

A THEORY OF GOVERNMENT DAMAGES LIABILITY: TORTS, CONSTITUTIONAL TORTS, AND TAKINGS

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Confusion reigns when it comes to government liability in tort. Governmental tort liability is riddled with immunities unknown in the private sector – a confusing patchwork without seeming explanation.¹ Government tort liability is also without a justificatory theory. Theories of tort liability generally fall within two broad camps: the instrumentalists claim that tort liability promotes efficient investments in safety by cutting into the revenues of those who under-invest in safety; and the advocates of corrective justice claim that tort liability embodies a moral obligation of culpable parties to bear losses for which they are fairly considered responsible.² Neither theory offers much support for government tort liability. Unlike private tortfeasors, the government’s objective is not profit maximization; it responds to political and not market discipline. Thus, the instrumental justification for tort liability is wanting in the public sector.³ As for corrective justice, the government passes its legal costs along to the taxpayers, who bear little meaningful culpability for the underlying tortious conduct but who may be taxed to fund essentially unlimited liability far in excess of the exposure to liability faced, for example, by a shareholder in a private corporation. Thus, corrective justice also supplies little support for public-sector tort liability.⁴ Indeed, there is an emerging consensus among legal scholars that government tort liability lacks a coherent justification.⁵ Unease with government liability is not confined to the academy; the United States

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¹ See text at notes 20-56, *infra*.

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

³ See text at notes 109-118, *infra*.

⁴ See text at notes 119-21, *infra*.

⁵ See text at notes 136-38, *infra*.

Supreme Court has itself expressed doubts about the utility of damages awards against the government.⁶

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

The discussion below proceeds in three parts. Part I describes the scope of government damages liability. Part II demonstrates the inability of conventional theories of tort law to support government liability, and goes on to defend government tort liability by arguing that it creates a political incentive to make cost-justified investments in safety not present in a regime of non-liability. Part III submits that there is considerable empirical evidence to support the theory of political behavior that it advances – the consistent legislative practice of enacting governmental tort immunity statutes.

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

⁶ See text at notes 84-91, *infra*.

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

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

on the question of what kinds of takings are for a public use, as in the Court’s recent decision in *Kelo v. City of New London*.⁷

I THE CONTOURS OF GOVERNMENT TORT LIABILITY

The rules for government tort liability are complex. One set of rules governs suits against a governmental defendant, and another when the suit is against a public employee. Liability rules differ for federal, state, and local governments, and for constitutional and nonconstitutional torts. One type of constitutional injury – a “taking” of private property for public use – receives different treatment altogether.⁸

A. Common Law Torts

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

1. *Federal tort liability* – Under the common law doctrine of sovereign immunity, the federal government is immune from liability for damages without its consent.⁹ Under this common law rule, however, federal employees were personally liable for their own wrongful conduct even when acting within the scope of employment.¹⁰

It is sometimes said that the sovereign immunity of the United States is inconsistent with the Constitution.¹¹ To be sure, Article III provides that “[t]he judicial power shall extend . . . to

⁷ 125 S. Ct. 2655 (2005).

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

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

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

¹¹ See, e.g., Jackson, *supra* note 10, at 523; Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L.

Controversies to which the United States shall be a party,”¹² and the Constitution breathes not a word about a federal immunity from liability. The view that sovereign immunity has no constitutional grounding, however, overlooks the Appropriations Clause. It provides: “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”¹³ Most state constitutions contain similar restrictions.¹⁴ Under such a constitutional restriction on the use of public funds, a court cannot hear a case asking it to compel the government to pay a judgment absent legislative authorization for payment; in such a case, the remedy sought is itself unconstitutional.

For example, in *District of Columbia v. Eslin*,¹⁵ while the cases at issue were on appeal, Congress forbade payment of the judgments that the plaintiffs had obtained, and the Supreme Court concluded that no court could enforce the judgments, rendering the cases nonjusticiable.¹⁶ More

REV. 1, 38-46, 65-66 (2002).

¹² U.S. CONST. art. III, § 2. The scholarship of which I am aware to support federal sovereign immunity in the Constitution’s text is Professor Nelson’s claim that the term “controversy” was understood at the time of Article III’s adoption to exclude a suit against a sovereign without its consent. Professor Nelson assembles considerable evidence for his claim that in the eighteenth century, a court could not exercise jurisdiction over a sovereign without its consent, but much less evidence to support his claim that such a suit was not considered a “controversy.” See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1567-608 (2002). And the historical evidence on the ability to sue sovereign without its consent immunity is highly contestable. See, e.g., John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895-914 (1983).

¹³ U.S. CONST. art. I, § 9, cl. 7. For the leading account of the Appropriations Clause, see Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988).

¹⁴ Forty states have parallel constitutional provisions. See ALA. CONST. art. 4, § 72; ALASKA CONST. art. 9, § 13; ARK. CONST. art. 5, § 29; CAL. CONST. art. 16, § 7; DEL. CONST. art. 8, § 6(a); FLA. CONST. art. VII, § 1; GA. CONST. art. 3, § 9; HAW. CONST. art. VII, § 5; IDAHO CONST. art. VII, § 13; ILL. CONST. art. VIII, § 1; IND. CONST. art. 10, § 3; IOWA CONST. art. 3, § 24; KAN. CONST. art. 2, § 24; KY. CONST. § 230; LA. CONST. art. VII, § 10(A); ME. CONST. art. 5, pt. 3, § 4; MD. CONST. art. 3, § 32; MINN. CONST. art. XI, § 1; MO. CONST. art. 3, § 36; MONT. CONST. art. VIII, § 14; NEB. CONST. art. III, § 25; NEV. CONST. art. 4, § 19; N.J. CONST. art. 8, § 2, ¶ 2; N.Y. CONST. art. VII, § 7; N.C. CONST. art. 5, § 7; N.M. CONST. art. IV, § 30; N.D. CONST. art. X, § 12; OHIO CONST. art. II, § 22; OKL. CONST. art. V, § 55; ORE. CONST. art. IX, § 4; PA. CONST. art. 3, § 24; S.C. CONST. art. 10, § 8; S.D. CONST. art. XI, § 9; TENN. CONST. art. II, § 24; TEX. CONST. art. 8, § 6; VA. CONST. art. X, § 7; WASH. CONST. art. VIII, § 4; W. VA. CONST. art. 10, § 3; WIS. CONST. art. VIII, § 2; WYO. CONST. art. III, § 35. In addition, three state constitutions expressly provide for sovereign immunity, see ALA. CONST. art. I, § 14; ARK. CONST. art. 5, § 20; W. VA. CONST. art. VI, § 35; and twenty-two grant the state legislature authority to determine governmental liability. See ALASKA CONST. art. II, § 21; CONN. CONST. art. XI, § 4; DEL. CONST. art. I, § 9; FLA. CONST. art. X, § 13; GA. CONST. art. I, § II, ¶ 9(a); ILL. CONST. art. XIII, § 4; IND. CONST. art. 4, § 24; KY. CONST. § 231; LA. CONST. art. XII, § 10(c); MONT. CONST. art. 2, § 18; NEB. CONST. art. V, § 22; NEV. CONST. art. IV, § 22; N.Y. CONST. art. 3, § 19; OHIO CONST. art. I, § 16; OKLA. CONST. art. 23, § 7; OR. CONST. art. IV, § 24; Pa. CONST. art. 1, § 11; S.D. CONST. art. 3, § 27; TENN. CONST. art. 1, § 17; WASH. CONST. art. 2, § 26; WIS. CONST. art. IV, § 27; WYO. CONST. art. I, § 8.

¹⁵ 183 U.S. 62 (1901).

¹⁶ See *id.* at 65-66.

recently, in *OPM v. Richmond*,¹⁷ the Court held that a claimant could not use common law estoppel principles to obtain federal disability benefits not authorized by statute because a court-ordered payment of benefits without congressional authorization would violate the Appropriations Clause.¹⁸ Thus, the Appropriations Clause and its state counterparts effectively insulate the government from suit for damages absent legislative authorization.¹⁹ An appropriations-based understanding of sovereign immunity also explains why sovereign immunity poses no obstacle to a suit against a public employee even when he acts at the direction of the sovereign. Under the Appropriations Clause, the United States cannot satisfy a damages judgment absent legislative consent, but there is no obstacle to enforcing a damages award against a federal official's own assets.

Despite the availability of sovereign immunity, Congress has been unwilling to shield the federal treasury from all tort liability. The Federal Tort Claims Act ("FTCA") provides: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."²⁰ The FTCA adds that it supplies the exclusive remedy for torts committed by a federal employee acting within the scope of employment except for an action brought under the United

¹⁷ 496 U.S. 414 (1990).

¹⁸ *See id.* at 424-26.

¹⁹ To be sure, appropriations legislation may itself be challenged under a substantive constitutional provision. *See, e.g.,* *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533 (1997) (First Amendment); *United States v. Lovett*, 328 U.S. 303 (1946) (Bill of Attainder Clause). Moreover, under the decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), appropriations legislation is thought to impermissibly infringe upon the judicial power under Article III when it directs the judiciary to apply a rule of decision without altering substantive law. *See* *Miller v. French*, 530 U.S. 327, 347-49 (2000); *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438-41 (1992). But *Klein* does not invalidate legislation that merely declines to fund the judgment sought by the plaintiff, as the holding in *Eslin* demonstrates. *Eslin*, in turn, is consistent with contemporary Article III jurisprudence. Article III is understood to prevent a court from hearing a case when the plaintiff's injury cannot be redressed by a favorable judicial decision. *See, e.g.,* *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103-04 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Thus, when there is no appropriation available to pay the damages award sought by the plaintiff, a court would be unable to hear that case under Article III because it could not issue an enforceable damages award in light of the Appropriations Clause. Indeed, the Supreme Court held that the Court of Claims could issue judgments against the United States without running afoul of Article III only by relying on Congress's consistent practice of appropriating funds to pay judgments of that court. *See* *Glidden v. Zdanok*, 370 U.S. 520 (1962).

²⁰ 28 U.S.C. § 2674 (2000).

States Constitution or a federal statute.²¹ The FTCA grants immunity from liability on

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution or enforcement of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.²²

The FTCA also confers immunity from liability for “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter,”²³ a “claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer,”²⁴ and “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights”²⁵

2. *State and local tort liability* – Only one state has enacted legislation providing that governmental defendants are liable in tort on the same terms as private tortfeasors.²⁶ All other states limit government tort liability by statute. Many state immunity statutes confer immunities on governmental defendants and public employees similar to those in the FTCA; for example, 33 states recognize discretionary function immunity;²⁷ 23 recognize immunity for injuries caused by reliance

²¹ *See id.* § 2679(b).

²² *Id.* § 2680(a).

²³ *Id.* § 2680(b).

²⁴ *Id.* § 2680(c).

²⁵ *Id.* § 2680(c). Immunity is additionally conferred from liability for the fiscal operations of the Treasury or the regulation of the monetary system, *see id.* § 2680(h), claims arising out of the combatant activities of the military, *see id.* § 2680(i), claims arising in a foreign country, *see id.* § 2680(k), and claims arising from the activities of the Tennessee Valley Authority, the Panama Canal Company, or from the activities of federal banks, *see id.* § 2680(j)-(n).

²⁶ *See* WASH. REV. CODE §§ 4.92.090 & 4.96.010 (2005). There is, however, a Washington statute granting public officials immunity for discretionary acts or omissions but it provides that their employer remains liable. *See id.* § 4.24.470. Even so, the Washington Supreme Court has construed the statute to preserve common law government immunity for discretionary functions. *See McCluskey v. Handorff-Sherman*, 882 P.2d 157, 161-63 (Wash. 1994). For a discussion of the experience of Washington, see Michael Tardif, *Washington State's 45-Year Experiment in Governmental Liability*, 29 SEATTLE U. L. REV. 1 (2005).

²⁷ *See* ALASKA STAT. § 09.50.250(1) (2005) (state and state employees); *id.* § 09.65.070(d)(2) (local governments and employees); ARIZ. REV. STAT. § 12-820.01 (2004); CAL. GOV'T CODE § 820.2 (West 2004); CONN. GEN. STAT. § 52-557n(a)(2)(B) (2004) (local governments and employees); DEL. CODE ANN. tit. 10, §§ 4001(1)& 4011(b)(3) (2005); GA. STAT. ANN. § 50-21-24(2) (2005) (state and state employees); HAW. REV. STAT. § 662-15(1) (2005) (state and state employees); IDAHO CODE § 6-904(1) (2005); 745 ILL. COMP. STAT. § 10/2-201 (2004) (local governments and employees); IND. CODE § 34-13-3-3(7) (2005); IOWA CODE §§ 669.14(1) & 670.4(3) (2004); KAN. STAT. ANN. § 75-6104(e) (2005); KY. REV. STAT. ANN. §§ 44.073.13(a) & 65.2003(3)(d) (2005) LA. REV. STAT. ANN. § 9:2798.1(B) (2005);

on statutes or other enactments;²⁸ 23 immunize the collection of a tax;²⁹ 17 states immunize specified intentional torts of public employees;³⁰ and 40 states confer immunity from punitive damages.³¹ Other common immunities conferred on state and local governments and their

ME. REV. STAT. ANN. tit. 14, §§ 8104B(3) & 8111(1)(C) (2005); MD. CODE ANN., CTS. & JUD. PROC. § 5-507(b)(1) (2006) (municipal employees absent malice); MASS. ANN. LAWS ch. 258, § 10(b) (2005); MINN STAT. §§ 3.736(3)(b) & 466.03(6) (2004); MISS. CODE ANN. § 11-46-9(1)(d) (2005); NEB. REV. STAT. §§ 13.910(2) & 81-8,219(1) (2005) (state and its employees); NEV. REV. STAT. ANN. § 41.032(2) (Michie 2005); N.D. CENT. CODE §§ 32-12.1-03(3)(d) & 32-12.2-02(3)(b) (2005); N.H. REV. STAT. § 541-B:19 (2005) (state and state employees); N.J. STAT. ANN. § 59:2-3(a), (c)-(d) (West 2005); OHIO REV. CODE ANN. § 2744.03(A)(2) & (5) (West 2005) (local governments and employees); OKLA. STAT. tit. 12, § 155 (2005); OR. REV. STAT. § 30.265(3)(c) (2005); 42 PA. CONS. STAT. ANN. §§ 8524(3) & 8546(3) (West 2005) (state employees); S.C. CODE ANN. § 15-78-60(5) (Law Co-op 2005); TENN. CODE ANN. § 29-20-205(1) (2005) (local governments); TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (Vernon 2005); UTAH CODE ANN. § 63-30d-301(5)(a) (2005); VT. STAT. ANN. tit. 12, § 5601(e)(1) (2005); WIS. STAT. ANN. § 893.80(4) (West 2005) (construed to confer discretionary immunity in *Kiersyn v. Racine Unified School Dist.*, 596 N.W.2d 417 (1999)). Other jurisdictions recognize discretionary immunity as a common law doctrine. See *Powell v. District of Columbia*, 602 A.2d 1123, 1126 (D.C. 1992); *Weiss v. Fote*, 167 N.E.2d 63, 65-68 (N.Y. 1984); *City of Chesapeake v. Cunningham*, 604 S.E.2d 420 (Va. 2004); *Libercent v. Aldrich*, 539 A.2d 981, 984 (Vt. 1987); *McCluskey v. Handorff-Sherman*, 882 P.2d 157, 161-63 (Wash. 1994); *Parkulo v. West Va. Bd. of Probation & Parole*, 483 S.E.2d 507 (W. Va. 1996).

²⁸ See CAL. GOV'T CODE § 820.6 (West 2004); GA. STAT. ANN. § 50-21-24(1) (2005) (state and state employees); HAW. REV. STAT. § 662-15(1) (2004) (state and state employees); IDAHO CODE § 6-904(1) (2005); 745 ILL. COMP. STAT. § 2-203 (2004) (local governments and employees); IOWA CODE §§ 669.14(1) & 670.4(3) (2004); IND. CODE § 34-13-3-3(9) (2005); KAN. STAT. ANN. § 75-6104(c) (2005); MASS. ANN. LAWS ch. 258, § 10(a) (2005); MINN STAT. §§ 3.736(3)(a) 466.03(5) & 466.03(5) (2004); MISS. CODE ANN. § 11-46-9(1)(b) (2005); MONT. CODE ANN. § 2-9-103 (2005); NEB. REV. STAT. §§ 13-910(1) & 81-8,219(1) (2005); NEV. REV. STAT. ANN. § 41.032(1) (Michie 2005); N.H. REV. STAT. § 541-B:19 (2005) (state and state employees); N.J. STAT. ANN. § 59:3-4 (West 2005) (public employees); N.D. CENT. CODE §§ 32-12.1-03(3)(a) & 32-12.2-02(3)(a) (2005); OKLA. STAT. tit. 51, § 155(4) (2005); OR. REV. STAT. § 30.265(3)(f) (2005); 42 PA. CONS. STAT. ANN. § 8524(2) (West 2005) (state employees); S.C. CODE ANN. § 15-78-60(4) (Law. Co-op. 2005); VT. STAT. ANN. tit. 12, § 5601(e)(1) (2005) (state); W. VA. CODE § 29-12A-5(a)(4) (2005) (local governments).

²⁹ See ARK. CODE ANN. § 19-10-204(b)(2)(B) (2006); CAL. GOV'T CODE § 860.2 (West 2004); GA. CODE ANN. § 50-21-24(3) (2005) (state and state employees); HAW. REV. STAT. § 662-15(2) (2005) (state and state employees); IDAHO CODE § 6-904(A)(1) (2005); IOWA CODE §§ 669.14(2) & 670.4(2) (2004); KAN. STAT. ANN. § 75-6104(f) (2005); KY. REV. STAT. ANN. § 65.2003(2) (2004) (municipalities and employees); MASS. ANN. LAWS ch. 258, § 10(d) (2005); MINN STAT. §§ 3.736(3)(c) & 466.03(3) (2005); MISS. CODE ANN. § 11-46-9(1)(i) (2005); NEB. REV. STAT. §§ 13-219(5) & 81-219(2) (2005); N.D. CENT. CODE § 32-12.2-02(3)(h) (2005) (state and employees); N.J. STAT. ANN. § 59:7-2 (West 2005); OKLA. STAT. tit. 51, § 155(11) (2005); OR. REV. STAT. § 30.265(3)(b) (2005); S.C. CODE ANN. § 15-78-60(11) (Law. Co-op. 2005); TENN. CODE ANN. § 29-20-205(8) (2005) (local governments); TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(1) (Vernon 2005); UTAH CODE ANN. § 63-30d-301(5)(h) (2005); W. VA. CODE § 29-12A-5(a)(8) (2005) (local governments); VA. CODE ANN. § 8.01-195.3(5) (Michie 2005) (state); VT. STAT. ANN. tit. 12, § 5601(e)(2) (2005) (state). See also *S.S. Kresge Co. v. Bouchard*, 306 A.2d 179 (R.I. 1973) (construing statutory waiver of sovereign immunity not to reach action alleging unlawful overassessment of taxes).

³⁰ See ALASKA STAT. § 09.50.250(3) (2006); CONN. GEN. STAT. § 52-557n(a)(2)(A) (2004) (local governments); GA. STAT. ANN. § 50-21-24(7) (2005) (state); HAW. REV. STAT. § 662-15(4) (2005) (state); IDAHO CODE § 6-904(3) (2005); IOWA CODE § 669.14(4) (2004) (state); KY. REV. STAT. ANN. § 44.072 (2005) (states and counties); MD. CODE ANN., CTS. & JUD. PROC. § 5-522(a)(4) (2006) (state immune for employee's malice or gross negligence); MASS. ANN. LAWS ch. 258, § 10(c) (2005); NEB. REV. STAT. §§ 81-8,219(4) & 13-910(7) (2005); N.J. STAT. ANN. § 59:2-10 (West 2005); N.D. CENT. CODE § 32-12.2-01(6) (2005) (state); OHIO REV. CODE ANN. § 2744.03(A)(2) (West 2005) (local governments); TENN. CODE ANN. §§ 9-8-307(d) & 29-20-205(2) (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2) (Vernon 2005); UTAH CODE ANN. § 63-30d-301(5)(b) (2005); VT. STAT. ANN. tit. 12, § 5601(e)(6) (2005) (state).

