalities. We can by no means assume that political institutions come out ahead of private ones in doing more good than bad, and we generally have more to fear from a wayward government than we do a wayward business or church. If nothing else, the former has vastly greater powers to destroy, imprison, or kill—a rough but telling measure of an institution's downside risks. Prudence thus suggests that we not privilege governments with civil immunity, counting on political pressure to do what economic pressure cannot, but that we instead subject governments to the same regime or ordinary liability that non-governmental entities routinely face, subjecting each to the full force of both private and public disincentives to wrongdoing.

C. Governmental Immunity Contrasted with the Nexus Prong of Standing Doctrine

This subsection briefly considers the nexus prong of standing doctrine, a mechanism similar to but different from sovereign and official immunity. Both legal devices operate to exempt government defendants from liability for their wrongs against private parties. Because their similarities risk causing confusion, a quick look at the nexus prong of standing doctrine can help clarify the nature of governmental immunity, this paper's main concern. The nexus test also arguably offers another manifestation of the same public choice forces that have evidently encouraged the rise and spread of sovereign and official immunity.

Nexus matters because standing matters. Without standing, a litigant cannot get a court to hear a substantive claim, much less relieve the alleged wrongdoing. Standing can thus impose a significant limitation on plaintiffs seeking judicial remedies against the government or its agents. In that, it resembles governmental immunity. Federal courts find the standing requirement in Art. III of the Constitution, which limits the judicial power to "cases . . . arising under this Constitution . . . [and] controversies to which the United States shall be a party . . . ."[172] As the Supreme Court defines it, standing doctrine has three prongs. It requires a litigant to plead: 1) an injury-in-fact; 2) a causal nexus between that injury and the

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171. *See, e.g.*, Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1155–60 (2013) (describing police scandals in the Rampart division of the L.A.P.D. and in Tulia, Texas).

172. U.S. CONST. art. III, § 2.

conduct complained of; and 3) a request for relief likely to redress the alleged injury.[173]

The second of the three prongs making up standing doctrine resembles governmental immunity because it sometimes results in the government facing less liability than a similarly situated private defendant would face. It requires the complaining party to show a certain kind of nexus exists between the complained-of injury and the government's conduct.[174] The nexus test has not been around very long, has evolved during its short existence, and remains rather elusive today, but it appears to systematically favor the federal government over private plaintiffs. This proves especially true of the "logical nexus" demanded by courts hearing taxpayers' claims.

When first announced by the Supreme Court in *Flast v. Cohen*, the nexus test required examination of the substantive issues raised in a case "to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."[175] Though this formulation of the test proved notoriously uncertain,[176] in practice it operated, at least according to critical commentators, to convince courts to deny standing even where a decision on the merits might do more to remedy a salient injustice.[177] Perhaps because of its unpredictable and potentially powerful effect on the scope of litigants' rights, the Supreme Court subsequently limited the "logical nexus" requirement described in *Flast* to so-called taxpayer cases—those in which the complainants rely on their status as taxpayers to establish standing to sue the government.[178] Outside of that context, the Court understands the nexus prong to concern not logic, as in *Flast*, but causation, as in the law more generally.[179]

What does the special "logical nexus" required by *Flast* for taxpayer suits mean? Doctrinally speaking, it means that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution."[180] Taxpayer complaints

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173. Bennett v. Spear, 520 U.S. 154, 167 (1997).

174. *Id.*

175. Flast v. Cohen, 392 U.S. 83, 102 (1968).

176. Jenkins v. McKeithen, 395 U.S. 411, 423 (1969) (quoting Flast v. Cohen, 392 U.S. 83, 98 (1968)).

177. Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 54 (1985).

178. Duke Power Co. v. Carolina Envl. Study Grp., Inc., 438 U.S. 59, 79 (1978).

179. *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 163 (1997) (stating "the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party no before the court.").

180. *Flast*, 392 U.S. at 102.

about violations of other provisions of the Constitution, such as the plaintiff's claim in *U.S. v. Richardson* that Congress had failed to require the Executive to provide a sufficiently detailed accounting of the expenditures of the Central Intelligence Agency, fail to satisfy that standard and thus lack standing.[181]

Practically speaking, *Flast's* logical nexus test means that courts will close their doors to great many claims against the government. That is not by accident but by design. As evidenced in *Flast*, courts do not want to hear the claims of any taxpayer who "seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System."[182]

Setting aside the fairness of denying taxpayers the right to win judicial relief for the waste of their money and the unconstitutional expenditure of public funds, we might well wonder whether this aspect of standing doctrine makes sense as an administrative matter. Compare how courts treat shareholders who claim that a corporation has mismanaged their investment. Though they often grapple with the question of whether a shareholder has standing to bring a direct or derivative suit,[183] and though they give defendant corporate directors broad discretion under the business judgment rule,[184] courts apply nothing like the *Flast* logical nexus test to shareholder claims of corporate mismanagement. Courts give shareholders complaining of corporate mismanagement, unlike taxpayers complaining of government mismanagement, standing to sue for judicial remedies. Has that relatively more generous approach left business corporations much less efficient than government institutions? Evidently not.

Perhaps we can best understand the *Flast* logical nexus test not as a mechanism for advancing fundamental fairness or administrative efficiency but as a predictable consequence of public choice pressures.[185] In that, the logical nexus test resembles governmental immunity. Both doctrines reduce the sovereign's

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181. United States v. Richardson, 418 U.S. 166, 168 (1974).

182. *Flast*, 392 U.S. at 106.

183. *See, e.g.*, Eisenberg v. Flying Tiger Line, Inc., 451 F.2d 267 (2d Cir. 1971) (exploring the distinction between derivative and direct shareholder suits).

184. *See, e.g.*, Model Business Corporation Act § 8.31 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/model-bus-corp-laws-w-o-comments-2010.doc-813k-2014-01-09 (establishing standing of liability of directors).

185. *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (The Univ. of Mich. Press 1962) (setting forth a seminal formulation of public choice theory).

liability for misfeasance and malfeasance; both arose not from any constitutional or legislative directive but out of the discretion of agents—federal judges—hired and paid by the sovereign. Moreover, both governmental immunity and the *Flast* logical nexus test demonstrate the power of public choice pressures to shape law and policy.

As philosophers have long observed, the prospect of escaping liability for wrongdoing offers irresistible attractions to rational agents.[186] It should thus come as no surprise—at least to seasoned observers—that when government judges have the power to define the scope of government liability, they tend to expose it to less liability than what other parties ordinarily face. Self-interest would encourage judges to favor that policy and little could stop them from adopting it.

IV. CONCLUSION: VAN HALEN'S BROWN M&MS, QUARTERING, AND IMMUNITY REFORM

Little things matter. They matter not only in themselves, but in what they portend about larger things. This ancient wisdom finds voice in Christian scripture,[187] Chinese proverbs,[188] and the performance contract used by the rock band, Van Halen.[189]

Van Halen's standard performance contract required that the band's hospitality room include a bowl of M&Ms with all the brown candies removed.[190] Van Halen had nothing against brown M&Ms. Nor was it gripped with bad case of rock star excess. Van Halen used the M&M clause the way that coal miners use canaries in coal mines—to give it an early warning of more serious problems.[191] If its contractual counterpart failed to pay attention to brown M&Ms, Van

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186. *See, e.g.*, PLATO, PLATO: THE REPUBLIC 55 (2.359a–2.360d) (Richard W. Sterling & William C. Scott, trans, (W. W. Norton & Co.,1985) (relating the myth of the ring of Gyges).

187. *Luke* 16:10 (King James) ("He that is faithful in that which is least is faithful also in much: and he that is unjust in the least is unjust also in much.").

188. *See* RONALD COASE & NING WANG, HOW CHINA BECAME CAPITALIST 187 (Palgrave Macmillan 2012) (relating to the traditional Chinese moral precept, "[d]o not give up a good deed because it is trivial; do not commit a misconduct because it is trivial.").

189. *Infra* § 4.

190. *See Van Halen's Legendary M&M's Rider*, THE SMOKING GUN, *available at* http://www.thesmokinggun.com/file/van-halens-legendary-mms-rider (last visited Jan. 2, 2015) ("M&M's WARNING: ABSOLUTELY NO BROWN ONES").

191. *See Brown Out*, SNOPES.COM, http://www.snopes.com/music/artists/vanhalen.asp (last visited Oct. 17, 2011) (providing background on the Van Halen clause).

Halen had reason to doubt that it had taken care of wiring, security, ticketing, and other important matters.

As with brown M&Ms in Van Halen's performance contract, so too with the Third Amendment. This seemingly trivial provision about quartering troops in private homes provides a quick-and-ready test of how well our government takes its commitment to respect our rights.[192] The legal system of the United States has given serious consideration to the Third Amendment only once, in *Engblom v. Carey*, but in so doing it revealed a telling deficiency.[193] Despite admitting that the plaintiffs might have suffered unconstitutional quartering at the hands of government officials, government courts declined to remedy the wrong.[194] As this paper has explained, that relatively minor incident reveals the major problem of governmental immunity.

If we cannot trust the government in small matters, we cannot trust it in larger ones. That we evidently cannot trust the government to respect our Third Amendment rights suggests all too strongly that we cannot trust it to respect our other rights, either. The doctrine of governmental immunity exemplifies disrespect for our rights. And why? Not for any good reason, so far as the analysis above discerns.[195]

This paper has discovered big lessons about governmental immunity by studying a small thing: the Third Amendment. So far, though, the analysis has not gone very far beyond critiquing the present system. This paper concludes on a positive note by suggesting two reforms: First, abolish sovereign and official immunity; second, adjudicate claims against the government through more independent and objective mechanisms than government courts staffed by government employees.