³¹ See ALA. CODE § 6-11-26 (2005) (state and local governments); ALASKA STAT. § 09.50.280 (2006) (state); ARIZ. REV. STAT. § 12-820-04 (2006); CAL. GOV'T CODE § 818 (West 2004) (state and local governments); COLO. REV. STAT. § 24-10-114(4) (2005) (state and local governments); FLA. STAT. § 768.28(5) (2005); GA. STAT. ANN. § 50-21-30

employees include immunity for an injury caused by the issuance, denial, or revocation of a license,³² a failure to inspect or to make an adequate inspection of property,³³ the adoption or failure to adopt

(2005) (state and state employees); HAW. REV. STAT. § 662-15 (2004) (state government); IDAHO CODE § 6-918 (2005); 745 ILL. COMP. STAT. § 10/2-102 (2004) (local governments); IND. CODE § 34-13-3-4(b) (2005); IOWA CODE §§. 669.4 & 670.4(5) 2004 (state and local governments); KAN. STAT. ANN. § 75-6105(c) (2005); KY. REV. STAT. ANN. § 65.2002 (2005) (municipalities and employees); MD. CODE ANN., CTS. & JUD. PROC. §§ 5-522(a)(1) & 5-303(c)(1) (2006) (state and local governments); ME. REV. STAT. ANN. tit. 14, § 8105(5) (2005) (state and local governments); MASS. ANN. LAWS ch. 258, § 2 (2005); MINN STAT. §§ 3.736(3) & 466.04(1)(b) (2005) (state and local governments); MONT. CODE ANN. § 2-9-105 (2005) (state and local governments); MISS. CODE ANN. § 11-46-15(2) (2005); MO. REV. STAT. § 537.610(3) (2006) (state and local governments); NEV. REV. STAT. ANN. § 41.035(1) (2005) (state and local governments); N.H. REV. STAT. §§ 541-B:14(I) & 507-B:3(II) (2005) (state and state employees); N.M. STAT. ANN. §41-4-19(C) (2005); N.J. STAT. ANN. § 59:9-2(c) (West 2005); N.D. CENT. CODE §§ 32-12.1-03(2) & 32-12.2-02(2) (2005) (state and local governments); OHIO REV. CODE ANN. § 2744.05(A) (West 2005) (local governments); OKLA. STAT. tit. 51, § 154(C) (2005) (state and local governments); OR. REV. STAT. § 30.270(2) (2005); 42 PA. CONS. STAT. ANN. §§ 8528(c) & 8553(c) (West 2005) (local governments); S.C. CODE ANN. § 15-78-190(b) (2005); TENN. CODE ANN. § 9-8-307(d) (2005) (state); TEX. CIV. PRAC. & REM. CODE ANN. § 101.024 (Vernon 2005); VA. CODE ANN. § 8.01-195.3 (Michie 2005); W. VA. CODE § 29-12A-7(a) (2005) (local governments and employees); WIS. STAT. ANN. § 893.80(3) (West 2005); WYO. STAT. ANN. § 1-39-118(d) (2005). *See also* Hazen v. City of Anchorage, 718 P.2d 456, 465-66 (Alaska 1986) (local governments); Prigge v. Conn. Dep't of Child & Families, No. X06CV02181467, 2004 Conn. Super. LEXIS 804 at *13 (Conn. Super. Ct. March 26, 2004) (state); City of Hartford v. Int'l Ass'n of Firefighters, 717 A.2d 258 (Conn. App. Ct. 1998) (local governments); Schueler v. Martin, 674 A.2d 882 (Del. Super. 1996) (state and local governments); Graff v. Motta, 695 A.2d 486 (R.I. 1997) (state and local governments).

³² *See* ALASKA STAT. § 09.65.070(d)(3) (2006); ARIZ. REV. STAT. § 12-820-02(A)(5) (2006); CAL. GOV'T CODE § 818.4 (West 2004); CONN. GEN. STAT. § 52-557n(a)(2)(b)(7) (2004) (local governments and employees); DEL. CODE ANN. tit. 10, § 4011(b)(2) (2005) (local governments and local employees); GA. STAT. ANN. § 50-21-24(9) (2005) (state and state employees); IDAHO CODE § 6-904B(3) (2005); 745 ILL. COMP. STAT. § 10/2-104 (2004) (local governments and employees); IND. CODE § 34-13-3-3(11) (2005); IOWA CODE § 670.4(9)-(10) (2004) (local governments and employees); KY. REV. STAT. ANN. § 65.2003(3)(c) (2005) (municipalities and employees); ME. REV. STAT. ANN. tit. 14, § 8104B(2) (2005) (state and local governments); *id.* § 8111(1)(B) (public employees); MASS. ANN. LAWS ch. 258, § 10(e) (2005); MINN STAT. §§ 3.736(3)(k) & 466.03(15) (2005) (state and state employees and municipalities); *id.* § 466.03(6d), (10) (local employees immune except for day care licensing); MISS. CODE ANN. § 11-46-9(1)(h) (2005); NEB. REV. STAT. § 81-8,219(8) (2005) (state and state employees); *id.* § 13-910(4) (local governments and employees); N.J. STAT. ANN. § 59:2-5 (West 2005); N.D. CENT. CODE §§ 32-12.1-03(3)(f) & 32-12.2-02(3)(d) (2005); OHIO REV. CODE ANN. § 2743.01(A) & (E) (West 2005) (state and state employees); OKLA. STAT. tit. 51, § 155(13) (2005); S.C. CODE ANN. § 15-78-60(12) (2005); TENN. CODE ANN. §§ 9-8-307(a)(2)(B) & 29-20-205(3) (2005); UTAH CODE ANN. § 63-30d-301(5)(c) (2005); W. VA. CODE § 29-12A-5(a)(9) (2005) (local governments). *See also* Rhode Island Affiliate, American Civil Liberties Union v. Rhode Island Lottery Comm'n, 553 F. Supp. 752, 765 n.9 (D.R.I. 1982) (construing Rhode Island's statutory waiver of sovereign immunity not to reach licensing cases).

³³ *See* ALASKA STAT. § 09.65.070(d)(1) (2006); ARIZ. REV. STAT. § 12-820-02(A)(6) (2006); CAL. GOV'T CODE § 818.6 (West 2004); DEL. CODE ANN. tit. 10, § 4011(b)(1) (2005); GA. STAT. ANN. § 50-21-24(8) (2005) (state and state employees); IDAHO CODE § 6-904B(4) (2005); 745 ILL. COMP. STAT. § 10/2-105 (2004) (local governments and employees); IND. CODE § 34-13-3-3(12) (2005); IOWA CODE § 669.14(13) (2004) (state and state employees) (inspection of pools or spas); *id.* § 670.4(6), (12) (local governments and employees immune for latent defects relating to inspection of pools or spas); KAN. STAT. ANN. § 75-6104(k) (2005); KY. REV. STAT. ANN. § 65.2003(e) (2005) (municipalities and employees); MASS. ANN. LAWS ch. 258, § 10(f) (2005); NEB. REV. STAT. § 81-8,219(7) (2005) (state and state employees); *id.* § 13-910(3) (local governments and employees); NEV. REV. STAT. ANN. § 41.033 (2005); N.J. STAT. ANN. § 59:2-6 (West 2005); N.Y. GEN. MUN. LAW § 205-d (McKinney 2005) (New York City fire wardens); N.D. CENT. CODE § 32-12.1-02(3)(f) (2005) (local governments and employees); *id.* § 32-12.2-02(3)(f) (state and state employees); OHIO REV. CODE ANN. § 2743.01(A) & (E) (West 2005) (state and state employees); OKLA. STAT. tit. 12, § 155 (2005); S.C. CODE ANN. § 15-78-60(13) (2005); TENN. CODE ANN. §§ 9-8-307(a)(2)(A) & 29-20-205(4) (2005); UTAH CODE ANN. § 63-30d-301(5)(d) (2005); W. VA. CODE § 29-12A-5(a)(10) (2005) (local governments); WIS. STAT. ANN. § 893.80(1p) (West 2005).

legislation or other legislative functions,³⁴ acts or omissions in the execution or enforcement of the law,³⁵ the institution of judicial or administrative proceedings,³⁶ the plan or design for public improvements,³⁷ the condition of property or facilities used for recreational purposes,³⁸ the

³⁴ See CAL. GOV'T CODE § 818.2 (West 2004); GA. STAT. ANN. § 50-21-24(4) (2005) (state and state employees); 745 ILL. COMP. STAT. § 10/2-103 (2004) (local governments and employees); IND. CODE § 34-13-3-3(8) (2005); KAN. STAT. ANN. § 75-6104(a) (2005); KY. REV. STAT. ANN. § 65.2003(3)(a) (2005) (municipalities and employees); ME. REV. STAT. ANN. tit. 14, § 8104B(1) (2005) (state and local governments); *id.* § 8111(1)(A) (public employees); MISS. CODE ANN. § 11-46-9(1)(a), (e) (2005); MONT. CODE ANN. § 2-9-111(2) (2005); N.J. STAT. ANN. § 59:2-3(b) (West 2005); N.D. CENT. CODE §§ 32-12.1-03(3)(b) & 32-12.2-02(3)(c) (2005); OHIO REV. CODE ANN. § 2744.03(A)(1) (West 2005) (local governments and employees); OKLA. STAT. tit. 51, § 155(1) (2005); S.C. CODE ANN. § 15-78-60(1)-(2), (4) (2005); VA. CODE ANN. § 8.01-195.3(2) (Michie 2005) (state); W. VA. CODE § 29-12A-5(a)(4) (2005) (local governments).

³⁵ See CAL. GOV'T CODE § 821.4 (West 2004) (immunity from negligence except for false arrest and imprisonment); CONN. GEN. STAT. § 52-557n(a)(2)(b)(8) (2004) (municipal immunity absent notice of illegality or reckless disregard for health or safety); *id.* § 52-57n(a)(2)(b)(9) (municipal immunity for failure to detect or prevent pollution); IDAHO CODE § 6-904B(1) (2005) (detention of goods by a law enforcement officer); 745 ILL. COMP. STAT. § 10/2-202 (2004) (immunity from negligence for local governments and employees); IOWA CODE § 669.14(3), (11) (2004) (state and state employees immune for detention of goods or merchandise by a law enforcement officer or an act or omission in financial regulation); KAN. STAT. ANN. § 75-6104(c) (2005); KY. REV. STAT. ANN. § 44.073(13)(d) (2005) (state immunity from liabilities for duties running to the public as a whole); *id.* § 65.2003(3)(b) (municipalities and employees immune for failure to enforce any law); MISS. CODE ANN. § 11-46-9(1)(j) (2005) (detention by law enforcement absent malice or arbitrary and capricious conduct); N.J. STAT. ANN. § 59:2-4 (West 2005); OKLA. STAT. tit. 51, § 155(4) (2005); S.C. CODE ANN. § 15-78-60(4) (2005); W. VA. CODE § 29-12A-5(a)(4) (2005) (local governments). See also *Dang v. Ehredt*, 977 P.2d 29, 35-36 (Wash. Ct. App. 1999) (law enforcement officers enjoy common law immunity for reasonable enforcement decisions).

³⁶ See CAL. GOV'T CODE § 820.26 (West 2004); CONN. GEN. STAT. § 52-57n(a)(2)(b)(5) (2004) (local governments and employees); GA. STAT. ANN. § 50-21-24(5) (2005) (state and state employees); 745 ILL. COMP. STAT. § 10/2-208 (2004) (local governments and employees); IND. CODE § 34-13-3-3(6) (2005); ME. REV. STAT. ANN. tit. 14, §§ 8104B(4) & 8111(1)(D) (2005); N.J. STAT. ANN. § 59:2-3(b) (West 2005); OHIO REV. CODE ANN. § 2744.03(A)(1) (West 2005) (local governments and employees); OKLA. STAT. tit. 51, § 155(2) (2005); S.C. CODE ANN. § 15-78-60(23) (2005); TENN. CODE ANN. § 29-20-205(5) (2005) (local governments); UTAH CODE ANN. § 63-30d-301(5)(e) (2005); VA. CODE ANN. § 8.01-195.3(6) (Michie 2005) (state); W. VA. CODE § 29-12A-5(a)(2) (2005) (local governments).

³⁷ See CAL. GOV'T CODE § 830.6 (West 2004); IDAHO CODE § 6-904(7) (2005); 745 ILL. COMP. STAT. § 10/3-103 (2004) (local governments); IOWA CODE §§ 669.14(8) & 670.4(7)-(8) (2004) (immunity for highways, roads or streets absent gross negligence); KAN. STAT. ANN. § 75-6104(m) (2005); ME. REV. STAT. ANN. tit. 14, § 8104A(2)(A) & (4) (2005) (state and local governments immune for the construction, ownership, or maintenance of historic sites and dams or defects, lack of repair, or lack of railing on highway, sidewalk, parking area, sidewalk, bridge, or airport runway); MINN. STAT. § 466.03(18) (2005) (schools immune for fire code variances sought for security reasons); *id.* § 466.03(20) (local governments and employees immune for condition, use or maintenance of land acquired for highway projects); MISS. CODE ANN. § 11-46-9(1)(p) (2005); NEB. REV. STAT. §§ 13-910(11) & 81-8,219(11) (2005); N.J. STAT. ANN. § 59:4-6 (West 2005); TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.063 & 101.064(b) (Vernon 2005); UTAH CODE ANN. § 63-30d-301(5)(n) (2005) (flood or storm systems); VT. STAT. ANN. tit. 12, § 5601(e)(8) (2005) (state highways); WYO. STAT. ANN. § 1-39-120 (2005) (design defects in bridges, culverts, highways, roadways, streets, alleys, sidewalks or parking areas, as well as failure to construct or reconstruct or failure to maintain same).

³⁸ See CAL. GOV'T CODE § 831.21 (West 2004) (beaches); *id.* § 831.4 (trails providing access to recreational areas); CONN. GEN. STAT. § 52-557n(a)(2)(b)(4) (2004) (local governments); HAW. REV. STAT. § 662-15(7) (2005) (state and state employees immune for acts of a boating enforcement officer); *id.* § 662-19 (immunity for injury from use of a public skateboard park); 745 ILL. COMP. STAT. § 10/3-106 (2004) (immunity from negligence for local governments); IND. CODE § 34-13-3-3(4) (2005) (unpaved roads, trails of footpaths that provide access to recreational or scenic areas); *id.* § 34-13-3-3(5) (extreme sports areas); IOWA CODE § 670.4(15) (2005) (local governments and employees immune on claims arising from skateboarding, in-line skating, bicycling, unicycling, scootering, river rafting, canoeing, or kayaking); KAN. STAT. ANN. § 75-6104(o) (2005); ME. REV. STAT. ANN. tit. 14, § 8104A(2)(A) (2005) (state and local governments); MINN. STAT. §§ 3.736(3)(i) & 466.03(15) (2005) (state and state employees and local governments for parks, areas, and

condition of unimproved public property,³⁹ a failure to provide adequate police service or protection,⁴⁰ a failure to provide adequate jails or other corrections or penal facilities,⁴¹ injuries caused by the probation, parole, release, or escape of arrestees, convicts, or prisoners,⁴² a failure to provide adequate firefighting or other emergency service,⁴³ a failure to prevent disease or to impose a quarantine or an injury caused by a quarantine or incurred in the course of a public health

trails); *id.* § 466.03(6e)-(6f) (local employees immune for parks and waterslides); N.H. REV. STAT. § 507-B:11 (2005) (municipalities and school districts immune for property used without charge for skateboarding, rollerblading, stuntbiking or rollerskiing); N.J. STAT. ANN. § 59:2-7 (West 2005); S.C. CODE ANN. § 15-78-60(16), (26) (2005).

³⁹ *See* CONN. GEN. STAT. § 52-557n(a)(2)(b)(1) (2004); IND. CODE § 34-13-3-3(1) (2005); KAN. STAT. ANN. § 75-6104(p) (2005); ME. REV. STAT. ANN. tit. 14, § 8104A(2)(A) (2005) (state and local governments); MINN. STAT. §§ 3.736(3)(g) & 466.03(15) (2005) (state and local governments); *id.* § 466.03(13) (local employees); N.J. STAT. ANN. § 59:4-8 & 4-9 (West 2005); N.D. CENT. CODE § 32-12.2-02(3)(k) (2005) (state and state employees); OKLA. STAT. tit. 51, § 155(9)-(10) (2005); S.C. CODE ANN. § 15-78-60(10) (2005); UTAH CODE ANN. § 63-30d-301(5)(k) (2005); W. VA. CODE § 29-12A-5(a)(7) (2005) (local governments).

⁴⁰ *See* ARIZ. REV. STAT. § 12-820-.02(A)(1) (2006) (immunity from negligence); *id.* § 12-820-.02(A)(7)-(8) (immunity from negligence for failure to prevent unlawful sales of handguns or for preventing the sale of a handgun); CAL. GOV'T CODE §§ 845 & 846 (West 2004); GA. STAT. ANN. § 50-21-24(6) (2005) (state and state employees); 745 ILL. COMP. STAT. § 10/4-102 & 4-107 (2004) (local governments and employees); KAN. STAT. ANN. § 75-6104(n) (2005); KY. REV. STAT. ANN. § 44.073(13)(e) (2005); MASS. ANN. LAWS ch. 258, § 10(h) (2005); MISS. CODE ANN. § 11-46-9(1)(c) (2005) (absent reckless disregard for the safety of a person not engaged in criminal activity); N.J. STAT. ANN. § 59:5-4 (West 2005); N.D. CENT. CODE §§ 32-12.1-03(3)(f) & 32-12.2-02(3)(f) (2005); OHIO REV. CODE ANN. § 2743.02(A)(3)(a) (West 2005) (state and state employees); OKLA. STAT. tit. 51, § 155 (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(3) (Vernon 2005); W. VA. CODE § 29-12A-5(a)(5) (2005) (local governments); WIS. STAT. ANN. § 893.80(6) (West 2005) (major cities).

⁴¹ *See* ARIZ. REV. STAT. § 12-820-.02(A)(4) (2006) (immunity from negligence for injury to one prisoner caused by another); CAL. GOV'T CODE § 845.2 (West 2004); 745 ILL. COMP. STAT. § 10/4-103 (2004) (local governments and employees); IOWA CODE § 669.14(6) (2004) (state and state employees immune on any claim by an inmate); MINN. STAT. §§ 3.736(3)(m) & 466.03(12) (2004) (destruction of property of state prisoners or residents of institutions); MISS. CODE ANN. § 11-46-9(1)(d) (2005); MISS. CODE ANN. § 11-46-9(1)(m) (2005) (immunity from claims of prisoners); MONT. CODE ANN. § 2-9-108(2) (2005) (immunity from negligence liability to convicted prisoners absent serious bodily injury or death, excepting medical malpractice); N.J. STAT. ANN. § 59:5-1 (West 2005); OKLA. STAT. tit. 51, § 155(24) (2005); S.C. CODE ANN. § 15-78-60(25) (2005) (absent gross negligence); S.D. CODIFIED LAWS § 3-21-8 (Michie 2005); UTAH CODE ANN. § 63-30d-301(5)(j) (2005); W. VA. CODE § 29-12A-5(a)(14) (2005) (local governments).

⁴² *See* ARIZ. REV. STAT. § 12-820-.02(A)(2) -(3) (2006); CAL. GOV'T CODE § 845.8 (West 2004); IDAHO CODE § 6-904A(2) (2005); 745 ILL. COMP. STAT. § 10/4-106 (2004) (local governments and employees); IND. CODE § 34-13-3-3(17) (2005); KAN. STAT. ANN. § 75-6102(1) (2005); MASS. ANN. LAWS ch. 258, § 10(i) (2005); N.D. CENT. CODE §§ 32-12.1-03(3)(f) & 32-12.2-02(3)(f) (2005); N.J. STAT. ANN. § 59:5-2 (West 2005); OKLA. STAT. tit. 51, § 155(22), (24) & (25) (2005); S.C. CODE ANN. § 15-78-60(21) (2005); S.D. CODIFIED LAWS § 3-21-9 (Michie 2005); TENN. CODE ANN. § 9-8-307(a)(2) (2005) (state); VT. STAT. ANN. tit. 24, § 296a (2005); W. VA. CODE § 29-12A-5(a)(13) (2005).

⁴³ *See* ALASKA STAT. § 09.65.070(c) (2006) (municipal employees); CAL. GOV'T CODE §§ 850-850.4 (West 2004); D.C. CODE ANN. § 2-412 (2006); 745 ILL. COMP. STAT. §§ 10/5-101 to 5-103 (2004) (local governments and employees); IOWA CODE § 670.4(11) (2005) (local governments and employees); KAN. STAT. ANN. § 75-6104(j) (2005); LA. REV. STAT. ANN. § 9:2793.1 (2005); MD. CODE ANN., CTS. & JUD. PROC. § 5-604 (2006); MASS. ANN. LAWS ch. 258, § 10(g) (2005); MISS. CODE ANN. § 11-46-9(1)(c) (2005); N.Y. GEN. MUN. LAW § 205-b (McKinney 2005) (volunteer firefighters immune absent willful negligence or malfeasance); N.D. CENT. CODE § 32-12.1-03(3)(f) (2005) (local governments and employees); *id.* § 32-12.2-02(3)(f) (state and state employees); S.C. CODE ANN. § 23-47-70 (2005); OHIO REV. CODE ANN. §§ 9.60, 2743.01(A) & (E), 3737.221 (West 2005); S.D. CODIFIED LAWS § 33-15-38 (Michie 2005); TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2) & (3) (Vernon 2005); UTAH CODE ANN. § 63-30d-301(5)(o) & (p) (2005); W. VA. CODE § 29-12A-5(a)(5) (2005) (local governments).

emergency,⁴⁴ a failure to provide adequate medical care,⁴⁵ and specified unintentional torts.⁴⁶ Some immunity statutes, rather than granting categorical immunities, delineate the circumstances under which governmental defendants can be held liable, usually involving injuries caused by the condition or use of public property, and otherwise grant immunity.⁴⁷ In addition, 42 states limit the damages

⁴⁴ See ALASKA STAT. § 09.50.250(2) (2006) (state and state employees); CAL. GOV'T CODE § 855.4 (West 2004); IDAHO CODE § 6-904(2) (2005); 745 ILL. COMP. STAT. § 6-104 (2004) (local governments and employees); IOWA CODE § 669.14(3) (2004) (state and state employees); MISS. CODE ANN. § 11-46-9(1)(k) (2005); NEB. REV. STAT. § 81-8,219(3) (2005) (state immunity); *id.* § 13-910(6) (local governments and employees); N.H. REV. STAT. § 541B:17-a(I) (2005) (state and authorized state employees acting in good faith and not willful, wanton, or grossly negligent); N.J. STAT. ANN. § 59:6-3 (West 2005); S.C. CODE ANN. § 15-78-60(18) (2005); UTAH CODE ANN. § 63-30d-201(2) (2005); VT. STAT. ANN. tit. 12, § 5601(e)(3) (2005) (state).

⁴⁵ See CAL. GOV'T CODE §§ 855.4 & 855.6 (West 2004) (failure to diagnose); 745 ILL. COMP. STAT. §§ 10/6-105 & 6-106 (2004) (local governments and employees immune for failure to diagnose); MINN. STAT. § 3.736(3)(l) (2005) (state and state employees immune for hospitals and correctional facilities where reasonable use is made of available appropriations); *id.* § 466.03(11) (same for local governments and employees); MISS. CODE ANN. § 11-46-9(1)(r) (2005) (lack of adequate personnel or facilities if reasonable use is made of appropriations); N.J. STAT. ANN. §§ 59:6-2 & 6-4 to 6-6 (West 2005) (failure to provide adequate personnel or facilities and failure to diagnose).

⁴⁶ See IND. CODE § 34-13-3-3(14) (2005); ME. REV. STAT. ANN. tit. 14, § 8111(1)(E) (2005); NEV. REV. STAT. ANN. § 41.0334 (2005); N.H. REV. STAT. § 541-B:19(d) (2005); OKLA. STAT. tit. 51, § 155(17) (2005); 42 PA. CONS. STAT. ANN. § 8546(2) (West 2005); W. VA. CODE § 29-12A-5(a)(12) (2005) (local governments).

⁴⁷ See ALA. CODE § 11-47-190 (2005) (municipalities liable for torts of employees within the scope of employment and for conditions on streets, alleys, and public ways); COLO. REV. STAT. § 24-10-106 (2005) (public entities liable for the operation of non-emergency vehicles, hospitals, jails, correctional facilities, dangerous conditions in public buildings or roadways); DEL. CODE ANN. tit. 10, § 4012 (2005) (municipal liability for ownership, use or maintenance of vehicles, equipment or aircraft, construction, operation or maintenance of buildings, or the sudden and accidental discharge of pollutants); *id.* § 4011(c) (municipal employees liable for willful, wanton, or malicious conduct); D.C. CODE ANN. § 2-412 (2006) (district liable for damages caused by operation of a vehicle); ME. REV. STAT. ANN. tit. 14, § 8104-(A)(1)(A-G) (2005) (negligent act or omission in the ownership, maintenance or use of any vehicle, mobile equipment, trailers, aircraft, watercraft, snowmobiles, machinery, equipment, negligent construction, maintenance, or operation of a public building, negligent and sudden or accidental discharge of pollutants, negligent construction, cleaning or repair on any highway, sidewalk, parking area, bridge, airport runway, or traffic control device); MICH. COMP. LAWS §§ 691.1402(1), 691.1407, 691.1405, 691.1407(4), 691.1413, 691.1417(3) (2005) (state and local governments immune except for proprietary functions, negligent operation of motor vehicles, negligent medical care except for hospitals owned by department of community health or department of corrections, overflow of sewer drains caused by a negligent failure to repair, and negligent maintenance of highways); MO. REV. STAT. §§ 537.600 & 537.610.1 (2006) (state and local governments liable for operation of motor vehicles, dangerous conditions on public property, and to the extent insurance is available); N.M. STAT. ANN. §§ 41-4-5 to -12 (2005) (governmental liability for negligence of public employees in the operation of vehicles, aircraft, or watercraft; the operation or maintenance of public property or equipment, airports, public utilities and waste disposal, health care facilities, health care service, construction and maintenance of bridges, roadways, culverts, highways, streets, alleys, sidewalks, parking areas; and for battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation, violation of property rights, or a deprivation of rights, privileges or immunities secured by the constitution or laws of the United States or New Mexico caused by law enforcement officers within the scope of duty); N.C. GEN. STAT. §§ 115C-42, 153A-435 & 160A-485 (2005) (local governments and employees immune extent to the extent they purchase insurance); 42 PA. CONS. STAT. ANN. § 8522 (West 2005) (state and state employees can be liable for negligence in operation of vehicles; medical malpractice; care, custody, or control of personal property; real estate, highways and sidewalks; potholes and other dangerous conditions; care, custody or control of animals; state liquor store sales; military activities, toxoids and vaccines); *id.* § (local governments liable for negligence in operation of vehicles; care, custody, or control of personal property and real property; trees, traffic controls and street lighting; utility service facilities; streets; sidewalks; and care, custody and control of animals); TENN. CODE ANN. §§ 29-20-201 & 29-201-202 (2005) (local governments immune absent willful or wanton conduct or gross negligence and for operation of vehicles, or unsafe conditions of public

recoverable from a governmental defendant or a public employee.⁴⁸

property); UTAH CODE ANN. § 63-30d-301 (2005) (waiving immunity for damage to property held for purposes of forfeiture, defective or dangerous conditions of public property except when latent, and negligent acts of public employees); WIS. STAT. ANN. §§ 345.05, 893.81, 893.83 (West 2005) (local governments liable for mob or riot except on freeways or public property absent contributory negligence and for failure to repair highways up to \$50,000 and for negligent operation of a motor vehicle); WYO. STAT. ANN. §§ 1-39-104 to -108 (2005) (liability for operation of a vehicle, aircraft, watercraft, building, recreation area, park, airport, public utility, hospitals or outpatient health care negligent provision of health care; and tortious conduct of police officers); *Scott v. Savers Prop. & Cas. Ins. Co.*, 663 N.W.2d 715 (Wis. 2003) (permitting only actions against public officers involving ministerial duties, duties to address a known danger, actions involving professional medical discretion and actions that are malicious, willful, and intentional).

⁴⁸ See ALA. CODE §§ 41-9-62, 41-9-68 & 41-9-70 (2005) (claims against the State heard by the Board of Adjustment subject to workers compensation caps); *id.* § 11-93-2 (\$100,000 per claimant or \$300,000 per occurrence against local governments); ALASKA STAT. § 09.50.270 (2006) (permitting the Department of Administration to approve payment or recommend an appropriation to the legislature); ARK. CODE ANN. §§ 19-10-204 & 19-10-215 (2006) (claims against the state heard by the State Claims Commission that can award up to \$10,000 except for death and disability); COLO. REV. STAT. § 24-10-114 (2005) (\$150,000 per person and \$600,000 per incident); CONN. GEN. STAT. §§ 4-142 & 4-159 (2004) (claims against the State heard by Office of Claims Commissioner who can award up to \$7,500 or recommend a greater award to the legislature); DEL. CODE ANN. tit. 10, § 4013 (2005) (\$300,000 per occurrence); FLA. STAT. § 768.28(5), (8) (2005) (\$100,000 per claimant and \$200,000 per occurrence); GA. STAT. ANN. § 50-21-29(b) (2005) (\$1 million per plaintiff and \$3 million per occurrence against the state); IDAHO CODE §§ 6-924 & 6-926 (2005) (\$500,000 per occurrence unless the defendant has purchased additional insurance); 705 ILL. COMP. STAT. § 505/8 (2004) (claims against the State heard by the Court of Claims with a \$100,000 cap per claimant except for operation of state vehicles); IND. CODE § 34-13-3-4(a) (2005) (\$300,000 per person for actions accruing before 2006, \$500,000 per person for actions accruing before 2008, and \$700,000 for actions accruing thereafter, and a \$5,000,000 cap per occurrence when multiple persons are injured or killed); KAN. STAT. ANN. § 75-6105(a) (2005) (\$500,000 per incident); KY. REV. STAT. ANN. §§ 44.070, 44.072 (2005) (claims against the state heard by the Board of Claims that can award \$200,000 per person and \$350,000 per incident but no noneconomic damages); LA. REV. STAT. ANN. § 13:5106(B) (2005) (\$500,000 per person plus the payment of future medical benefits); MD. CODE ANN., STATE GOV'T § 12-104(a)(2) (2006) (\$200,000 per person against the state); MD. CODE ANN., CTS. & JUD. PROC. § 5-303(a)(1) (2006) (\$200,000 per person and \$500,000 per incident against local governments); ME. REV. STAT. ANN. tit. 14, § 8105(1) (2005) (\$400,000 per occurrence); *id.* § 8104-D (negligence liability of public employees capped at \$10,000 per occurrence); MASS. ANN. LAWS ch. 258, § 2 (2005) (\$100,000); MICH. COMP. LAWS §§ 600.6419(1), 691.1407 (2005) (claims against the State heard by the Court of Claims with a \$ 1,000 cap); MINN. STAT. § 3.736(4)(b) & 466.04(1)(a) (2005) (\$1,000,000 per occurrence and \$300,000 for wrongful death except for securities cases, where cap is \$100,000 per person and \$500,000 for all claimants with respect to securities of the same series); MISS. CODE ANN. § 11-46-15(2)(c) (2005) (\$500,000 per occurrence); MO. REV. STAT. § 537.610.1(2) (2006) (\$300,000 per plaintiff and \$2 million per occurrence); MONT. CODE ANN. § 2-9-108(1) (2005) (\$750,000 per claim and \$1.5 million per occurrence); NEB. REV. STAT. § 81-8,209, -8,211, -8,214 & -8,215 (2005) (claims against the state heard by the State Claims Board, which must unanimously approve claims exceeding \$5,000 and requiring judicial review of claims approved for more than \$25,000); *id.* §§ 13-915 & -922 (\$1,000,000 per person and \$5,00,000 per incident against local governments and employees); NEV. REV. STAT. ANN. § 41.035 (2005) (\$50,000); N.H. REV. STAT. § 541-B:14 (2005) (\$250,000 per claimant and \$2,000,000 per incident against state or state employees); *id.* §507-B:4 (\$150,000 per claimant and \$500,000 per incident against local governments and employees); N.M. STAT. ANN. § 41-4-19(A) (2005) (\$100,000 per occurrence for property damage, \$300,000 per occurrence for medical expenses, and \$400,000 per person or \$750,000 per occurrence for all other damages); N.Y. CT. CL. ACT LAW § 9 (McKinney 2005) (claims against state and local governments heard by the Court of Claims); N.C. GEN. STAT. §§ 143-291, 143-299.1, 143-299.2 143-299.4, 143-300.1, 143-300.6 & 143-3001A (2005) (referring claims against the state, its agencies and employees, and board of education and their employees arising out of the operation of public school transit to the Industrial Commission with contributory negligence as a defense against all claims except those based on smallpox vaccinations, and capping damages at \$150,000 per person plus the agencies' share of lapsed salaries, with an absolute cap of \$500,000 per occurrence absent excess insurance); N.D. CENT. CODE § 32-12.1-03(3)(2) (2005) (\$250,000 per person and \$500,000 per occurrence against local governments); *id.* § 32-12.2-02(2) (\$250,000 per person and \$1,000,000 per occurrence against the state absent legislative appropriation); OHIO REV. CODE. ANN. § 2743.02(D) (West 2005) (state sued in Court of Claims with reduction of recovery for collateral recoveries by plaintiff); *id.* § 2744.05(B) (limiting noneconomic damages to \$250,000 against local governments and reducing award for collateral recoveries); OKLA. STAT. tit. 51, § 154(2005) (property damage at \$25,000 per person, \$125,000 for other losses and

State statutes usually grant public employees additional protections from the threat of liability.⁴⁹ Public employers are usually required to indemnify their employees or otherwise pay judgments against those employees arising from torts committed within the scope of their employment, although indemnity is generally not required in cases of egregious individual misconduct.⁵⁰ Like the FTCA, some states bar actions against public employees based on tortious

\$175,000 for cities with a population of 300,000 or more, \$200,000 for medical negligence, and \$175,000 for a wrongful felony conviction); OR. REV. STAT. § 30.270 (2005) (\$50,000 per person for property damage, \$100,000 per person for special and \$100,000 general damages for personal injuries, and \$500,000 in the aggregate arising from a single incident); 42 PA. CONS. STAT. ANN. § 8528(b) (West 2005) (\$250,000 per person and \$1,000,000 aggregate against state and state employees); *id.* §§ 8549 & 8553(b) (damages against local governments and employees capped at \$500,000 in the aggregate with reduction for collateral recoveries); R.I. GEN. LAWS § 9-31-2 & 9-31-3 (2005) (\$100,000 except for proprietary functions); *id.* § 24-5-13(b) (capping local governmental liability for potholes at \$300); S.C. CODE ANN. § 15-78-190 (2005) (\$300,000 per person and \$600,000 per occurrence and at \$1.2 million per occurrence for medical malpractice); S.D. CODIFIED LAWS §§ 3-22-8, 3-22-10, 21-32-16, 21-32-19, 21-32A-1 (Michie 2005) (permitting liability of state up to \$2,000 and other liability only for other than punitive damages to the extent the defendant is covered by insurance and capping payouts from risk pools through structured settlements at 2% per year or \$200,000 per claim per year); TENN. CODE ANN. §§ 9-8-307(e) & 9-8-108(a)(7)(A) (2005) (referring specified claims against state to the Claims Commission with a cap of \$300,000 per claimant and \$1,000,000 per occurrence and other claims against state to Board of Claims with \$1,000,000 aggregate cap); TEX. CIV. PRAC. & REM. CODE ANN. § 101.023(a) (Vernon 2005) (limiting state liability to \$250,000 per person and \$500,000 per occurrence); *id.* § 101.023(b) (limiting non-municipal local government liability to \$100,000 per person and \$300,000 per occurrence for personal injury and \$100,000 per occurrence for property damage); *id.* § 101.023(c) (limiting municipal liability to \$250,000 per person and \$500,000 per occurrence for personal injury and \$100,000 per occurrence for property damage); *id.* § 108.002 (limiting public employee liability to \$100,000 for personal injury, death, or deprivation of a right, privilege or immunity, and \$100,000 for property damage); UTAH CODE ANN. § 63-30d-604(1) (2005) (personal injury capped at \$553,500 per person and \$1,107,000 per occurrence; property damage capped at \$221,400 per occurrence); VA. CODE ANN. § 8.01-195.3 (Michie 2005) (damages against state capped at \$100,000 or available insurance); W. VA. CODE §§ 14-2-2 & 14-2-13 (2005) (claims against the state heard by the Court of Claims which can issue judgments within appropriated limits); *id.* §§ 29-12-1 to -18 (Board of Risk and Insurance Management shall acquire reasonable insurance and insurer may not assert sovereign immunity); *id.* § 29-12A-7(b) (2005) (capping noneconomic damages at \$500,000 per person); WIS. STAT. ANN. § 893.80(3) (West 2005) (\$50,000); WYO. STAT. ANN. § 1-39-118(a) (2005) (\$250,000 per plaintiff and \$500,000 per incident).

⁴⁹ In some states, sovereign immunity can be circumvented by suing an individual public employee in tort when the claim is deemed to be based on the employee's abuse of authority through his own wrongful conduct. *See, e.g.*, *Curry v. Woodstock Slag Co.*, 6 So. 2d 479 (Ala. 1942); *Currie v. Lao*, 592 N.E.2d 977, 980-82 (Ill. 1992); *Guffey v. Cann*, 766 S.W.2d 55 (Ky. 1989); *Morell v. Balasubramanian*, 514 N.E.2d 1101, 1102 (N.Y. 1987). *See also* *Coffee County School Dist. v. Snipes*, 454 S.E.2d 149, 151 (Ga. Ct. App. 1995) (local employees lack immunity for negligent performance of ministerial functions or acts undertaken maliciously or with intent to injure).

⁵⁰ *See* ALA. CODE § 11-47-24 (2005) (local employees indemnified up to specified caps); ARIZ REV. STAT. §§ 12-820-04 & 41-621-(P) (2006) (excepting punitive damages); ARK. CODE ANN. § 21-9-203(a) (2006) (excepting intentional misconduct and punitive damages); CAL. GOV'T CODE § 825 (West 2004) (excepting intentional misconduct); COLO. REV. STAT. § 24-10-118(2)(a) (2005) (excepting intentional misconduct); CONN. GEN. STAT. §§ 5-141d(a) & 7-465 (2005) (excepting intentional misconduct); DEL. CODE ANN. tit. 10, § 4002 (2005) (state employees); D.C. CODE ANN. § 1-109(a) (2005); GA. CODE ANN. § 45-90-22(a) (2005) (authorizing local governments to indemnify employees); IDAHO CODE § 6-903(b)-(c) (2005) (absent malice or criminal intent); 745 ILL. COMP. STAT. § 10/9-102 (2004) (local employees indemnified for compensatory damages); IND. CODE § 34-13-3-5 (2005); *id.* § 34-13-4(1) (discretion to indemnify civil rights violations); IOWA CODE §§ 669.21-22 (2004) (state employees indemnified absent willful and wanton conduct); *id.* § 670.8 (local employees absent willful or wanton misconduct except for punitive damages); KAN. STAT. ANN. § 75-6109 (2005) (absent fraud or malice and excepting punitive damages); KY. REV. STAT. ANN. § 65.2005 (2005) (municipal employees absent fraud, malice, or corruption); LA. REV. STAT. ANN. § 13:5108.1 (2005) (state employees); MD. CODE

conduct occurring within the scope of their public employment.⁵¹ Thus, governments and public

ANN., STAT GOV'T § 12-404 (2006) (authorizing indemnification of state employees); MD. CODE ANN., CTS. & JUD. PROC. § 5-303 (2006) (authorizing indemnification of local employees and making local governments liable on claims against employees); ME. REV. STAT. ANN. tit. 14, § 8112 (2005) (requiring indemnification when employer is liable absent criminal conduct, permitting indemnification when employer is not liable or for actions under federal law); MASS. ANN. LAWS ch. 258, § 9 (2005) (authorizing indemnity up to \$1,000,000 absent gross negligence, willful or malicious conduct); *id.* § 9A (requiring indemnification of state police up to \$1,000,000 absent gross negligence, willful or malicious conduct); *id.* § 13 (permitting municipalities to adopt by referendum mandatory indemnification up to \$1,000,000 absent intentional violation of civil rights); MICH. COMP. LAWS § 691.1408(1) (2005) (authorizing indemnification); MINN STAT. § 3.736(9) (2004) (state employees); *id.* § 466.07 (local employees absent malfeasance, willful neglect of duty, or bad faith); MISS. CODE ANN. §§ 11-46-5 & 11-46-7(3) (2005) (absent fraud, malice, libel, slander, defamation, or a criminal offense); MO. REV. STAT. § 105.711(2)(2) (2006) (state employees); *id.* § 18 (local employees indemnified absent intentional misconduct or recklessness); MONT. CODE ANN. § 2-9-305 (2005) (absent oppression, fraud, malice, criminal conduct); NEB. REV. STAT. § 81-8,239.05 (2005) (state employees excepting intentional misconduct); *id.* § 13-1801 (local employees except when their acts are unlawful); NEV. REV. STAT. ANN. § 41.0349 (2005) (absent wanton or malicious conduct); N.J. STAT. ANN. § 59:10-1 (West 2005) (state employees indemnified except for punitive damages or criminal conduct); *id.* § 10-4 (authorizing indemnification of local employees absent fraud, malice, willful misconduct or intentional wrongdoing); N.H. REV. STAT. §§ 29-A:2 & 99-D:2 (2005) (state and county employees excepting intentional misconduct); *id.* §§ 31-105-06 & 29A:2 (authorizing municipalities to indemnify employees for accidental injuries and requiring indemnification for judgments involving civil rights violations committed without malice); N.M. STAT. ANN. § 41-4-4(C)-(E) (2005) (granting a right of contribution from an employee guilty of fraud or intentional malice); N.Y. PUB. OFF. LAW § 17(2) (McKinney 2005) (state employees indemnified absent intentional misconduct); N.C. GEN. STAT. § 143-300.3 (2005) (authorizing indemnification of state employees absent fraud, malice or corruption); N.D. CENT. CODE § 32-12.1-04(4) & 32-12.2-03(4) (2005) (excepting punitive damages); OHIO REV. CODE ANN. § 9.87 (West 2005) (state employees up to \$1,000,000 per occurrence absent malice, bad faith, wanton or reckless conduct, or for punitive damages); *id.* § 2744.07(A) (indemnity for local employees); OKLA. STAT. tit. 51, §§ 160, 162 (2005) (except for punitive damages absent fraud, corruption, or discriminatory animus and when the employee was acting in good faith and consistent with applicable written policies known to the employee); OR. REV. STAT. § 30.285 (2005) (absent malfeasance in office of willful or wanton neglect of duty); 42 PA. CONS. STAT. ANN. § 8550 (West 2005) (local employees indemnified absent crime, fraud, malice, or willful misconduct); R.I. GEN. LAWS §§ 9-31-12(a) & 45-15-16 (2005) (authorizing indemnification); S.C. CODE ANN. § 1-11-440 (2005) (requiring indemnification of employees of the State Budget and Control Board and Retirement Systems Investment Panel); *id.* § 12-4-325(A) (requiring indemnification of officers of the Department of Revenue); S.D. CODIFIED LAWS §§ 3-19-1 to -3 (Michie 2005) (authorizing indemnity); TENN. CODE ANN. §§ 9-8-112(a) (2005) (state employees absent willful, intentional, or malicious conduct); *id.* § 29-20-310 (local employees indemnified absent willful, malicious, or criminal conduct, or conduct for personal financial gain); TEX. CIV. PRAC. & REM. CODE ANN. § 102.002 (Vernon 2005) (local employees indemnified for negligence up to specified caps); *id.* § 104.001 (state employees indemnified up to specified caps for negligence, deprivations of rights, privileges or immunities absent bad faith, conscious indifference, or reckless disregard, or determination of Attorney General); UTAH CODE ANN. § 63-30d-603(1)(b) (2005) (absent fraud, willful misconduct, driving while intoxicated or impaired, or perjury); VA. CODE ANN. § 2.2-1837 (Michie 2005) (requiring insurance for state employees); *id.* § 15.2-1520 (authorizing indemnification of local employees); VT. STAT. ANN. tit. 12, § 5601(b) (2005) (state employees absent gross negligence or willful misconduct with indemnification capped at \$250,000 per person and \$1,000,000 per occurrence); VT. STAT. ANN. tit. 24, § 901a(b) (2005) (municipal employees indemnified absent willful or intentional misconduct); WASH. REV. CODE §§ 4.92.075 & 4.96.041(2005) (absent bad faith); W. VA. CODE § 29-12A-11(a)(2) (2005) (local employees); WIS. STAT. ANN. § 895.46 (West 2005); WYO. STAT. ANN. § 1-39-104(c) (2005) (indemnification up to damages caps); *Gamble v. Fla. Dep't of Health & Rehabilitative Servs.*, 779 F.2d 1509, 1517-18 (11th Cir. 1986) (construing Florida law to require indemnification absent intentional misconduct); *Livesay v. Baltimore County*, 862 A.2d 33, 38 (Md. 2004) (construing Maryland law to require indemnification of local employees).