Abolishing governmental immunity would redress the complaint, widespread and well founded, that the doctrine contradicts the fundamental principles and plain language of the Constitution.[196] Far from removing a necessary feature of our political institutions, the reform would bring the law of the United States into conformity with that of the rest of the developed world[197] — including the law of England, the supposed inspiration for governmental immunity, both at the time of its domestic reception[198] and today.[199] It also proves

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192. U.S. CONST. amend. III.
193. *See supra* § 2.2.
194. Engblom v. Carey, 572 F. Supp. 44, 49 (S.D.N.Y. 1983).
195. *See supra* § 3.2.
196. *See supra* § 3.2 (reviewing criticisms of governmental immunity).
197. Gilman, *supra* note 88, at 636–37.
198. *See* Doernberg, *supra* note 92, at 453–54; de Seife, *supra* note 102, at 984–

instructive that private communities, many of them rivaling the size of cities, thrive despite enjoying nothing like the benefits of sovereign or official immunity.[200]

But if government courts do not hear claims against the government, who will? Happily, non-governmental institutions have a ready answer to that question. Private parties eager to keep their affairs out of government courts have long relied on various alternative mechanisms for settling their disputes.[201] These alternatives range from the sassywood ordeals customarily administered by Liberian spiritual leaders[202] to formal rules of civil procedure crafted by non-governmental organizations according to worldwide best practices.[203] The latter set of dispute resolution rules, because they so resemble government rules in form and effect, offer a ready alternative to the present practice of letting government courts monopolize the business of hearing claims against the government.

Consider, for instance, how non-governmental organizations have solved the problem of choosing an objective panel to resolve a dispute: each party chooses an arbitrator, those two arbitrators choose a third, and the three then decide the case by majority vote.[204] This mechanism, embraced by both the United Nations

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199. Gilman, *supra* note 88, at 637.

200. *See supra* § 2.3 (analyzing liability of private communities and their agents).

201. *See generally* BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (The Independent Institute, 2d ed. 2011).

202. PETER T. LEESON, ANARCHY UNBOUND: WHY SELF-GOVERNANCE WORKS BETTER THAN YOU THINK 219–24 (Cambridge Univ. Press 2014).

203. *See, e.g.*, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (Am. Law Inst./Intl. Inst. for the Unification of Law 2005), *available at* http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf; UNCITRAL ARBITRATION RULES (United Nations Comm. on Intl. Trade Law "UNCITRAL" 2010), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf; COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (American Arbitration Association (AAA) 2013), *available at* https://www.adr.org/aaa/faces/services/disputeresolutionservices/mediation; *Rules of Arbitration* (Intl. Chamber of Commerce 2012), *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/.

204. UNCITRAL ARBITRATION RULES art. 9 (UNCITRAL 2010) (specifying that "each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator . . . ."); COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES §§ R-13, 14 (AAA Oct. 1, 2013) (describing the process by which parties choose arbitrators and appointment of third arbitrator).

Commission on International Trade Law and the American Arbitration Association, offers a fairer approach to assessing claims against the government than letting government judges monopolize the proceedings. Federal regulations already allow some relatively small claims against the government, brought under a few statutes, to go to court-annexed arbitration.[205] The same regulations expressly bar common law or constitutional claims from such proceedings, however, and refuse to recognize any arbitral award of injunctive or declaratory relief.[206] The law of the United States can and should do more to ensure the fair resolution of legal claims brought against the government or its agents, such as by committing them to "citizen courts" that follow the best practices supported by international and American non-governmental bodies.[207]

The jurisprudence of the Third Amendment highlights not just the inequity of denying judicial remedies for the unconstitutional quartering of troops in private homes, but the inequity of governmental immunity in general, the doctrine at root responsible for the defeat of the *Engblom* plaintiffs. Under the law of the United States, the *Engblom* defendants enjoyed certain privileges to violate others' constitutional and common law rights—at least once, in cases of qualified good faith immunity, and perhaps repeatedly, in the case of absolute immunity. Considering how *Engblom* would have turned out in a private context makes the power of governmental immunity shockingly clear. Why should we suffer the reintroduction of privileges that the Founders rejected, fought, and defeated? The doctrine of governmental immunity will not withstand a concerted attack. It boasts neither an honored past nor the counsels of current wisdom. If we will but rally to its call, the Third Amendment might help protect us not only from the rather unlikely threat of unconstitutional quartering but also from the all-too-salient threat of governmental immunity.

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205. 28 C.F.R. § 50.20(b) (1985) (allowing claims under $100,000 brought under specified federal statutes to be resolved by court-annexed arbitration).

206. 28 C.F.R. § 50.20(d)(2), (3).

207. *See* Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory Of Justification*, 61 CASE W. RES. L. REV. 17, 68–71 (2010) (explaining the reasons for and operation of citizen courts). Ideally, and in contrast to routine commercial arbitration, citizen courts would issue written opinions and not claim immunity for itself or its officers.