⁵¹ See ALASKA STAT. § 09.50.253 (2006); ARK. CODE ANN. § 19-10-305(a) (2005) (except when liability insurance is available or for malicious acts or omissions); FLA. STAT. § 768.28(5-9)(a) (2005) (absent bad faith, malice, or willful and wanton conduct); GA. STAT. ANN. § 50-21-25(a) (2005) (state employees); HAW. REV. STAT. § 662-10 (2005) (actions in which the employer is held liable); IND. CODE § 34-13-3-45 (2005); MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b) (2006) (state employees absent malice or gross negligence); MASS. ANN. LAWS ch. 258, § 2 (2005); MICH. COMP. LAWS § 691.1407(2) (2005) (when employee reasonably believed she was within the scope of authority, the public employer was engaged in a governmental function, and the employee's conduct does not involve gross negligence); MISS.

employees are free to engage in a broad swath of tortious activities without fear of liability.

3. *Asymmetry with private tort liability* – The justification for government immunity is far from self-evident; indeed, the vast majority of scholars attack it as improperly undermining the rule of law.⁵² One of the few academic defenders of immunity is Roderick Hills, who has argued that immunity protects the public fisc from the improvidence of public officials whom, he believes, lack sufficient incentive to protect the public fisc from damages awards.⁵³ But the truth of this supposition is far from evident. After all, elected officials have substantial political incentives to keep taxes low and to avoid unnecessary government expenditures, and Professor Hills develops no argument to explain why these incentives are insufficient to restrain profligate government litigation costs. Harold Krent has offered a different justification for immunity, claiming that it preserves the separation of powers by ensuring that legislative or executive policy is not undermined by damages awards.⁵⁴ But this argument has a cart-before-the-horse quality; it does not explain why legislative or executive prerogatives properly include the power to engage in tortious conduct without paying the injured party compensation. In any event, this argument does not justify immunity in cases when the plaintiff's injury is caused by a violation of the Constitution. After all, it is considered the

CODE ANN. § 11-46-7(2) (2005); MONT. CODE ANN. § 2-9-305(5)-(MONT. CODE ANN. § 2-9-305(5)-6) (2005) (actions in which the employer is held liable);6) (2005) (actions in which the employer is held liable); OHIO REV. CODE ANN. § 9.86 (West 2005) (suit against state employees absent malice, bad faith, wanton or reckless conduct); OR. REV. STAT. § 30.265(1) (2005); R.I. GEN. LAWS § 9-31-12(b) (2005) (suit against state employees barred absent fraud, willful misconduct, or malice); S.C. CODE ANN. § 15-78-70 (2005) (absent fraud, malice, intent to harm, or a crime of moral turpitude); S.D. CODIFIED LAWS § 21-32-17 (Michie 2005) (suit against state employees barred although immunity for ministerial acts held unconstitutional in *Kyllo v. Panzer*, 535 N.W.2d 896 (S.D. 1995)); TENN. CODE ANN. § 9-8-307(h) (2005) (state employees absent willful, malicious, or criminal acts); *id.* § 29-20-310(b) (2005) (local employees except medical malpractice); UTAH CODE ANN. § 63-30d-202(3) (2005) (absent fraud, willful misconduct, driving while intoxicated or impaired, or perjury); VA. CODE ANN. § 8.01-195.3 & (Michie 2005) (state); VT. STAT. ANN. tit. 24, § 901a (2005) (suit against state employees barred absent gross negligence or willful misconduct); VT. STAT. ANN. tit. 24, § 901a(b) (2005) (suit against municipal employees barred absent willful or intentional misconduct); W. VA. CODE § 29-12A-5(b) (2005) (local employees not liable absent malice, bad faith or wanton and reckless conduct); *State v. Chase Securities Inc.*, 424 S.E.2d 591, 599-600 (W. Va. 1992) (state officials immune if they did not violate clearly established law).

⁵² See, e.g., Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091, 1101-08; Erwin Chemirinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1210-16 (2001); Jackson, *supra* note 10, at 572-605; Mark C. Niles, *Nothing But Mischief: The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275 (2002); Randall, *supra* note 11, at 96-103.

⁵³ See Roderick M. Hills, Jr., *The Eleventh Amendment as a Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1234-35 (2001).

province of the judiciary to define the scope of legislative or executive power under the Constitution.⁵⁵ Thus, the constitutional tort merits separate consideration.⁵⁶

B. Constitutional Torts

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

1. *Federal liability* -- Sovereign immunity bars an action seeking to recover damages from the federal government itself for a constitutional tort.⁵⁷ The federal employee who actually committed the tort, however, is in a different legal position. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,⁵⁸ the Supreme Court held that federal officials are liable for damages when they violate the plaintiff's constitutional rights.⁵⁹ A damages remedy is available absent what the Court regards as "special factors counseling hesitation in the absence of affirmative action by Congress,"⁶⁰ or the availability of a more limited statutory remedy nevertheless deemed to be adequate.⁶¹ Constitutional tort damages are not based on the presumed or intrinsic value of constitutional rights; they can be awarded only for what the common law of torts considers an actual and compensable

⁵⁴ See Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1541-60 (1992).

⁵⁵ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *United States v. Lopez*, 514 U.S. 549, 566 (1995); *United States v. Will*, 449 U.S. 200, 217 (1980).

⁵⁶ The phrase "constitutional tort" refers to actions seeking damages for a violation of the plaintiff's constitutional rights. See, e.g., Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965).

⁵⁷ See *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

⁵⁸ 403 U.S. 388 (1971).

⁵⁹ See *id.* at 395-97. *Bivens* involved an alleged Fourth Amendment violation, but its holding has since been applied to other constitutional provisions. See *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979); *Butz v. Economou*, 438 U.S. 478, 504-06 (1978).

⁶⁰ *Bivens*, 403 U.S. at 396. Accord, e.g., *United States v. Stanley*, 483 U.S. 669, 679-86 (1987) (rejecting claim of former Army sergeant to recover damages caused by administration of drug as part of experimental program); *Chappell v. Wallace*, 462 U.S. 296 (1983) (rejecting race discrimination claim by Navy personnel against superior officers).

⁶¹ See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (rejecting *Bivens* claim for consequential damages caused by wrongful denial of disability benefits in light of statutory remedy limited to an award of benefits); *Bush v. Lucas*, 462 U.S. 367 (1983) (rejecting *Bivens* claim for consequential damages caused by wrongful demotion of federal employee in light of statutory remedies limited to backpay and retroactive seniority). *Bivens* liability, however, is limited to federal employees. Even when sovereign immunity has been waived, no constitutional tort claim is recognized against the federal government or federal agencies because the remedy against individual employees is thought sufficient to protect the victims of constitutional torts. See *FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994). See also *Correctional Services Corp.*

loss.⁶²

Individual federal officials sued for constitutional torts are entitled to assert the defense of qualified immunity.⁶³ Under this doctrine, officials enjoy immunity unless their conduct contravened clearly established constitutional law.⁶⁴ Qualified immunity is unavailable when prior decisional law makes the illegality of an official's conduct manifest or when the official undertakes conduct that no reasonable person could think was constitutional despite the absence of controlling precedent.⁶⁵ The risk that the vigorous performance of public employees' duties will be inhibited by the threat of personal liability is thought to justify the defense of qualified immunity.⁶⁶

2. *State and local liability* -- States enjoy immunity from damages liability for constitutional torts by virtue of the Eleventh Amendment, which, despite its textual limitation to cases involving citizens of different states,⁶⁷ is thought to incorporate a general principle of sovereign immunity.⁶⁸ The Eleventh Amendment is construed, however, to permit Congress to authorize damages actions against states under its power to enforce the Fourteenth Amendment.⁶⁹ Moreover, the Eleventh

v. Malesko, 534 U.S. 61, 70-72 (2001).

⁶² See *Memphis Cmty Sch. Dist. v. Stachura*, 477 U.S. 299, 306-08 (1986); *Carey v. Phipus*, 435 U.S. 247, 253-58 (1978).

⁶³ See *Harlow v. Fitzgerald*, 457 U.S. 800, 813-15 (1982). There are some officials, however, who are entitled to absolute immunity. The President enjoys absolute immunity from damages liability arising from the performance of his duties, members of Congress and their staffs are absolutely immune from civil liability for what are deemed to be legislative acts, judges and other adjudicative officials enjoy absolute immunity for their adjudicative functions, and prosecutors enjoy absolute immunity for what are deemed prosecutorial acts. See *id.* at 807.

⁶⁴ See, e.g., *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001); *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987); *Davis v. Scherer*, 468 U.S. 183, 190-91 (1984); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-19 (1982).

⁶⁵ See *Hope v. Pelzer*, 536 U.S. 730, 740-44 (2002); *Wilson v. Layne*, 526 U.S. 603, 615-18 (1999); *Mitchell v. Forsythe*, 472 U.S. 511, 530-35 (1985).

⁶⁶ See, e.g., *Richardson v. McKnight*, 520 U.S. 399, 407-08 (1997); *Wyatt v. Cole*, 504 U.S. 158, 167-68 (1992); *Forrester v. White*, 484 U.S. 219, 223-24 (1988); *Mitchell v. Forsythe*, 472 U.S. 511, 525-26 (1985).

⁶⁷ "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

⁶⁸ See, e.g., *Alden v. Maine*, 527 U.S. 706, 712-30 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). The Eleventh Amendment is understood to preclude Congress from compelling states to defend damages actions for an alleged violation of federal law even in a state court. See *Alden*, 527 U.S. at 730-54.

⁶⁹ See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 519-20 (2004); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003).

Amendment does not protect state officials from personal liability for constitutional torts.⁷⁰ State officials are also considered “persons” amenable to suit for depriving the plaintiff of rights under the Constitution or federal law under section 1983 of Title 42 of the United States Code.⁷¹ State officials sued for constitutional torts may assert qualified immunity as a defense to their personal liability.⁷²

Local governments are not protected by the Eleventh Amendment⁷³ and are amenable to suit under section 1983.⁷⁴ Section 1983, however, has been construed to reject vicarious municipal liability for the constitutional torts of municipal employees acting within the scope of their employment.⁷⁵ Instead, local governments can be held liable only for their own policies or customs or for the acts of municipal policymakers.⁷⁶ Curiously, this is precisely the basis on which discretionary immunity is available for common law tort liability; in that context, the touchstone for immunity is whether the challenged decision involves a judgment rooted in government policy.⁷⁷ But while discretionary immunity applies no matter how likely government policy is to inflict tortious injury within the meaning of the common law of torts, municipal liability for constitutional torts is imposed when a municipal policy or custom is unconstitutional or reflects deliberate

⁷⁰ *See* *Hafer v. Melo*, 502 U.S. 21, 29-31 (1991); *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974). Moreover, the Supremacy Clause of the United States Constitution prevents states from enacting immunity laws that can be used as defenses in section 1983 litigation. *See*, *Howlett v. Rose*, 496 U.S. 356, 375-78 (1990); *Felder v. Casey*, 487 U.S. 131, 141-45 (1987); *Martinez v. California*, 444 U.S. 277, 284 & n.8 (1980).

⁷¹ *See* *Hafer v. Melo*, 502 U.S. 21, 27-29 (1991). In contrast, the Court has held that a state is not considered a “person” amenable to suit under section 1983. *See* *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws . . . shall be liable to the person injured

42 U.S.C. § 1983 (2000).

⁷² *See* *Scheuer v. Rhodes*, 416 U.S. 232, 239-49 (1974).

⁷³ *See, e.g.*, *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-69 (2001); *Mt. Healthy City School District Board of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

⁷⁴ *See* *Monell v. Dep’t of Social Servs. of the City of New York*, 436 U.S. 658, 690 (1978).

⁷⁵ *See id.* at 691-95.

⁷⁶ *See, e.g.*, *Board of County Comm’rs of Bryan County v. Brown*, 520 U.S. 397, 403-04 (1997); *City of Canton v. Harris*, 489 U.S. 378, 388-90 (1989).

indifference to constitutional violations by municipal employees.⁷⁸ Local governments, moreover, may not assert the defense of qualified immunity,⁷⁹ although they enjoy immunity from punitive damages.⁸⁰ Precisely the opposite liability rules apply to local officials sued for constitutional torts; they can assert the defense of qualified immunity,⁸¹ but are subject to awards of punitive damages for intentional or reckless misconduct.⁸²

3. *Asymmetry with private tort liability* -- The immunity doctrines for constitutional torts have for the most part been devised by the Supreme Court.⁸³ The Court, however, has made little effort to explain why it grants government tortfeasors defenses unavailable in private tort law; and the rather slender efforts the Court has made along these lines are strikingly unpersuasive. In *Richardson v. McKnight*,⁸⁴ for example, as it held that the employees of a private firm hired to run a state prison were not entitled to assert qualified immunity, the Court wrote:

First, the most important special government-immunity producing concern – unwarranted timidity [caused by fear of personal liability] – is less likely present, or at least is not special, when a private company subject to competitive market pressures operates a prison. Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to both a safer and more effective job This is not to say that government employees, in their efforts to act within constitutional limits, will always, or often, sacrifice the otherwise effective performance of their duties. Rather, it is to say that government employees typically act within a *different* system. They work within a system that is responsible through elected officials to voters who, when they vote, rarely consider the performance of individual subdepartments or civil servants specifically and in detail. And that system is often characterized by multidepartment civil service rules that, while providing employee security, may limit the incentives or ability of individual departments or supervisors to reward, or to punish, individual employees. Hence a judicial determination

⁷⁷ See, e.g., *United States v. Gaubert*, 499 U.S. 315, 323-26 (1991).

⁷⁸ See *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 405-08 (1997); *Collins v. City of Harker Heights*, 503 U.S. 115, 123-24 (1992); *City of Canton v. Harris*, 489 U.S. 378, 386-89 (1989).

⁷⁹ See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

⁸⁰ See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-70 (1981).

⁸¹ See *Owen v. City of Independence*, 445 U.S. 622, 654-57 (1980).

⁸² See *Smith v. Wade*, 461 U.S. 30 (1983).

⁸³ The Court has sometimes derived the immunity rules for constitutional torts from the governmental immunity and liability in effect when section 1983 was enacted, see, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993), but it has altered these rules if they are come to be viewed as counterproductive or otherwise inadvisable. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982).

⁸⁴ 521 U.S. 399 (1997).

that effectiveness concerns warrant special immunity-type protection in respect to this latter (governmental) system does not prove its need with respect to the former. Consequently, we can find no *special* immunity-related need to encourage vigorous performance. Second, “privatization” helps to meet the immunity-related need “to ensure that talented candidates” are “not deterred by the threat of damages suits from entering public service.” . . .

[I]nsurance increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face. Because privatization law also frees the private prison-management firm from many civil service law restraints, it permits the private firm, unlike a government department, to offset any increased employee liability risk with higher pay or extra benefits. In respect to this second government-immunity-related purpose then, it is difficult to find a *special* need for immunity, for the guards’ employer can operate like other private firms; it need not operate like a typical government department. Third, lawsuits may well “distrac[t]” these employees “from their duties,” but the risk of distraction alone cannot be a sufficient grounds for immunity.⁸⁵

This passage argues that a private firm’s employees are not likely to be overdeterred by the threat of liability because they will be indemnified, but offers no support for its claim that indemnification is less likely to exist in the public sector. In fact, indemnification is nearly always offered to public employees by statute, policy, or collective bargaining agreement,⁸⁶ a fact well known to the author of *Richardson*, since he recited it in another case decided during the very same Term.⁸⁷ The ubiquity of employee indemnification should be unsurprising; labor economics teaches that employers must offer sufficient compensation to account for the risk of liability that employees face, and will choose indemnification to address this problem to avoid concern that their employees’ financial interests in avoiding liability will reduce their productivity.⁸⁸ There is also little reason to credit the Court’s assertion that public employers cannot cope with overdeterrence – public managers are accountable to elected officials, who have political incentives to enhance the performance of government agencies. Nor did the Court identify any civil service rule which

⁸⁵ *Id.* at 410-11 (emphasis in original) (citations and internal quotations omitted).

⁸⁶ See, e.g., Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 587, 590-96 (2000); Neal Miller, *Less-than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force*, 28 CREIGHTON L. REV. 733, 749-52 (1995); Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability under Bivens*, 88 GEO. L.J. 65, 76-77 (1999); Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer’s § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1216-1223 (2001); Nicole G. Tell, Note, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a Section 1983 Police Misconduct Suit*, 65 FORDHAM L. REV. 2825, 2836 (1997). State indemnification statutes are set out at note 44, *supra*.

⁸⁷ See *Board of County Comm’rs of Bryan County v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting).

prevents public employers from firing those who engage in tortious misconduct or rewarding those who improve agency performance.⁸⁹

Thus, we are left with little in the way of a rationale for special rules of governmental immunity.⁹⁰ But if we credit the Court's view that the voters have little ability to evaluate the performance of government agencies and that public-sector supervisors have little control over their subordinates, then the rationale for government damages liability itself is thrown into doubt. If neither the voters nor supervisors have much ability to punish public employees who commit torts, and given that government can readily recoup its legal expenses by levying taxes, it is hard to see any justification for government tort liability – it neither deters wrongdoing nor shifts costs to culpable parties. At most, government liability offers an injured party compensation, but if that is its only virtue, surely this objective could be achieved through a system of publicly funded insurance with far lower transaction costs than those inhering in a system of tort liability.⁹¹

C. Takings.

The Fifth Amendment's Takings Clause provides: "Nor shall private property be taken for public use, without just compensation."⁹² Since the Fifth Amendment's text mandates the provision of just compensation for anything that amounts to a "taking," presumably no rules of immunity from the obligation to provide compensation can survive constitutional attack under the Fifth Amendment itself. This is largely an academic question, however, since the federal government has

⁸⁸ See, e.g., Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1239-43 (1984).

⁸⁹ Justice Scalia made many of these points in his dissenting opinion. See 520 U.S. at 418-21. For additional criticism of *Richardson*, see Clayton P. Gillette & Paul B. Stephan, *Richardson V. McKnight and the Scope of Immunity after Privatization*, 8 SUP. CT. ECON. REV. 103 (2000).

⁹⁰ An additional justification sometimes offered for qualified immunity is that it reduces the costs of adopting a new rule of constitutional law by immunizing the government from damages liability for conduct preceding adoption of the new rule. See John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999). But the more straightforward way to address this concern is through the law of retroactivity, and on that score the Supreme Court has held that new rules of constitutional law are applicable to all cases pending at the time the new rule is announced. See *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 96-97 (1993). Moreover, municipalities are denied qualified immunity even when their policies do not violate clearly established law. See text at note 79, *supra*.

⁹¹ This point, for example, is at the core of the case for no-fault automobile insurance. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.14 (4th ed. 1992).

⁹² U.S. CONST. amend. V.

waived whatever sovereign immunity it might otherwise have against damages liability for an uncompensated taking,⁹³ and it is settled that a plaintiff may obtain injunctive relief against state officials for an uncompensated taking of property without compensation.⁹⁴ Thus, the ability of a plaintiff to obtain a remedy for an allegedly unconstitutional taking of property is not in doubt.⁹⁵

The text of the Takings Clause resolves most of the questions that vex government liability for common law and constitutional torts. Unlike any other constitutional text, the Takings Clause imposes an unqualified obligation to pay compensation, mandating relief in the form of money judgments. Accordingly, courts properly award compensation for “takings” without worrying about the risk of over-deterrence. Moreover, the Takings Clause suggests a rationale for a taxpayer-funded just compensation requirement quite apart from any conception of deterrence. Instead of treating takings for a public use as a legal wrong in the sense that torts are legal wrongs that demand deterrence or corrective justice, the Takings Clause acknowledges the propriety of taking private property for public use, adding, however, that it is “just” to expect the public to provide compensation for the forced acquisition of property for its own use. Thus, the compensation requirement responds to a concept of unjust enrichment and undue burden – the public should compensate those whose property is taken for its own use.⁹⁶ Common law and constitutional torts, in contrast, are considered legal wrongs, yet we have seen that there is great doubt that government

⁹³ See, e.g., *United States v. Causby*, 328 U.S. 256, 267 (1946).

⁹⁴ See *Tindal v. Wesley*, 167 U.S. 204, 212-23 (1897). This rule is an aspect of the familiar doctrine, most frequently associated with the decision in *Ex parte Young*, 209 U.S. 123 (1908), that the Eleventh Amendment does not bar an action seeking injunctive relief against a state official to halt a violation of federal law. See, e.g., *Frew by Frew v. Hawkins*, 540 U.S. 431, 437 (2004); *Verizon Maryland Inc. v. Public Service Comm’n of Md.*, 535 U.S. 635, 645-48 (2002); *Hafer v. Melo*, 502 U.S. 21, 29-31 (1991). A similar rule authorizing injunctive relief against federal officials was employed prior to the federal waiver of sovereign immunity. See *United States v. Lee*, 106 U.S. 196 (1882).

⁹⁵ The one exception is a plaintiff seeking a remedy for a temporary uncompensated taking. Injunctive relief would be moot in such a case, but a temporary taking must be compensated. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-22 (1987). It is unclear whether the Eleventh Amendment, as presently construed, would protect a state against a suit seeking compensation under the Fifth Amendment. See Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067 (2001).

⁹⁶ Professor Michelman has provided the leading account of the just compensation requirement as rooted in its own conception of justice in the form of fairness to individuals put to undue burdens for the sake of others, based on the work of John Rawls. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1218-24 (1967).

tort liability offers either deterrence or punishment of culpable parties. The contrast between government liability for takings and governmental liability for common law and constitutional torts, in short, only reinforces the problematic character of the latter. Since the Constitution itself does not require compensation except for takings, surely we should expect some principled justification for a constitutional or common law tort remedy against government. But given the crazy quilt of liability and immunity for constitutional and common law torts, such a justification appears elusive.

II. THE POLITICS OF GOVERNMENT TORT LIABILITY

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

A. The Case Against Government Tort Liability

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

1. *Theories of tort liability* -- The two major schools of thought about tort law share the objective of shifting losses to culpable parties. The instrumental account justifies tort liability as creating an incentive to make cost-justified investments in safety.⁹⁷ Thus, as Learned Hand famously put it, tort liability turns on whether the cost of the injury multiplied by the likelihood that it would occur exceeds the cost that the defendant would have had to incur to avoid the loss.⁹⁸ An employer's vicarious liability for the torts of its employees committed within the scope of their employment is necessitated by the risk that employees will prove judgment-proof, leading to suboptimal investments in safety absent employer liability.⁹⁹ The advocates of corrective justice, in contrast, argue that tort law embodies a moral intuition that a wrongdoer ought to make the injured

⁹⁷ See, e.g., GUIDO CALEBRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 135-73 (1970); POSNER, *supra* note 91, § 6.1; STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 5-32 (1987).

⁹⁸ See *United States v. Carroll Towing Co.* 159 F.2d 169, 172 (2d Cir. 1947).

⁹⁹ See, e.g., POSNER, *supra* note 91, at § 6.8; Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic*

party whole.¹⁰⁰ Vicarious employer liability is warranted because an employee acting within the scope of employment is part of a larger organization that can fairly be held responsible for the conduct of an employee working on its behalf.¹⁰¹

The justifications for constitutional tort liability are no different; the Supreme Court tells us that the law of constitutional torts is governed by the same principles as ordinary tort law.¹⁰² Constitutional tort damages have an instrumental justification in that they create an economic incentive for the government and its officials to make cost-justified investments in preventing constitutional violations,¹⁰³ and are justified in terms of corrective justice based on an asserted moral entitlement to compensation when one has been the victim of a constitutional wrong.¹⁰⁴ As for the obligation to pay compensation for takings, essentially the same two justifications are advanced. The instrumental account contends that the Takings Clause promotes social welfare by giving government a disincentive to take property when the social benefits of the taking will not exceed the cost of paying compensation to the owner,¹⁰⁵ and we have seen an intrinsic account of the just compensation requirement contending that it embodies a moral entitlement of property owners not to be subjected to disproportionate burdens for the benefit of others.¹⁰⁶

2. *The inapplicability of conventional theory to government* -- Initially, the assumption that government tort liability works in the same manner as the common law liability of private tortfeasors was widely shared. The Supreme Court repeatedly opined that constitutional tort liability can be counted upon to provide compensation while deterring official misconduct in the

Analysis of the Scope of Employment Rule and Related Legal Doctrines, 101 HARV. L. REV. 563 (1988).

¹⁰⁰ See, e.g., JULES L. COLEMAN, RISKS AND WRONGS 303-85 (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 145-70 (1995); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

¹⁰¹ See, e.g., WEINRIB, *supra* note 100, at 185-87.

¹⁰² See, e.g., *City of Monterrey v. Del Monte Dunes*, 526 U.S. 687, 709-10 (1999); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994).

¹⁰³ See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 16-19, 135-46 (1983).

¹⁰⁴ See, e.g., Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1009-22 (1990).

¹⁰⁵ See, e.g., POSNER, *supra* note 91, at 58-59; Michelman, *supra* note 96, at 1214-18 (1967); Michael A. Heller &

same manner as private tort law.¹⁰⁷ Even the most astute commentators indulged the same assumption.¹⁰⁸

The attack on this citadel was launched by Daryl Levinson, who observed that unlike a private firm, the government is not organized to maximize profits, but respond to voters' preferences, who are not "uniquely interested in maximizing the profits, or total wealth, of the jurisdiction."¹⁰⁹ Indeed, "government responds to political, not market incentives – to votes, not dollars."¹¹⁰ Accordingly, requiring government to pay damages for constitutional torts will fail to reliably deter constitutional violations, which frequently produce political benefits.¹¹¹ For example, a policy of randomly searching young men in high-crime areas could greatly increase constitutional tort liability, but it could also pay such handsome political dividends that liability would have no deterrent effect on elected officials.¹¹² Moreover, a majoritarian theory of political behavior predicts that "[s]o long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will never deter a majoritarian government from violating constitutional rights"¹¹³ As for the obligation to pay compensation for takings, Levinson argued that compensation is unlikely to create an incentive to engage in only efficient takings: "[W]hy should we expect government to fully internalize the benefits of takings

James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999).

¹⁰⁶ See text at note 96, *supra*.

¹⁰⁷ See, e.g., *Elder v. Holloway*, 510 U.S. 510, 514-15 (1994); *Memphis Cmty Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *Carlson v. Green*, 446 U.S. 14, 20-21 (1980); *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980); *Butz v. Economou*, 438 U.S. 478, 505-06 (1978); *Robertson v. Wegman*, 436 U.S. 584, 590-91 (1978).

¹⁰⁸ See, e.g., John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1461-64 (1998); Larry Kramer & Alan O. Sykes, *Municipal Liability Under §1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 276-87; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 253-78 (1988).

¹⁰⁹ Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 355 (2000) (footnote omitted).

¹¹⁰ *Id.* at 345.

¹¹¹ See *id.* at 367-68.

¹¹² See *id.* at 367-70.

¹¹³ *Id.* at 370. Levinson added that deterrence cannot be expected when a majority of citizens experience greater benefits than an increase in their taxes. See *id.* at 370-73.

when it does not receive them in the form of benefits?”¹¹⁴ A proposed taking that imposes large costs on individual property owners that exceed their social benefits could nevertheless garner majority support when a majority perceives benefits from the taking that exceed the increase in its own taxes to fund compensation.¹¹⁵ Levinson added that public choice theory predicts that powerful interest groups might be able to successfully lobby for unconstitutional policies or improvident takings that provide them with special benefits despite the obligation to pay compensation, such as an influential homeowners association that might lobby to condemn nearby property it dislikes even though the cost of condemnation might exceed its benefits.¹¹⁶ Levinson concluded, “[t]he most consistent prediction generated by interest group analysis is that compensation for takings or constitutional will tend to defuse political opposition and therefore increase the incidence of both.”¹¹⁷ At best, “any predictions about the incentive effects of constitutional cost remedies on government behavior are highly suspect.”¹¹⁸

Levinson also rejected corrective justice as a justification for government liability for constitutional torts or a requirement of compensation for takings. As to the former, the fact that “constitutional tort compensation ultimately comes from the pockets of taxpayers attenuates the connection between moral responsibility and the burden of rectification.”¹¹⁹ One could add that shareholders of private corporations have the benefit of liability limited to their investment even though they can readily sell their stock at any time; yet taxpayers must fund essentially unlimited liability and face substantial costs if they wish to “exit” the jurisdictions that tax them to fund

¹¹⁴ *Id.* at 350 (footnote omitted).

¹¹⁵ *See id.* at 364-66. He illustrated the point: “[T]he proposed regulation will benefit each of citizens 1-6 (the members of the minimum winning coalition) by \$2000, while costing each of citizens 7-10 \$4000. Citizens 1-6 will support the regulation because it leaves them better off by \$400 (\$2000 in direct benefits minus one-tenth of \$16,000, or \$1600, in compensation taxes), and the inefficient regulation will therefore pass.” *Id.* at 365.

¹¹⁶ *See id.* at 375-79.

¹¹⁷ *Id.* at 379-80.

¹¹⁸ *Id.* at 386-87. *See also* Daryl J. Levinson, *Empire-Building in Constitutional Law*, 118 HARV. L. REV. 915, 964-68 (2005).

¹¹⁹ Levinson, *supra* note 109, at 409. Levinson also observed that many constitutional violations are systemic in nature, making it unrealistic to identify the particular plaintiff as a victim, *see id.* at 409, and that many constitutional

governmental liabilities.¹²⁰ As for takings, Levinson rejected a moral claim of property owners to compensation on the ground that the existing distribution property cannot itself be defended as just.¹²¹

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

The efforts made to date to defend government tort liability from Levinson's attack have been unsatisfying. For example, Bernard Dauenhauer and Mark Wells have defended constitutional tort liability in terms of corrective justice, arguing that the taxpayers are properly held responsible for government torts since they largely correspond to the universe of voters responsible for electing those who run the government.¹²² But this is hardly corrective justice from the standpoint of those

injuries are difficult to monetize in any fair or principled fashion, *see id.* at 410.

¹²⁰ For discussion of the nature of limited shareholder liability, *see, e.g.*, Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387 (1992).

¹²¹ *See* Levinson, *supra* note 109, at 397-400.

¹²² *See* Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 914-28 (2001).

voter-taxpayers who chose the losing candidate in the last election. Nor is it fair to consider the taxpayers a proxy for voters. Voting is governed by a one-person one-vote rule,¹²³ but taxes are not levied on that basis.¹²⁴ It is also unfair to hold elected officials responsible for most governmental torts. Tort liability is usually imposed without any requirement that the tort was committed with the involvement or culpability of elected officials; only a section 1983 claim against a municipality requires any showing of culpability on the part of policymakers. Most constitutional torts, however, are committed by relatively low-level officials subject to limited control by elected officials or the voters, as the Supreme Court explained in *Richardson*.¹²⁵

Attacks on Levinson's position from an instrumental perspective have been no more persuasive. For example, Mark Brown has argued that citizens are more likely to obey the law when the government is required to honor its own legal obligations and is held liable for their violation.¹²⁶ He offers no empirical evidence to support this view, however, and his theory seems implausible. The Supreme Court recognized constitutional tort liability as we know it today in *Monroe v. Pape*.¹²⁷ While constitutional tort litigation exploded in the wake of that decision,¹²⁸ there is no evidence that people became more law-abiding. In fact, crime rates rose in the years following *Monroe*, and criminologists certainly have not observed any relationship between the rise of constitutional tort litigation and norms of law-abidingness.¹²⁹

Somewhat more plausibly, Myriam Gillies has attempted to meet Levinson on his own

¹²³ See, e.g., *Cox v. Larios*, 542 U.S. 947 (2004); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989).

¹²⁴ Moreover, it is usually unconstitutional to make eligibility to vote turn on one's status as a taxpayer. See *Kramer v. Union Free School Dist. No. 15*, 391 U.S. 621 (1969).

¹²⁵ See text at note 85, *supra*.

¹²⁶ See Mark R. Brown, *Deterring Bully Government: A Sovereign Dilemma*, 76 TUL. L. REV. 149, 168-78 (2001).

¹²⁷ 365 U.S. 167 (1961).

¹²⁸ As Justice Powell once observed, in 1961, only 270 civil rights actions were filed in the federal courts, but by 1981 over 30,000 such suits were filed. See *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 533 (1982) (dissenting opinion). To be sure, these figures are somewhat misleading because they include cases that are not fairly characterized as constitutional torts, such as employment discrimination actions. See Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 658-68 (1987). Still, there can be little doubt that since *Monroe*, constitutional tort litigation has expanded dramatically.

¹²⁹ See, e.g., GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS

terms. Admitting that governmental tort liability can have little deterrent effect unless it exacts a political price, she claims that tort litigation does just that by unearthing damaging information or producing adverse verdicts or rulings that produce damaging publicity for officeholders.¹³⁰ But she offers a paucity of empirical evidence to support this claim. There is, for example, little reason to believe that civil litigation is a major vehicle for unearthing government misconduct. Professor Gilles offers no evidence that damages litigation has produced effective political accountability; indeed, it is difficult to think of any major government scandal unearthed by tort litigation. The major national scandals of recent decades, such as Watergate or the Iran-Contra affair, for example, were not unearthed by tort plaintiffs.¹³¹ At the local level, it is equally difficult to identify a major scandal unearthed by a tort plaintiff; the huge Ramparts police corruption scandal in Los Angeles, for example, was unearthed by the Los Angeles Police investigation.¹³² What is more, only a tiny fraction of civil litigation against the government is likely to generate publicity, much less significant political consequences. When a governmental tort has political consequences, moreover, it is more likely because of the underlying conduct rather than the ensuing litigation. For example, the beating of Rodney King by Los Angeles police officers produced an immediate and enormous adverse public reaction well before any civil litigation was brought arising from that incident.¹³³ Given the incentive of the political opposition and the press, among others, to unearth government misconduct, and the ordinary political checks that come into play whenever allegations of government misconduct enter the political arena, the marginal utility of civil litigation in unearthing

IN AMERICA (1998).

¹³⁰ See Myriam A. Gillies, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 859-65 (2001). Similarly, James Park has argued that awards of damages are necessary so that courts are able to articulate constitutional principles and rights in cases where other types of relief are unavailable. See James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 422-40 (2003).

¹³¹ See CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974) (Watergate); LAWRENCE E. WALSH, *FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS* 25-53 (1993) (Iran-Contra).

¹³² See Nat'l Ass'n of Criminal Defense Lawyers, *NACDAL News*, CHAMPION, April 2000, at 12.

¹³³ See, e.g., Seth Mydans, *Tape of Beating Revives Charges of Racism*, N.Y. TIMES, March 7, 1991, at A18; Elaine Woo, *Rev. Jackson Joins Call for Gates' Ouster, Scolds Bradley; Protest: The Civil Rights Activist Tells Demonstrators at Police Headquarters that Mayor Should Speak Out "More Clearly and Decisively" on King Beating Controversy*, L.A. TIMES, March 17,

such misconduct and punishing officeholders is not likely great. But if it were, then Professor Gilles' argument suggests that the cure may be worse than the disease. If civil litigation is uniquely valuable at ferreting out government misconduct because of the financial incentive that the civil plaintiff has to pursue such allegations, then elected officials would presumably pay premiums – beyond the amount necessary to compensate the plaintiff – in order to settle litigation that might otherwise cause political embarrassment.¹³⁴ Thus, governmental tort liability effectively enables plaintiffs to extort excessive settlements funded with tax dollars. That perverse result is precisely why Professor Hills defends sovereign immunity.¹³⁵

These responses, however, are far from the typical academic reaction to Professor Levinson's critique of government damages liability. It is perhaps only a slight exaggeration to say that Levinson has revolutionized academic thinking about governmental damages liability.¹³⁶ Most academics have been persuaded by Levinson; it has now become fashionable to warn that the consequences of imposing damages liability on government are uncertain at best.¹³⁷ For this reason, some scholars now advocate imposing personal liability while forbidding or limiting indemnification

1991, § B, at 1.

¹³⁴ Publicity surrounding settlements can be minimized through sealed settlement agreements, which are used with increasing frequency by defendants who wish to inhibit public scrutiny of the events surrounding the litigation. See, e.g., Alan F. Blakely, *To Squeal Or Not To Squeal: Ethical Obligations of Officers of the Court in Possession of Information of Public Interest*, 34 CUMB. L. REV. 65 (2003-2004); Laurie K. Dore, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999); Heather Waldbeser & Heather DeGrave, *A Plaintiff's Lawyer's Dilemma: The Ethics of Entering a Confidential Settlement*, 16 GEO. J. LEG. ETHICS 815 (2003).

¹³⁵ See text at note 53, *supra*.

¹³⁶ Indeed, the editors of the *Georgia Law Review* found Levinson's argument so provocative that they devoted a symposium to an assessment of Levinson's article. See Thomas A. Eaton, *Foreword – Re-examining First Principles: Deterrence and Corrective Justice in Constitutional Torts*, 35 GA. L. REV. 837 (2001).

¹³⁷ See, e.g., Vicki Been & Joel C. Beavois, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for International Regulatory Takings Doctrine*, 78 N.Y.U. L. REV. 30, 89-90 (2003); Reza Dibadj, *Reconceiving the Firm*, 26 CARDOZO L. REV. 1459, 1517 (2005); Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 58-59 (2005); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 956-61 (2003); Clayton P. Gillette, *Kelo and the Local Political Process*, 3 HOFSTRA L. REV. 13, 15-16 (2005); Louis A. Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGIS. ISSUES 161, 192-95 (2003); Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1187-88 (2005); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1031 (2005); Evan J. Mandery, *Efficiency Considerations of Compensating the Wrongfully Convicted*, 41 CRIM. L. BULL. 287 (2005); John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after Chavez V. Martinez*, 39 GA. L. REV. 733, 831-35 (2005); Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1014-15 (2004); Christopher Serkin, *The Meaning of Value: Assessing Just*

or mandating sanctions such as termination or public censure.¹³⁸ Sanctioning an individual official, however, ignores the very dynamic that has led to a nearly-universal regime of indemnification – if individual officials face a credible threat of meaningful sanctions, the risk of over-deterrence would be quite real, and the resulting decline in the effective value of public-sector compensation would produce a concomitant decline in the quality of the public workforce unless compensation amounting to effective indemnification were offered.¹³⁹ Sanctioning individual public employees is no answer to Levinson.¹⁴⁰

When I first read Levinson’s article, I was a rather senior official in municipal government in Chicago. Levinson’s claim that government damages liability has indeterminate political consequences did not ring true to me. If Levinson were right, the officials within Chicago’s government with whom I worked should have been indifferent to municipal tort liability. In fact, city government devoted enormous resources to trying to minimize liability. Why was that so? Why did Chicago pay for risk managers and a legal department that vigorously contested liability if, as Levinson supposed, the payment of compensation was actually an effective means of defusing political opposition?

Levinson’s essential insight – that government responds to political and not market incentives – strikes me as indisputable. In the private sector, a profit-maximizing actor will invest in loss prevention whenever that investment is likely to produce greater savings through reduced liability; but one cannot make a similar prediction about political actors, who are not profit-maximizers and who externalize liabilities by levying taxes. But one can construct a theory of

Compensation for Regulatory Takings, 99 NW. U. L. REV. 677, 725-27 (2005); Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 22-24 (2003).

¹³⁸ See, e.g., Dunahoe, *supra* note 137, at 71-109; Emery & Maazel, *supra* note 86, at 596-600; David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricting Remedies*, 2005 U. ILL. L. REV. 1199, 1225-26.

¹³⁹ See text at note 88, *supra*.

¹⁴⁰ Another potential solution is to rely on property rather than liability rules that enforce legal rights through the issuance of injunctive relief. See generally Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Injunctive relief is unavailable, however, when the wrongful conduct at issue has ceased. See, e.g., *Renne v. Geary*, 501 U.S. 312, 320-21 (1991); *City of Los Angeles v.*

political behavior that explains why governmental damages liability can be reliably expected to encourage the government to undertake cost-justified liability-limiting measures.

B. The Politics of Government Damages Liability

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

1. *A theory of political behavior* – Consider the following account of political behavior as it relates to government damages liability: The primary objective of elected officials is to prevail in their next election, whether they are seeking reelection or some different, presumably higher office. To do this, they offer voters and other potential supporters what they believe to be an attractive mix of policies. In particular, elected officials impose taxes and allocate available resources generated by those taxes in what they regard as a politically optimal manner. Public resources must be distributed in a manner that meets the demands of actual and desired supporters, while keeping taxes at what is regarded as an politically optimal level. In this fashion, elected officials seek to craft policies that a majority coalition will conclude have created a sufficiently high ratio of benefits to taxes paid to make success sufficiently probable in the next election. It is therefore immaterial whether one accepts a majority-rule theory – postulating that elected officials are concerned with the views of a majority of their constituents – or, as the public choice literature hypothesizes, elected officials are likely to be more responsive to those groups with particular stakes in various public policy issues, recognizing that most voters have limited interests at stake in most policy issues.¹⁴¹ Under the theory advanced above, all that matters is that elected officials concern themselves with utilizing the public resources over which they have control to secure a likelihood success in future elections.

On this view of political behavior, there is a very real price to tort liability. The resources available for allocation in order to produce what elected officials regard as the optimal ratio of

Lyons, 461 U.S. 92, 105-06 (1983).

¹⁴¹ See, e.g., POSNER, *supra* note 91, at § 19.3.

governmental benefits to taxes are reduced by the funds that must be allocated to legal costs. To pay judgments and other litigation expenses, officials must either raise taxes – (or incur debt in jurisdictions where that is permitted, which, of course, requires that additional tax revenues be diverted in future budgets to repay the debt with market-rate interest) -- or experience a reduction in the funds available for allocation in what elected officials regard as the politically optimal fashion. Moreover, sums paid out to judgment creditors pay particularly small political dividends since these plaintiffs likely view these sums as an entitlement rather than a politically-bestowed reward likely to produce loyalty to incumbent officials. Thus, elected officials should be highly sensitive to tort liabilities. Because there is a political incentive to maximize discretionary spending on politically favored constituencies while minimizing taxes, an elected official should be willing to make efficient investments in loss prevention in order to reduce governmental liability costs. And the interest in maximizing political control over tax and spending policy is one all elected officials share, regardless of partisan affiliation or whether they exercise executive or legislative powers. Indeed, this theory predicts that when existing immunity legislation is too weak to approximate the politically optimal mix of tax and spending policy, there will be political pressure – from interest groups unable to obtain desired benefits when resources must be allocated to litigation and from elected officials themselves – to enact legislation in order to respond to the voters’ tax and spending preferences.

2. *Assessing the theory* -- How would one go about assessing the merits of the theory advanced above? The starting premise – that politicians are concerned about winning the next election – is perhaps uncontroversial. The view that elected officials behave in ways that enhance their likelihood of success in the next election could be rejected only by a “Profiles-In-Courage” model of elected officials discharging their duties without regard for electoral consequences. There is little reason to embrace such a model; the political equivalent of natural selection will eventually oust elected officials who ignore constituent preferences. In any event, political science research

consistently shows that reelection is one of the primary concerns of elected officials.¹⁴²

The next premise – elected officials consider their power to allocate available public resources an important means of building electoral support – is perhaps more doubtful. One could argue that incumbent officials have other, more useful ways of building or maintaining political support, or that they rarely fear defeat at the next election. Incumbents, however, face one type of vulnerability not shared by challengers; the voters have much more information about them as a consequence of their records.¹⁴³ For that reason, incumbents have special incentives to utilize their control over tax and spending policy in order to offset the disadvantage of a concrete record that makes campaign promises less effective. At the local level, as Paul Peterson has observed, politicians have long been concerned with allocating resources to maximize political benefits:

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

The allocational policies that have provoked the most enduring local conflict have related to the terms and conditions of public employment. Their centrality in local politics has often been attributed to their material and divisible qualities. Jobs can literally be divided into ever smaller packages and distributed to ever more specific segments of the community. Policies controlling their disposition can be almost infinitely varied from one sector of public service to another and from one rank to another within the service. Different groups can each be given their own parcel of positions, whose recruitment and promotion policies can be geared to that group's interests. The benefit, moreover, is perfectly concrete and material, a tangible good whose value can be fairly accurately calculated.¹⁴⁴

Similarly, studies of congressional behavior consistently identify a desire on the part of members of

¹⁴² See, e.g., RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 1-14 (1973); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 13-17 (1974).

¹⁴³ See, e.g., John Ferejohn, *Incumbent Performance and Electoral Control*, 50 *PUB. CHOICE* 5 (1986).

¹⁴⁴ PAUL E. PETERSON, *CITY LIMITS* 150-51 (1981) (footnote omitted).

Congress to allocate public resources to the use of “pork barrel” projects that are likely to provide particularized benefits to their constituents.¹⁴⁵ Studies of both executive and legislative behavior at the state level, while less frequent, reach the same conclusion.¹⁴⁶ The use of these pork barrel policies at the state and federal level is another example of allocational politics. Litigation costs, however, reduce the resources available to elected officials available for allocational politics. For that reason, elected officials have reason to be sensitive to those costs.

Even granting the concern of elected officials with maximizing the resources available for allocational politics, objections remain to the theory of political behavior advanced above. For example, it is reasonable to believe that the time frame of concern to politicians is the next electoral cycle and that their political judgments are therefore made with only that time frame in mind.¹⁴⁷ For that reason, elected officials might ignore litigation costs, believing that they have no real ability to reduce them quickly enough to affect the current electoral cycle. Still, there is reason for skepticism about this view of the time horizons of public officials – most politicians likely plan long careers in public service and will pay a political price if they are still in office when tort judgments must be paid.¹⁴⁸

¹⁴⁵ See, e.g., JOHN A. FERREJOHN, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947-1968, at 233-52 (1974); MAYHEW, *supra* note 136, at 52-59; ROBERT M. STEIN & KENNETH N. BICKERS, PERPETUATING THE PORK BARREL: POLICY SUBSYSTEMS AND AMERICAN DEMOCRACY 118-36 (1995); Steven J. Ballo, Eric D. Lawrence, Forrest Malzman & Lee Sigelman, *Partisanship, Blame Avoidance, and the Distribution of Legislative Pork*, 46 AM. J. POL. SCI. 515 (2002); Frances E. Lee, *Senate Representation and Coalition Building in Distributive Politics*, 94 AM. POL. SCI. REV. 59 (2000); Matthew D. McCubbins & Terry Sullivan, *Constituency Influences on Legislative Policy Choice*, 18 QUALITY & QUANTITY 299 (1984); Barry R. Weingast, Kenneth A. Shepsle & Christopher Johnsen, *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642 (1982); Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245 (1979). For an interesting demonstration of the efficacy of this type of allocative politics, see Steven D. Levitt & James M. Snyder, Jr., *The Impact of Federal Spending on House Election Outcomes*, 105 J. POL. ECON. 30 (1997).

¹⁴⁶ See, e.g., ALAN ROSENTHAL, GOVERNORS AND LEGISLATURES: CONTENDING POWERS 133-35, 158-60 (1990); Charles S. Bullock III & M.V. Hood, *When Southern Symbolism Meets the Pork Barrel: Opportunity for Executive Leadership*, 86 SOC. SCI. Q. 69 (2005).

¹⁴⁷ See, e.g., James M. Buchanan & Dwight R. Lee, *Tax Rates and Tax Revenues in Political Equilibrium: Some Simple Analytics*, 20 ECON. INQUIRY 344 (1982).

¹⁴⁸ Moreover, time horizons may not all that different in the public and private sectors. There is increasing concern that the emphasis on short-term profits and stock prices in the private sector has incited management to be less than fully sensitive to threats to the long-term financial health of the firm. See, e.g., Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1245-48 (2002); David Millon, *Why Is Corporate Management Obsessed With Quarterly Earnings and What Should Be Done About It?*, 70

One might also argue that litigation costs are not a sufficiently significant proportion of governmental budgets to be of concern to elected officials. It is difficult to respond to this objection, since it is notoriously difficult to obtain information from governments about litigation-related costs, although the available anecdotal evidence suggests that government tort litigation generates substantial budgetary outlays.¹⁴⁹ For example, between 1994 and 1996, New York City paid some \$70 million to plaintiffs in police misconduct litigation.¹⁵⁰ The City of Los Angeles was required to expend the same amount to settle police misconduct litigation stemming from corruption in a single anti-gang unit.¹⁵¹ And a United States Department of Justice task force concluded that in the early 1980s municipalities had experienced significant financial difficulties as a result of rapidly escalating tort liability costs.¹⁵² At the federal level, Harold Krent has estimated that the discretionary function immunity saves the government several billion dollars per year.¹⁵³ That estimate may be low. In *United States v. Gaubert*,¹⁵⁴ for example, the Court held that discretionary immunity barred a \$100 million claim representing the loss of a single investor allegedly caused by federal negligence in supervising a single federally regulated bank.¹⁵⁵ Had there been no immunity, the budgetary impact of liability for negligent supervision of federally regulated banks could have been enormous.¹⁵⁶ But reliable statistics are difficult to find; in particular, it is difficult to know how much the government saves because of the cases that are never filed as a consequence of

GEO. WASH. L. REV. 890, 892-900 (2002); Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263, 1283-94 (1992).

¹⁴⁹ See, e.g., Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 766-74 (2004).

¹⁵⁰ See Emery & Maazel, *supra* note 86, at 590.

¹⁵¹ See John M. Broder, *Los Angeles Paying Victims \$70 Million for Police Graft*, N.Y. TIMES, April 1, 2005, at A19.

¹⁵² See U.S. DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AFFORDABILITY AND AVAILABILITY 8-9 (Feb. 1986).

¹⁵³ See Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort*, 38 U.C.L.A. L. REV. 871, 871 (1991).

¹⁵⁴ 499 U.S. 315 (1991).

¹⁵⁵ See *id.* at 319-20.

¹⁵⁶ See Barry R. Goldman, Note, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 GA. L. REV. 837, 851-52 (1992).

immunity.¹⁵⁷ And it is also difficult to evaluate the political magnitude of these expenditures since their political significance depends a comparison to the portion of governmental budgets that are available for discretionary distribution after fixed costs not subject to effective political control are disregarded – a calculation that is difficult if not impossible to make.

It can also be argued that elected officials might have little ability to understand or control litigation costs. Although most liability-creating events are the result of the actions of relatively low-level officials, civil service protections and a variety of other arrangements insulate the bureaucracy from political control, leaving elected officials with limited authority over bureaucratic behavior.¹⁵⁸ This may mean that elected officials view litigation expenses as essentially a fixed cost over which they have no control. Moreover, senior bureaucrats have an incentive to conceal problems within their areas of responsibility from elected officials.¹⁵⁹ Still, elected officials must ultimately appropriate sufficient funds to pay for litigation expenses, so there is reason to believe that elected officials at least have some knowledge of litigation costs.¹⁶⁰

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

¹⁵⁷ It is worth noting, however, that one observer has argued that Washington State, the only state without government tort immunity, has experienced serious financial consequences as a result. See Tardif, *supra* note 20, at 44-53.

¹⁵⁸ See SCHUCK, *supra* note 103, at 60-66. See generally GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* 157-77 (1965); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEG. STUD. 257 (1974).

¹⁵⁹ See, e.g., WILLIAM A. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 138-54 (1971).

¹⁶⁰ Bureaucratic insulation from political control is likely to be reduced when elected officials have a low-cost means of monitoring bureaucratic conduct. See Jeffrey Banks & Barry Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 AM. J. POL. SCI. 509 (1992). The fact that bureaucrats must ask the legislature for an annual appropriation to pay judgments gives elected officials a ready means of monitoring bureaucratic risk management, and

vulnerable at the next election, term limits may actually increase the number of incumbents particularly concerned about distributional politics.¹⁶¹ Thus, term limits do not necessarily argue against the theory of political behavior I have advanced.

A final objection to the theory advanced above comes from Professor Levinson himself. We have seen that he believes that elected officials actually welcome tort liability as a means for deflecting opposition to their policies.¹⁶² If that is right, then government tort liability actually yields political benefits.

Thus, in the absence of persuasive empirical evidence, it is fairly debatable whether the theory of political behavior advanced in Part II.B.1 has merit, although it seems obvious to me that elected officials would always prefer to control the disposition of public funds rather than yielding control to judges and juries, if for no other reason than to be able to take credit when funds are paid out – even when paid as compensation to those injured by government conduct. There is, however, empirical evidence available to test the reaction of elected officials to the threat of tort liability – the existence of tort immunity legislation.

3. *Immunity Legislation as Empirical Evidence in Support of the Theory* – We have seen that statutory tort immunity is ubiquitous; the federal government and forty-nine states have legislation offering governmental defendants substantial protection from tort liability.¹⁶³ Enacting such legislation, however, is not politically costless; it is reasonable to expect political opposition to tort immunity. From the standpoint of the economic interests of the typical voter, tort immunity legislation is a wash, since whatever risk of uncompensated loss an individual voter is likely to run

therefore suggests that political control over litigation costs is relatively high.

¹⁶¹ For discussion of the complicated effect of term limits on distributional politics, see Dan Bernard, Sangita Dubey & Eric Hughson, *Term Limits and Pork Barrel Politics*, 88 J. POL. ECON. 2383 (2004). For empirical evidence that term limits actually increase electoral competition by reducing the number of entrenched incumbents, see Kermit Daniel & John R. Lott, *Term Limits and Electoral Competitiveness: Evidence from California's State Legislative Races*, 90 PUB. CHOICE 165 (1997).

¹⁶² See text at note 117, *supra*.

¹⁶³ See text at notes 20-51, *supra*.

should be roughly equal to the additional taxes that the voter must pay to finance governmental litigation costs. But voters might be expected to oppose tort immunity on the basis of the widely held belief that people who are wrongfully injured should be entitled to recover fair compensation from the wrongdoer – a point that corrective justice theorists¹⁶⁴ argue reflects a deeply held moral intuition.¹⁶⁴

Public choice theory predicts that the problems of collective action presented when the stakes for each individual are relatively small mean that the holders of particularly large economic interests in policy questions will play a disproportionate role in the political process.¹⁶⁵ This view suggests as well that interest groups with a substantial financial interest in pressing tort liability will be a particularly important source of political opposition to immunity. Indeed, the plaintiffs' bar acts as a potent lobby opposing legislation restricting tort liability.¹⁶⁶ On government immunity issues, it could form alliances with any number of business interests that have a financial interest in government liability, such as trucking interests that experience losses when public roads are not well designed or maintained, or when negligent or otherwise unlawful governmental licensing decisions shut businesses down.¹⁶⁷ And on particular liability issues, any number of lobbies are likely to press for government liability, such as community organizations concerned about police brutality, domestic violence victims' advocates concerned about police indifference to this issue, bicyclists' advocates concerned about improving the design and maintenance of bike paths, patients' rights groups concerned about the quality of service provided by public ambulances and hospitals,

¹⁶⁴ See text at note 100, *supra*.

¹⁶⁵ See, e.g., Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEG. STUD. 101 (1987); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). See generally, e.g., MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 111-67 (1968).

¹⁶⁶ See, e.g., Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEG. STUD. 807 (1994).

¹⁶⁷ Business opposition to governmental immunity legislation would reflect the demoralization costs likely to ensue if residents of a jurisdiction are required to run the risk that they will suffer an injury at the hands of the government or a government official for which they can receive no compensation. The concept of demoralization costs

and so on.

In contrast, other than the government itself, it is difficult to identify a lobby that should favor governmental tort immunity. The insurance industry might ordinarily be expected to advocate for immunity, but governmental immunity works against insurance interests by limiting the ability of insurance companies to seek recovery from the government when its wrongful acts cause insured losses of to policyholders whose rights the insurers can assert through subrogation or similar arrangements.¹⁶⁸ Taxpayers' advocates and public employee unions might have some interest in this issue, but they would be far more likely to pursue their interests directly – by lobbying for tax cuts or indemnity, respectively – rather than deploying their limited resources and political capital on an issue that only indirectly affects their core interests. I know of no evidence that these groups – or any other organized lobby aside from those controlled by elected officials – have ever taken a position on governmental tort immunity legislation. Indeed, when I was in municipal government, we frequently tried to interest these groups in lobbying on governmental tort immunity issues; we never succeeded. But even if these groups were thought to be vigorous proponents of immunity legislation, that point would only strengthen the theory of political behavior advanced above. After all, to the extent that tort liability increases tax burdens, thereby activating the taxpayers lobby, or reduces the government's ability to provide its employees with their desired compensation, thereby activating public employee unions, then tort liability imposes a political price on elected officials.

4. *Corroborative evidence for the theory* – Thus, empirical evidence in the form of governmental immunity statutes suggests that elected officials are sensitive to tort liability. But sometimes the absence of legislation also supports this conclusion. Consider the aftermath of *Florida Prepaid*

was first advanced by Professor Michelman as one of the justifications for the prohibition on uncompensated takings, *see* Michelman, *supra* note 96, at 1214-18, but it has application to governmental tort immunity as well, *see id.* at 1169 n.5.

¹⁶⁸ Such arrangements are common in the insurance industry as a vehicle by which insurance companies are able to sue those responsible for insured losses. *See, e.g.*, Jeffrey A. Greenblatt, *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?*, 64 U. CHI. L. REV. 1337 (1997).

Postsecondary Educational Expense Board v. College Savings Bank.¹⁶⁹ In that case, the Supreme Court held that federal legislation subjecting states to damages liability for patent infringement infringed the Eleventh Amendment's prohibition on damages actions against nonconsenting states.¹⁷⁰ Given the strength of the patent lobby and its interest in this issue as evinced by its ability to obtain federal legislation on this issue, the patent lobby should have been able to secure state legislation granting the right to seek damages for patent infringement. Yet such legislation has not been forthcoming.¹⁷¹ It is difficult to understand this apparent lobbying failure unless state legislatures and governors perceive a cost to state patent infringement liability that was not apparent to Congress – which saw no obstacle to refusing the entreaties of the patent lobby when federal revenues were not at risk.

The history of governmental immunity legislation provides additional support for the theory advanced above. Prior to the enactment of the FTCA, there was a long history of Congress granting legislative relief to victims of federal torts until it found itself overwhelmed by the volume of requests for legislative relief.¹⁷² That is itself a fairly clear indication of the political momentum behind compensation. Even since the FTCA, this political dynamic has asserted itself; after the Supreme Court, in *Dalehite v. United States*,¹⁷³ held that the United States enjoyed discretionary immunity from liability for an explosion and fire, Congress nevertheless felt compelled to enact the Texas City Disaster Relief Act, with authorized compensation while mitigating the budgetary impact by capping permissible recovery at \$25,000 per claimant.¹⁷⁴ This history suggests that there is political potency to the demand that compensation be provided to the victims of government torts.

¹⁶⁹ 527 U.S. 627 (1999).

¹⁷⁰ *See id.* at 635-48.

¹⁷¹ *See, e.g.*, Jason Karasik, Note, *Leveling the IP Playing Field: Conditional Waiver Theory and the Intellectual Property Protection Restoration Act*, 27 HASTINGS COMM & ENT. J. 475, 498 (2005).

¹⁷² *See, e.g.*, Floyd Shimomura, *The History of Claims Against the United States: Evolution From a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985).

¹⁷³ 346 U.S. 15 (1953).

¹⁷⁴ *See* Texas City Disaster Relief Act, ch. 864, 69 Stat. 707 (1955), *amended by* 73 Stat. 706 (1959). The statute also did not compensate losses that had been indemnified by insurance and limited permissible attorney's fees. *See id.* The federal government ultimately paid \$17.1 million in claims on total losses estimated from \$300 million to several billions of dollars. *See* 4 COMMISSION ON GOVERNMENT PROCUREMENT, REPORT OF THE COMMISSION ON

There must be some offsetting political benefit to explain why elected officials enact immunity statutes that deny their constituents compensation.

Evidence that tort liability exacts a political price by reducing political control over public resources is also reflected in the pattern of immunity legislation. If the relevant political calculus was a product solely of the strength of the various lobbies pressing their position on a legislature, then one would expect the pattern of statutory immunity to reflect the strength of the various lobbies.¹⁷⁵ Some of that is going on in immunity legislation – the statutes that immunize governments from paying damages to prisoners, for example, seem to reflect a legislative loss by a disfavored group lacking political influence. But the most common categorical immunity – for discretionary decisions – is aimed at no particular class of plaintiffs, but instead is directly aimed at protecting the political prerogative to set policy.¹⁷⁶ The same is true of the even more common caps on damages recoverable from governmental defendants.¹⁷⁷ This pattern suggests that the interest in maintaining control over public resources drives the enactment of immunity legislation rather than the relative strength of competing lobbies.

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

GOVERNMENT PROCUREMENT 99 (U.S. Gov't Printing Off. Dec. 1972).

¹⁷⁵ This is the view of the legislative process ordinarily taken by public choice theorists, for example, who see political decisionmaking as a consequence of the interaction of the lobbies with particularly significant stakes in various policy issues. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-21 (1991).

¹⁷⁶ *See, e.g.*, Krent, *supra* note 54, at 1545-51; Niles, *supra* note 52, at 1301-05.

¹⁷⁷ *See* note 48, *supra*.

officials perceive a political advantage in the enactment of immunity legislation.

C. The Impact Of Governmental Tort Liability.

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

But under the view of political behavior advanced here, Professor Levinson was right to claim that government tort liability has no efficiency justification comparable to the role of tort liability in the private sector. In the private sector, tort liability creates an incentive to invest in loss prevention in order to avoid an expected greater liability, discounted to present value. If the only concern of elected officials is to maximize the public resources available to be allocated consistent with their own political preferences, then public officials would be subject to the same incentive. Surely Levinson is right that voters do not use any equivalent to firm value for judging the operation of government; and most government expenditures have political benefits for incumbents – pork-barrel spending being a prime example. Therefore, there is always a political opportunity cost to making investments in safety – some other use of the funds, and its attendant political benefits, must be foregone, unless taxes are raised or, if possible, additional debt is incurred, and those options carry a political cost as well. If, for example, elected officials invest greater funds in the internal affairs division of the police department in order to reduce police-related liability, they will have less money available to hire additional officers. Accordingly, there will be substantial political

opportunity costs when elected officials forego the opportunity to put more police on the streets, even when they do so for the sake of risk management. The political opportunity cost of spending additional funds on internal affairs may well be perceived to be higher than the political cost of failing to reduce future police-related liability – without knowing a great many things about the political facts on the ground, it is impossible to make confident predictions on this score.

Aside from political opportunity costs, liability-producing conduct may have political benefits that offset the deterrent effect of liability. To use Professor Levinson’s example, a program of aggressive stop-and-frisk of young males in high-crime areas may increase liability, but it also may pay such handsome political benefits that liability will have no deterrent effect.¹⁷⁸ We can expect deterrence only when the political cost of losing control over litigation-related costs outweighs the political benefits of the program, and that calculation is necessarily indeterminate. Thus, government tort liability cannot guarantee that government will spend a given sum in order to achieve greater savings in the future.

There is, however, little reason to believe that the government will overinvest in loss prevention. Tort liability gives elected officials an incentive to make only those investments that will likely produce even greater cost savings through reduced liability, but no more. There is little reason to believe that elected officials will reduce their own pool of funds available for politically optimal use by overspending on loss prevention; the political benefits of those investments are speculative, and most of them will likely be realized at some uncertain point in the future, which may well be beyond the next electoral cycle.¹⁷⁹ Thus, a regime of government liability is likely to fail to achieve the level of efficiency thought possible in the private sector, but it will lead to greater investment in

¹⁷⁸ See text at notes 112-13, *supra*.

¹⁷⁹ This is not to say that government never overinvests in loss prevention. There is increasing evidence that individuals tend to be overly concerned with certain types of relatively small risks. See generally, e.g., Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999); Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEG. STUD. 747 (1991). When elected officials respond to these concerns by overinvesting in loss prevention, however, they are responding to political pressure and not the threat of tort liability.

loss prevention than a no-liability regime, without creating credible risk of overdeterrence.

III. ASSESSING GOVERNMENT LIABILITY

Parts I and II endeavor to be merely descriptive. It remains to assess a regime of government tort liability.

We have seen that government tort liability can be expected to encourage elected officials to invest in loss prevention with little likelihood of overdeterrence. That may tempt one to favor government liability as a means of reducing welfare losses caused by government conduct. Indeed, the law reviews are full of proposals for damages claims that can be brought against the government to reduce the incidence of asserted welfare losses that are either attributable to government or avoidable through greater governmental investment in loss prevention. Recent proposals include requiring the government to pay damages to pretrial detainees who are ultimately acquitted,¹⁸⁰ those whom the police fail to protect from mob violence,¹⁸¹ students who are the victim of pregnancy discrimination,¹⁸² or obesity harassment,¹⁸³ the victims of racial profiling,¹⁸⁴ and those who are wrongfully convicted.¹⁸⁵ Scholars have also advocated the abolition of qualified immunity on the grounds that it too often leaves constitutional violations unremedied,¹⁸⁶ the abolition of absolute prosecutorial immunity for the same reason,¹⁸⁷ imposing vicarious liability on municipalities for the

¹⁸⁰ See Jeffrey Mars, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 209 (2005).

¹⁸¹ See Susan S. Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence*, 79 IND. L.J. 177 (2004).

¹⁸² See David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217 (2005).

¹⁸³ See Jessica Meyer, *Obesity Harassment in School: Simply "Teasing" Our Way to Unfettered Obesity Discrimination and Stripping Away the Right to Education*, 23 LAW & INEQ. 429 (2005).

¹⁸⁴ See David Rudovsky, *Law Enforcement By Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001).

¹⁸⁵ See Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35.

¹⁸⁶ See, e.g., Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091, 1101-10; Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 307-33 (1995); Pillard, *supra* note 80, at 91-103; Daniel Rotenberg, *Private Remedies for Constitutional Wrongs: A Matter of Perspective, Priority, and Process*, 14 HASTINGS CONST. L.Q. 77 (1986); Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 257-76 (1986).

¹⁸⁷ See Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53.

constitutional torts of their employees,¹⁸⁸ and permitting awards of presumed and punitive damages against municipalities in order to maximize the deterrent effect of civil liability.¹⁸⁹ Each of these proposals requires the government to assume costs in order to avoid losses experienced by individuals; consequently, they all have a negative impact on government budgets, regardless of the externalized benefits they may produce – unless one can make the rather implausible claim that these proposals would be so popular that the voters would tolerate an increase in taxes to fund the new expenditures that they necessitate.

Despite the evident disinterest of most legal scholars in this question, government liability has important effects on governmental budgeting; and those effects are not likely to be evenly distributed among all government expenditures. As Gerald Frug once observed of court-ordered remedial plans seeking to improve the performance of public institutions thought to be performing below constitutional standards:

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

Some have argued that such judicial intervention in the budget process in favor of prisoners and the mentally ill can be justified because those groups are left out of the normal political decisionmaking processes. Indeed they often are. But the scarce resources allocated by government are largely allocated to people indistinguishable from those affected by the court orders. The mentally ill involuntarily committed to an institution may receive additional services under court order at the expense of those voluntarily committed to the same institution, or those not committed but using outpatient facilities at public hospitals or

¹⁸⁸ See, e.g., SHUCK, *supra* note 103, at 82-121; Jack M. Beerman, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627 (1999); Mark R. Brown, *Correllating Municipal Liability and Official Immunity United Section 1983*, 1989 U. ILL. L. REV. 625, 669-88; Kramer & Sykes, *supra* note 108, at 272-96; Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 825-48 (1992); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 1000-07 (1989).

¹⁸⁹ See Rudovsky, *supra* note 138, at 1225-26.

mental health centers. Prisoners may receive better medical care at the expense of a parolee who seeks it at a public hospital, or they may receive training or addiction services at the expense of the public at large who need identical services. Many beneficiaries of court orders are not entitled to vote, but neither are the children whose access to education, libraries, or welfare benefits might be curtailed to pay for the court order. The allocation of scarce resources by court order is not likely to be fortunate to the powerless; it is already the powerless to whom the state largely directs its resources.¹⁹⁰

Professor Frug's point has even more force when applied to damages awards against the government – damages awards drain the public treasury in an even more direct fashion than compliance with injunctive decrees. What is more, it is far from clear that social welfare is enhanced by a regime of government tort liability. If one assumes that the public's willingness to pay taxes is essentially fixed at any given time, then diverting limited revenues from public uses that may produce greater social welfare gains – infrastructure, education, health care, police, and the host of other welfare-enhancing services that government provides – to the payment of judgments and other litigation expenses harms social welfare. The existence of political accountability creates a substantial incentive to spend public funds in ways that produce relatively broad benefits – an incentive that tort plaintiffs and their lawyers lack.

Finally, government tort liability also has a significant impact on one especially large group of essentially innocent third parties -- the taxpayers and the public at large. We have seen that the taxpayers lack meaningful culpability for the tortious conduct of government, yet the financial consequences of government liability are borne by them. Similarly, whenever a judge or jury unilaterally directs a commitment of government resources to a particular plaintiff, requiring the imposition of additional taxes or a reordering of budgetary priorities, republican values are compromised. Perhaps most important, government is subject to an array of responsibilities

¹⁹⁰ Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 741-42 (1978) (footnotes omitted). As far as I am aware, the rich literature on institutional reform litigation contains no answer to Professor Frug on this point. For a sampling of the literature and its explication of what are seen as the virtues of judicial management of public institutions, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Forword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983).

unknown in the private sector. While a private party can reasonably be expected to make all cost-justified investments in safety, private tortfeasors are generally under no duty to protect the public at large from threats not of their own creation.¹⁹¹ Government, however, has a politically enforceable obligation to protect the public from all threats to its safety and welfare. Accordingly, government faces infinitely more difficult resources allocation decisions than those confronting the private sector. Accordingly, when a judge or jury exercises control over the allocation of public resources, the consequences may be far more dramatic than in the private sector if the ability of the government to meet the social, economic, security, and other threats that the public expects it to confront is compromised by the burden of litigation costs.

Thus, government damages liability is problematic. With that preface, the various species of government liability merit separate consideration.

A. Common Law Torts

1. *The marginal utility of government liability* -- We have seen that government tort liability can be expected to produce greater government investment in loss prevention than a no-liability regime. There is reason to doubt, however, that the marginal gain in loss prevention will be significant.

Putting aside the system of tort liability, there is a means for holding the government accountable when it fails to make sufficient efforts to prevent losses fairly attributable to its own activities – the next election. When the government fails to invest sufficient resources in the maintenance of its streets, for example, there is an issue for the next election regardless of whether vehicle owners are able to bring tort actions to recover damages caused by potholes. Indeed, the political potency of this issue may well be greater if the vehicle owners' losses have gone uncompensated. The existence of such political accountability government calls into question any regime of common law tort liability. What is more, at least at the local level, there is an especially stringent form of political accountability at work. Because businesses and individuals to opt out of

¹⁹¹ See RESTATEMENT (SECOND) OF TORTS §§ 314-15 (1965).

the local political process by moving to a different location, and because new businesses and residents are always free to select their desired location, local governments are effectively competing with each other for desirable residents and businesses that can assist in local development.¹⁹² Considerable empirical evidence confirms that local governments compete to provide residents and businesses with a high ratio of services to taxes as a result of these competitive pressures.¹⁹³ It follows that even absent government tort liability, if a local government failed to make adequate investments in loss prevention – driving up local insurance rates and increasing the risk of uncompensated loss – then residents and businesses will locate elsewhere, undermining the local tax base and economy. This dynamic creates powerful political incentives to invest in loss prevention that do not depend on the threat of tort liability. Indeed, there is some reason to believe that even among the states, interjurisdictional competition also operates in this same fashion, albeit to a lesser extent.¹⁹⁴

In short, political accountability gives elected officials an incentive to protect the public's safety – their political vulnerability in such circumstances can be at least as important as the threat of damages liability. To make the point concrete, consider once again *Dalebite*. That case was one of some 300 cases arising from the explosion and fire at an ammonium nitrate facility at Texas City, Texas, on April 16 and 17, 1947, seeking some \$300 million in damages.¹⁹⁵ As part of a federal program in which facilities that formerly were used to make explosives were converted to the production of fertilizer for occupied Japan, nearly 3,000 tons of ammonium nitrate-based fertilizer were shipped to a warehouse in Texas City and loaded onto two ships.¹⁹⁶ One of the ships caught

¹⁹² See, e.g., NISKANEN, *supra* note 159, at 155; PETERSON, *supra* note 144, at 17-38, 71-77; Charles A. Tiebout, *A Pure Theory of Local Government Expenditures*, 64 J. POL. ECON. 426 (1956).

¹⁹³ See WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 254-69 (1995); Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 512-28 (1991).

¹⁹⁴ See Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1 (1995).

¹⁹⁵ 346 U.S. at 17.

¹⁹⁶ See *id.* at 18-23.

fire, both exploded, and “much of the city was leveled”¹⁹⁷ Justice Jackson added:

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

This was a man-made disaster; it was in no sense an ‘act of God.’ The fertilizer had been manufactured in Government-owned plants at the Government’s order and to its specifications. It was being shipped at its direction as part of its program of foreign aid. The disaster was caused by forces set in motion by the Government, completely controlled or controllable by it. Its causative factors were far beyond the control or knowledge of the victims; they were not only incapable of contributing to it, but could not even take shelter or flight from it.¹⁹⁸

The majority concluded that the allegations that the government negligently planned and executed the shipment of unstable fertilizer were barred by the FTCA’s immunity for discretionary judgments.¹⁹⁹ In dissent, Justice Jackson argued that the government officials running the program should have been foreseen that the fertilizer was unstable and posed an unreasonable threat to the public.²⁰⁰ Justice Jackson’s dissent makes a powerful argument that government officials had recklessly endangered the public – an argument with enormous political potency, whatever its legal merit. Indeed, we have seen that Congress eventually provided statutory compensation for the victims of the Texas City disaster, albeit at a level with less budgetary impact than an award of complete consequential damages.²⁰¹ As the events surrounding *Dalehite* illustrate, political forces come powerfully into play when the government endangers the public’s safety, even when there is immunity from liability.

Consider another example of more recent vintage. It has been reported that the failures in New Orleans’ levee system caused by Hurricane Katrina were the result of easily foreseeable and readily repairable faults in levee construction and maintenance.²⁰² That may make out a classic case

¹⁹⁷ *Id.* at 23.

¹⁹⁸ *Id.* at 48 (dissenting opinion).

¹⁹⁹ *Id.* at 35-43.

²⁰⁰ *Id.* at 50-53.

²⁰¹ See text at note 174, *supra*. The legislative history suggests that the primary motive for the relief act was a congressional acknowledgement that the Texas City disaster had been the consequence of governmental negligence. See H.R. Rep. No. 1386 at 32-33 (1954); S. Rep. No. 2390 at 3 (1954).

²⁰² See Bob Marshall, *17th Street Canal Levee Was Doomed; Report Blames Corp: Soil Could Never Hold*, N.O. TIMES-

of negligence,²⁰³ but surely no one could think that such a damages action would be necessary to hold public officials accountable for their failure to maintain the levee system properly.²⁰⁴ Any instance of government bungling that compromises the public's safety is likely to have potent political consequences.

2. *The difficulty of adjudicating governmental liability* -- Then there is the problematic nature of adjudicating government liability in tort. As Louis Jaffe long ago observed:

We can assume the hypothesis of a governmental decision which creates a risk that could be considered either unnecessary to achieve the end in view or avoidable by an expenditure deemed reasonable. The difficulties of evaluating such a decision in terms of negligence are notorious. The decision will have rested in part on a technical judgment as to the size of the risk and the need to incur it; in part on a political judgment as to who should bear the indirect costs. A judge or a jury is not well equipped either to make such determinations initially or to review them.²⁰⁵

For these reasons, Professor Jaffee defended immunity for discretionary decisions, "if only because, as we have noted, a court cannot undertake to determine whether complex governmental decisions are 'reasonable.'"²⁰⁶ Indeed, this is the standard account of discretionary immunity.²⁰⁷ But Professor Jaffee understated the problem; it is the rare tort action in which an evaluation of the manner in which the government has chosen to allocate scarce public resources is unnecessary.

Take as prosaic an example as the repair of potholes.²⁰⁸ State and local governments must decide

PICAYUNE, Nov. 30, 2005, § National, at 1. See also Andrew C. Revken & Christopher Drew, *Intricate Flood Protection Long a Focus of Dispute*, N.Y. TIMES, Sep. 1, 2005, at A14.

²⁰³ See Bruce Egger, *Lawyer: Sue Feds on Levee; N.O. Council Responds Eagerly*, N.O. TIMES-PICAYUNE, Dec. 2, 2005, § Metro, at 1.

²⁰⁴ The flooding in New Orleans after Hurricane Katrina has provoked a flurry of accusations in an effort to hold those thought to be responsible politically accountable. See, e.g., Frank Donze, *Sea of Levee Board Records Sought; Senate Probe Wants Lengthy Paper Trail*, N.O. TIMES-PICAYUNE, Nov. 30, 2005, § National, at 1; Editorial, *Help! Corps Back to the Drawing Board*, N.O. TIMES-PICAYUNE, Nov. 9, 2005, § Metro, at 7; Jeffrey Meitrodt, *Doubts on Levees Cloud Conference; 40-Mile Fix May Leave Rest of System at Risk*, N.O. TIMES-PICAYUNE, Nov. 9, 2005, § National, at 1; Mark Shleifstein, *Levee Team Runs into Wall; It Reports No Access To Key Records, Staff*, N.O. TIMES-PICAYUNE, Nov. 9, 2005, § National, at 1.

²⁰⁵ Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 235 (1963).

²⁰⁶ *Id.* at 237.

²⁰⁷ See, e.g., *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988); *United States v. S.A. Empresa de Vicao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813-14 (1984). Considerations of this nature also underlie the public duty doctrine utilized in many jurisdictions, which provides that the government does not have a duty in tort to provide governmental services, although the doctrine provides no defense to what is thought to be affirmative governmental negligence or misconduct. See DAN C. DOBBS, *THE LAW OF TORTS* §§ 271-72 (2000).

²⁰⁸ Litigation against government over an alleged failure to report potholes or other defects in public roads is a

how much money they will allocate to this function. When sufficient funds are not allocated to locate and repair all potentially dangerous potholes as soon as practicable, then the government imposes upon all who use its roads a risk of injury. Still, this is at its heart a discretionary judgment – government must decide how much it can afford to spend on pothole repair in light of its limited resources and the many demands on those resources. The government may be willing to tolerate a higher risk of injury from potholes rather than reduce the resources available for police protection, which may lead to even more serious losses. For these reasons, pothole repair can be characterized as falling within discretionary immunity.²⁰⁹ Even the method that repair crews use involves a discretionary judgment – patches can be repaired more durably with more labor-intensive methods, but the more time that is spent on each patch, the fewer potholes that can be repaired.²¹⁰

Indeed, the line between immunized discretion and nonimmunized negligence is wholly indistinct. To illustrate the point, consider *Indian Towing Co. v. United States*.²¹¹ In that case, the Supreme Court held that although the Coast Guard's decision to provide a lighthouse in aid of navigation was an immunized act of discretion, once it undertook to provide that service and induced reliance on the part of passing ships, it was obligated to keep the lighthouse in good repair.²¹² But programs to inspect and repair lighthouses cost money – the more frequent and thorough the inspections, the greater the cost. The Coast Guard must decide how to undertake inspection and repair in light of its limited resources and the many demands placed upon it. It is difficult to understand how a jury could define the Coast Guard's duty of care with respect to its

commonplace in the law of governmental torts. *See, e.g.,* *Cooper v. Louisiana State Dep't of Transp. & Dev.*, 885 So. 2d 1211 (La. Ct. App. 2004); *Minder v. Anoka County*, 677 N.W.2d 479 (Minn. Ct. App. 2004); *Hanley v. City of Chicago*, 795 N.E.2d 808 (Ill. App. Ct. 2003); *Nishihama v. City & County of San Francisco*, 112 Cal. Rptr. 2d 861 (Cal. App. Ct. 2001); *Lippel v. City of New York*, 722 N.Y.S.2d 511 (N.Y. App. Div. 2001); *City & County of Denver v. Gonzales*, 17 P.3d 137 (Colo. 2001); *Steele v. Town of Stonington*, 622 A.2d 551 (Conn. 1993); *Chatman v. Hall*, 608 A.2d 263 (N.J. 1992); *Townsend v. State*, 738 P.2d 1274 (Mont. 1987).

²⁰⁹ *See* *Minder v. Anoka County*, 677 N.W.2d 479 (Minn. Ct. App. 2004); *Mitchell v. City of Trenton*, 394 A.2d 886, 888 (N.J. Super. 1978).

²¹⁰ *See* *Wrobel v. City of Chicago*, 742 N.E.2d 401 (Ill. App. Ct. 2000).

²¹¹ 350 U.S. 61 (1955).

²¹² *See id.* at 69.

lighthouses without revisiting a host of policy decisions made by Congress in its appropriation decisions, and by Coast Guard officials when deciding how to allocate funds within appropriated limits. Perhaps the Coast Guard abuses its discretion by failing to promptly inspect and maintain lighthouses – although even this much is debatable inasmuch as committing resources in this fashion could leave even more serious hazards to navigation unaddressed – but its resource allocation decisions, even if misguided, are an immunized discretionary function nevertheless. Thus, although there are a few governmental decisions that do not involve any meaningful consideration of how limited resources are to be allocated,²¹³ any time that a plaintiff contends that a governmental defendant failed to undertake sufficient investment in loss prevention, it is entirely fair to characterize the lawsuit as seeking to impose liability on a policy judgment.²¹⁴

The problem of discretion, in turn, illustrates the anomalous role that courts must assume in assessing governmental tort liability. Most governmental decisions – how much time to spend training police officers in the use of excessive force, how whether and how allegations of misconduct by public officials should be investigated, whether potholes in public streets should be barricaded – involve questions about how scarce public resources should be allocated. We have seen that government faces infinitely more difficult resources allocation decisions than those confronting the private sector. There is little reason, however, to believe that judges or juries are in any position to make such judgments which, after all, require consideration of all the demands facing a unit of government with a responsibility to protect the safety and welfare of the entire public. The Appropriations Clause and its state counterparts suggest that it is a uniquely legislative function to

²¹³ An example of negligence without any meaningful relation to the formulation of public policy or the allocation of public resources is negligent driving by bank regulatory officials. *See* *United States v. Gaubert*, 499 U.S. 315, 325 n.7 (1991).

²¹⁴ It is small wonder, then, that commentators frequently complain that the scope of discretionary immunity is unclear and that it is applied inconsistently. *See, e.g.*, John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Governmental Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. L.J. 223 (1992); David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291 (1988-89); William P. Kratzke, *The Supreme Court's Recent Overhaul of the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1 (1993); Bruce A. Peterson & Mark E. Van Der Wiede, *Susceptible to Faulty Analysis: United States v.*

decide how public funds are to be allocated.²¹⁵ Yet judges and juries effectively exercise that function when they impose tort liability on government.

To be sure, one can argue that tort law should require the government to raise taxes to the point where sufficient funds are spent to provide reasonable protection from all threats, but the threat to republican values would be profound if tort law, rather than the people's elected representatives, took control of tax and loss prevention policy. Moreover, a decision to levy taxes at the level sufficient to make all investments in loss-prevention that a jury might find to be cost-justified would itself raise a host of complex issues about whether increased taxes may adversely affect the business climate or otherwise reduce the attractiveness of the jurisdiction to the point where the tax base will itself begin to erode, jeopardizing the ability of the jurisdiction to afford continued investment in loss protection. And in light of the political constraints on increasing taxes, governmental tort liability could have the perverse result of reducing rather than increasing governmental investment in loss prevention. Resources diverted to litigation costs are unavailable for investment in loss prevention, and especially in a poorer jurisdiction with a limited tax base, it may be impracticable to increase taxes sufficiently to cover both litigation costs and all other measures that a jury might one day conclude constituted cost-justified investment in loss prevention. Moreover, the financial burden of liability fall on taxpayers who, as we have seen, are essentially innocent third parties with far less ability to "exit" a taxing jurisdiction than a shareholder dissatisfied with corporate risk management has to sell his stock.

These problems have a racial dimension as well. As Richard Thompson Ford has explained, even in a race-neutral legal regime, racial and ethnic groups that have been faced discrimination in the past are disproportionately likely to be poor and therefore to reside in older, less desirable

Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447 (1997).

²¹⁵ See text at notes 13-19, *supra*.

communities where housing is relatively inexpensive.²¹⁶ These communities, in turn will more likely experience crumbling infrastructure and a host of other problems that give rise to tort liability, yet their tax base will make it all the more difficult to finance necessary improvements. Moreover, when tax revenues must be used to pay judgments and other legal expenses that will fall disproportionately on such communities, businesses and high-income taxpayers will experience a declining ratio government services received to taxes paid, and will have a greater incentive to locate elsewhere. The remaining tax base is less able to afford to pay tort judgments, and to fund the necessary cost-avoidance measures.

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

3. *The weak case for governmental liability* -- There is accordingly a strong argument to be made that governmental loss-prevention policies are best left to the ordinary process of political accountability, by which other government policies are assessed, rather than effectively controlled through the vehicle of tort litigation. Nevertheless, arguments for government tort liability remain.

Political accountability is at best an imperfect means for encouraging government to undertake adequate investment in loss prevention. The advocates of public choice theory teach that political accountability operates imperfectly because it is generally costly and difficult for the voters to monitor government policy.²¹⁷ Surely this observation has merit – it is not very often that government loss-prevention policy dominates a political campaign. We have also seen that a measure of accountability is also achieved by the ability of dissatisfied taxpayers and businesses to

²¹⁶ See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1849-52 (1994).

²¹⁷ See, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE THEORY TO IMPROVE PUBLIC LAW 146-47 (1997); DENNIS C. MUELLER, PUBLIC CHOICE II 205-06 (1989); NISKANEN, *supra* note

relocate, but the costs of exit are substantial, leaving taxpayers who must bear the burden of government liability with a far from optimal ability to affect government policy.²¹⁸ Thus, in a regime of no liability, the remaining restraints on government loss prevention policy are likely to produce less than optimal results. There is likely to be some marginal benefit from a regime of government liability by enhancing government incentives to invest in loss prevention, although it is admittedly difficult to estimate its magnitude.

Accordingly, the case for government liability is likely to turn on the marginal benefits in terms of promoting efficient government investment in loss prevention offered by a regime of government liability. We have seen, moreover, that many government tort immunities operate in areas in which political accountability is likely to be strongest – discretionary decisions, law enforcement, and the safety of public infrastructure, for example. In areas where elected officials are most likely to be held politically accountable for failing to protect the public, the marginal utility of government tort liability is therefore likely to be small. And from the standpoint of corrective justice, where it is reasonable to expect the public to exact its own form of punishment at the next election, it is surely problematic to effectively shift liability onto essentially innocent taxpayers, or to divert resources from those who may need them far more than the plaintiff, and who are essentially blameless for the plaintiff's loss, and allocate them to a plaintiff who, in most cases, could have purchased insurance rather than run a risk of uncompensated loss.²¹⁹ Accordingly, given the impact of tort liability on republican values as well as the price paid by essentially innocent third parties who

138, at 135-36.

²¹⁸ For a critical discussion of the empirical evidence that casts doubt on the ability of interjurisdictional competition to produce optimal tax and spending policy although acknowledging that such competition does constrain the behavior of state and local governments in the fashion described by the advocates of this view, see William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 239-43 (1997).

²¹⁹ To be sure, not everyone can afford insurance, but there is little reason to believe that the likelihood that the uninsured will incur uncompensated losses absent government tort liability is likely to be greater than the likelihood that the same class of persons will experience reduced benefits through governmental programs in a regime of liability. The class suing the government in tort is largely random; there is little reason to believe that government tort liability is nearly as redistributive as the government programs that would experience reduced funding in a regime of unlimited

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

Discretionary immunity, as well as statutory protections on a public employer's vicarious liability for the torts of its employees, is also justifiable in light of the problems that inhere in vicarious employer liability in the public sector. We hold private firms liable for the torts of their employees to ensure that they make all cost-justified investments in loss prevention, but Part II.C explains that this approach will not work in the public sector. Thus, the rule that requires private-sector employers to essentially act as insurers of the tort liability of their employees has no proper application to the public sector. As long as the government adequately trains and supervises its employees – a function for which it is likely to be held politically accountable – the justification for requiring the taxpayers to shoulder the costs of vicarious liability is vanishingly thin.

B. Constitutional Torts

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

liability. The interests of those who cannot afford insurance are unlikely to be advanced by government tort liability.

of tort liability disappears.

Inhering in the concept of a constitutional right is that its protection does not depend on the political acceptance of the right at stake. Thus, political accountability is an unacceptable method for securing constitutional rights; the Constitution protects even the unpopular or politically inexpedient.²²⁰ Accordingly, discretionary and other categorical immunities are inappropriate for constitutional torts; a law of constitutional torts must place pressure on the government to conform of all its conduct to the Constitution. That does not imply, however, that damages are always properly award for a constitutional violation. Once one understands that the primary virtue of damages awards against the government is to create a political incentive to undertake loss prevention, there is ample room for damages-limiting doctrines that protect the interests of the taxpayers and avoid unwarranted reallocation of scarce public resources.

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

Qualified immunity shields officials from liability unless they violate clearly established law.²²¹ Accordingly, qualified immunity limits the resources that the government must devote to training and supervision of public officials. Public employers need only undertake to secure compliance with established legal rules; they need not endeavor to train and supervise employees to

²²⁰ Although some advocates of popular constitutionalism take a different view, *see, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154-94 (1999), for present purposes, it should suffice to observe that their view represents a substantial departure from our current constitutional regime. *See id.* at 175-76.

²²¹ *See* text at notes 64-65, *supra*.

make more difficult legal judgments. Given the expense and uncertain efficacy of training and supervision directed at unsettled questions of constitutional law, it is doubtful that the diversion of scarce public resources from other public purposes to such training and supervision – or to the payment of judgments and other legal costs – is justifiable.

Consider *Wilson v. Layne*,²²² in which the Court, after holding that the Fourth Amendment forbids law enforcement officers from permitting reporters to accompany them as they execute a search warrant for a residence,²²³ nevertheless granted the officers qualified immunity, noting that Fourth Amendment law on this point was undeveloped when the search at issue occurred and the then-extant policies of the two law enforcement agencies involved in the case appeared to permit reporters to accompany officers executing a warrant.²²⁴ Surely there is no point in holding officers liable for adhering to office policy. In the absence of any claim against the employees' supervisors alleging that they had caused the violation by providing unreasonable training and supervision, liability cannot be expected to reduce the incidence of constitutional violations. *Wilson* illustrates how qualified immunity operates to evaluate the manner in which public officials have been supervised.

Or consider the decision in *Brosseau v. Haugen*.²²⁵ In that case, a police officer shot Haugen, who was wanted on an outstanding felony warrant, after he had eluded police seeking to execute the warrant, made his way to his jeep, and then began to drive off despite the officer's repeated orders to stop.²²⁶ The Court granted the officer qualified immunity on the ground that no clear rule had emerged about whether the Constitution permits an officer "to shoot a fleeing felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."²²⁷

²²² 526 U.S. 603 (1999).

²²³ *See id.* at 611-13.

²²⁴ *See id.* at 615-18.

²²⁵ 125 S. Ct. 596 (2004) (per curiam).

²²⁶ *Id.* at 597-98.

²²⁷ *Id.* at 600 (footnote omitted).

Justice Stevens, in dissent, nevertheless made a compelling case that the officer's conduct was unreasonable – Haugen had not committed a violent crime or threatened the officer, and there was no evidence that he intended to drive off recklessly or otherwise endanger bystanders.²²⁸ Justice Stevens acknowledged, however, that there was some risk that Brosseau might have injured someone as he drove off, and therefore that there was “uncertainty about how an officer making a split-second decision to use deadly force would have assessed the foreseeability of a serious accident”²²⁹ But in this context, it is doubtful that any greater investment in training and supervision of officers could have prevented a constitutional violation. The applicable constitutional rule is that a fleeing felon can be shot only when there is “probable cause to believe that the suspect poses a serious threat of physical harm, either to the officer or others”²³⁰ It is surely reasonable to expect public employers to train law enforcement officers to know this rule, but it is unclear that additional training and supervision will ever enhance the likelihood that the officer will act correctly when making a split-second decision about whether a fleeing felon is likely to endanger someone else. A significant error rate is inherent in split-second police judgments, and when a law enforcement agency has likely invested all resources that are reasonably warranted in training and supervision with respect to constitutional requirements, the case for awarding damages is vanishingly thin – the damages award will not likely reduce the rate of constitutional violations, but it would divert public resources that could be invested far more efficaciously in other types of public goods, including loss prevention.²³¹

Qualified immunity therefore properly shields public officials from liability in cases in which the public employer has made reasonable investments in securing compliance with the Constitution.

²²⁸ *Id.* at 602.

²²⁹ *Id.* at 603. For this reason, Justice Stevens believed that the case should be tried. *See id.* at 603-04.

²³⁰ *Id.* at 598 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

²³¹ Even before *Brosseau*, the Court had held that qualified immunity protects officials even when they are applying relatively settled legal standards but nevertheless required to make difficult judgments as applied to the particular facts confronting the official. *See, e.g., Saucier v. Katz*, 533 U.S. 194 (2002) (whether force used to effect arrest was excessive); *Anderson v. Creighton*, 483 U.S. 635 (1987) (whether exigent circumstances justified warrantless search

Qualified immunity places the burden on the employer/indemnitor to monitor its employees with respect to clearly established law, the context in which monitoring is most likely to be cost-effective.

While phrased as a protection for public employees, as it operates, qualified immunity judges the reasonableness of the employer's conduct by giving it an incentive to reduce constitutional injuries where the law is settled and the costs of monitoring are therefore reasonable. Municipal liability is also appropriate when based on a culpable municipal policy; once again, liability is properly premised on the government's own failure to take sufficient measures to ensure compliance with the Constitution.²³² There is, however, little justification for insisting on a greater allocation of public resources to loss prevention when the ability to reduce constitutional violations with respect to unsettled law or unclear legal obligations is itself open to great doubt.²³³ In the face of unsettled legal obligations, the most likely effect of imposing liability is to require a public employer to provide what amounts to constitutional tort insurance. We have seen, however, that a regime of vicarious

of residence).

²³² Thus, I have no quarrel with Justice Breyer's observation that there is little point to imposing different liability rules for municipalities and municipal employees inasmuch as the former usually indemnify the latter. *See* Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 436 (1997) (dissenting opinion). But because virtually all constitutional tort liability resides with employers in reality, qualified immunity serves the same function as the requirement of a culpable policy by limiting liability to cases in which the employer failed to take reasonable measures to avoid constitutional violations. While this approach suggests that the state and federal governments should face policy liability for constitutional torts – a result nevertheless forbidden by sovereign immunity – and that municipal liability might properly be based on negligence rather than deliberate indifference, it is unclear whether these limitations on government liability have much practical significance inasmuch as a public employee can generally be named as a defendant in a constitutional tort action even when the employer is immune or otherwise not liable and the defense of qualified immunity limits liability to cases involving fairly culpable employers. For a similar argument that qualified immunity makes constitutional tort liability properly turn on culpability, see John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998). Indeed, one could argue that policy liability for local governments should be abolished; given the unavailability of qualified immunity, even a municipal policy that represents a reasonable effort to construe uncertain constitutional obligations, such as the policies considered in *Wilson v. Layne*, could result in damages liability.

²³³ With respect to the claim that qualified immunity hinders the development of constitutional law by causing plaintiffs to underinvest in constitutional tort litigation since they may be denied recovery in cases such as *Wilson v. Layne* in which they press a novel constitutional claim, *see, e.g.*, *Brown*, *supra* note 186, at 1101-10; the empirical case that qualified immunity has stunted the development of constitutional law has yet to be made. Despite qualified immunity, new constitutional law can be made in cases seeking injunctive relief, attacking municipal policies, in criminal litigation, and in cases like *Wilson* itself. Moreover, the development of constitutional law is also facilitated by the Court's practice of reaching the merits before considering whether a damages award is defeated by qualified immunity. *See, e.g.*, *Wilson*, 526 U.S. at 609; *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998). *See generally* John M.M. Greabe, *Mirabile Dictum! The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403 (1999). I am unaware of any empirical evidence that the doctrine of qualified immunity has operated to inhibit the development of constitutional law.

employer liability has little justification in the public sector, where tort law cannot hope to produce the efficient level of investment in loss prevention that is the objective of respondeat superior.²³⁴ Thus, constitutional tort liability produces political pressure on government to conform its conduct to the Constitution; while qualified immunity and limited employer liability bar awards of damages in contexts where liability is unlikely to reduce the incidence of constitutional violations.

3. *Measure of damages* -- These same considerations support the refusal to base constitutional tort damages on the presumed or inherent value of constitutional rights.²³⁵ Aside from the difficulty of identifying a nonarbitrary basis to measure the abstract value of a constitutional right, imposing this type of liability would be unacceptably likely to overdeter – presumed damages awards inevitably place pressure on the government to engage in even non-cost-justified loss prevention measures. Far better to achieve deterrence through a regime of punitive damages collectable from individual wrongdoers, rather than through awarding a form of presumed damages that is ultimately paid by the taxpaying public. Indeed, it was my experience in municipal government that nothing terrified my clients more than the possibility of an award of punitive damages, for which they could not be indemnified. When I wanted to impress upon an official, even at the highest levels of municipal government, with the magnitude of legal risk inhering in a particular course of action, nothing worked better than a discourse on punitive damages. Given the costs that government liability impose on essentially innocent third parties, punitive damages paid by the actual wrongdoer are far preferable to a regime of presumed compensatory damages that would inevitably be punitive

²³⁴ Accordingly, although I disagree with much of the Court's reasoning, in my view the Court correctly denied private firms managing public prisons qualified immunity in *Richardson v. McKnight*. A private firm is subject to market discipline and therefore should internalize the costs of its employees' misconduct so that the firm's services are priced to enable it to engage in cost-justified loss prevention. A publicly run prison, in contrast, is subject to political and not market discipline, and therefore should not face constitutional tort liability when it undertakes reasonable efforts to achieve compliance with constitutional norms. *Richardson* is a close case, however, because public contractors have a degree of political accountability; they must fear losing their contractors if their performance produces adverse political fallout.

²³⁵ See text at note 62, *supra*.

is in effect.²³⁶ Indeed, the Supreme Court has made just this point as it rejected the availability of punitive damages against municipalities under section 1983.²³⁷ Moreover, punitive damages represent the ideal solution for officials who are willing to countenance or even encourage constitutional violations because of the political benefits they yield. Punitive damages are thought warranted in the private sector when compensatory awards are likely to give defendants insufficient incentives to avoid tortious behavior;²³⁸ in the public sector, punitive damages are warranted when compensatory awards may provide officials with insufficient political incentive to comply with the Constitution. Punitive damages are appropriate when compensatory damages will underdeter, and cases in which compensatory damages do not adequately address a political incentive to violate the Constitution are therefore proper for the imposition of punitive damages.²³⁹

4. *Statutory limitations on damages* – The *Bivens* line of cases suggests that damages liability for constitutional torts is constitutionally compelled, at least absent a satisfactory alternative remedy or the presence of special factors, since a constitutional right without a correlative remedy is no right at all.²⁴⁰ The Court has provided little guidance, however, as to what constitutes an adequate

²³⁶ Although the Supreme Court has yet to decide the question, the emerging consensus in the lower courts is that punitive damages may be awarded for a constitutional tort even in the absence of compensatory damages. *See, e.g.,* Kelly Koenig Levi, *Allowing a Title VII Punitive Damages Award Without an Accompanying Compensatory or Nominal Award: Further Unifying Federal Civil Rights Law*, 89 KY. L.J. 581, 595 (2000-01).

²³⁷ *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269-70 (1981).

²³⁸ *See, e.g.,* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143 (1989); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982); Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3 (1990); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421 (1998).

²³⁹ The clear majority of states do not authorize indemnification of public employees for punitive damages. *See* note 44, *supra*. Moreover, although most courts to consider this question have ruled that federal law permits indemnification of public employees for punitive damages, *see* Schwartz, *supra* note 80, at 1219-23, on the view advanced here that the purpose of a punitive damages award is to negate political incentives to commit (or at least tolerate) constitutional violations without imposing costs on essentially innocent third parties – the taxpayers and those dependent on public services – it may well be that federal law preempts state laws permitting indemnification for constitutional tort punitive damage awards. If federal law is properly understood to have as its objective creating an incentive on the part of individual employees to avoid constitutional violations by placing their personal assets at risk, then state indemnity statutes would be inconsistent with this federal objective and would therefore be preempted. *See, e.g.,* Crosby v. Nat's Foreign Trade Ass'n, 530 U.S. 363, 373 (2000); Livadas v. Bradshaw, 512 U.S. 107, 120 (1994); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

²⁴⁰ *See* Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 72-74 (2001); Mitchell v. Forsythe, 472 U.S. 511, 522-23 (1985); Carlson v. Green, 446 U.S. 14, 18-25 (1980); *Bivens*, 403 U.S. at 395-97.

alternative remedy.²⁴¹ On the view advanced here that the purpose of a constitutional tort action is to use the budgetary impact of liability to impose a political cost for constitutional violations, an adequate remedy should ordinarily involve a financial consequence for a constitutional violation to ensure that it imposes a political price. Yet on this view, the decision in *Schweiker v. Chilicky*,²⁴² at first blush, seems problematic. In that case, the Court rejected a *Bivens* claim for consequential damages caused by wrongful denial of disability benefits on the ground that Congress had authorized no more than an award of retroactive benefits in the disability benefits provisions of the Social Security Act.²⁴³ The result is that there was no budgetary impact associated with a constitutional violation; a result seemingly at odds with the view advanced here. But I have endeavored to demonstrate that public-sector liability rules should be sensitive to the impact of liability on third parties and the provision of government services, and these considerations offer a defense for *Chilicky*.

The constitutional violation alleged in *Chilicky* was that administrators had deprived the plaintiffs of property without due process of law by manipulating the disability review process to wrongfully terminate benefits in order to reduce the cost of the program.²⁴⁴ The statutory remedy of retroactive benefits, however, prevented administrators from achieving the budgetary reductions they sought, and for that reason deprived them of the political benefit they sought in reducing expenditures on an evidently disfavored constituency. A statutory remedy that deprives administrators of the political benefits they seek from violating the law may well be sufficient to sustain the adequacy of that remedy – especially when coupled with the availability of punitive

²⁴¹ See generally, e.g., Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995); George P. Brown, *Letting Statutory Tails Wag Constitutional Dogs: Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263 (1989); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1747-49 (2001); Betsey J. Grey, *Preemption of Bivens Claims: How Clearly Must Congress Speak?*, 70 WASH. U.L.Q. 1087 (1992); Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989); Note, *Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251 (1988).

²⁴² 487 U.S. 412 (1988).

²⁴³ See *id.* at 424-29.

damages against individual officials responsible for undermining the integrity of the program. Aside from that, the misconduct alleged involved undermining a congressional intent to provide the benefits at issue; the violation was therefore subject to what was likely to be effective political scrutiny. Indeed, by the time that the case reached the Court, Congress had already overhauled the program to eliminate perceived abuses.²⁴⁵ Moreover, the Court was undoubtedly right to concern itself with the potential for budgetary disruption caused by the threat of unlimited liability.²⁴⁶ If unlimited damages were available for a wrongful denial of disability benefits, the federal disability program could become so expensive that political support for would ebb. This would hardly be a blow for the disabled or others dependent on government aid.

For similar reasons, statutory damages caps similar to those that many states have enacted for common law torts are defensible. We have seen that reasonable damages caps preserve political pressure on government to conform its conduct to the law, but mitigate the anomalies associated with government damages liability. An example is provided by *Bush v. Lucas*,²⁴⁷ in which the Court rejected a *Bivens* action in light of the availability of statutory civil service remedies that granted the successful plaintiffs retroactive seniority and backpay.²⁴⁸ Since backpay and retroactive seniority means that the government in effect must pay an employee for not working, there is a significant political cost to this remedy that should sustain its adequacy. At a minimum, an inquiry into the political efficacy of a statutory remedy will usefully guide an assessment of its adequacy.

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

²⁴⁴ See *id.* at 415-20.

²⁴⁵ See *id.* at 415-17.

²⁴⁶ See *id.* at 425.

²⁴⁷ 462 U.S. 367 (1983).

violations should be sustained.

C. Takings

1. *The role of compensation in limiting overuse of eminent domain* -- We have seen that the constitutional requirement of compensation cannot be expected to produce only cost-justified takings of private property because the political costs of paying the requisite compensation cannot readily be monetized. Still, the constitutional requirement of compensation imposes considerable political restraint on the power of eminent domain. Consideration of the political operation of a regime in which takings did not require compensation makes the point.

Absent a constitutional requirement of compensation, property owners could protect their investments by securing takings insurance, and the rising cost of takings insurance that would result from overuse of condemnation could create a political restraint on elected officials.²⁴⁹ But it is unclear how effectively insurance rates would check governmental overuse of condemnation; after all, the cost of insurance is hardly the only issue on which politicians are judged. The requirement of compensation, in contrast, imposes political discipline on the use of eminent domain. The government must budget for compensation, and incur the political opportunity costs associated with the payment of compensation.²⁵⁰ Indeed, the compensation requirement imposes a far more direct political restraint than does ordinary tort liability. The incentive to invest in loss prevention created by common law or constitutional tort liability is muted by the fact that it is difficult to predict future

²⁴⁸ See *id.* at 388-89.

²⁴⁹ The availability of insurance and the political impact of high insurance rates caused by promiscuous use of eminent domain has caused some to argue that the compensation requirement is unjustified. See Steven P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451 (2003); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986).

²⁵⁰ Although they have not linked the observation to a theory of political behavior like the one advanced above, commentators have observed that the budgetary impact of compensation will restrain the use of eminent domain. See, e.g., FISCHEL, *supra* note 185, at 73-75; Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 77-81 (1986). Professor Fischel, however, has argued that this discipline is undermined when eminent domain is financed in significant part by another unit of government, such as when a federal grant is used to cover the cost of municipal condemnation. See William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929. Professor Fischel overlooks the political opportunity costs not only for local officials when they use their political capital to lobby for federal funding of eminent domain costs as opposed to some other project, but also for Members of Congress when they allocate scarce public resources.

liabilities, and even more difficult to predict the extent to which they will be reduced by investment in loss-prevention measures.²⁵¹ The compensation requirement affects governmental budgets in a far more immediate and predictable fashion – compensation is required for every taking, it must generally be paid at the time of the taking, its cost is readily determinable through appraisal.²⁵² Thus the political impact of compensation is unusually direct, immediate, and predictable.

2. *The public use inquiry* -- The preceding discussion suggests that the Supreme Court correctly defers to the judgment of elected officials when deciding whether a taking is for a “public use” within the meaning of the Takings Clause – even when property is condemned for the purpose of transferring it to a private party for purposes of economic development as in *Kelo v. City of New London*.²⁵³ Although it is possible that a legislature would decide to condemn property in a naked effort to transfer wealth to either the property owner or a third party to which it plans to convey the property unaccompanied by any broader public benefit,²⁵⁴ given the political opportunity costs of condemnation, it is unlikely that elected officials would choose to deploy scarce governmental resources in such a politically disadvantageous fashion. In such circumstances, the likelihood of retribution in the next election should be, at least for most elected officials, unacceptably high.

²⁵¹ For discussion of the effects of contingency on the deterrent value of ordinary tort liability, see, e.g., John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984); Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185 (1999).

²⁵² It has long been settled that the Constitution forbids a taking when compensation is not paid in advance unless the property owner has available a means of obtaining compensation with reasonable certainty and without unreasonable delay. See *Bragg v. Weaver*, 251 U.S. 57, 64 (1919). See also 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8.5(2) (3d ed. 2004). And aside from this constitutional requirement, under federal law, title does not pass until compensation has been paid, see *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 11-13 (1984); and for federal condemnations or state or local condemnations that receive federal financial assistance, the condemnor cannot take possession unless it has prepaid an amount not less than the compensation specified in an approved appraisal. See 42 U.S.C. § 4651(4) (2000). Moreover, under the Takings Clause itself, if the government takes property before compensation is paid, it is liable for prejudgment interest on the requisite compensation. See *Kirby Forest Industries*, 467 U.S. at 10-11.

²⁵³ 125 S. Ct. 2655 (2005). See also *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (approving taking of land from oligopolist for redistribution); *Berman v. Parker*, 348 U.S. 26 (1954) (approving taking for purpose of slum clearance and private redevelopment).

²⁵⁴ This point is often made by the proponents of searching judicial review of the public use requirement. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE LAW OF EMINENT DOMAIN* 162-69 (1985); Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285 (2000); Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998); Ilya Somin, *Overcoming Poletown: County of Wayne V.*

To be sure, one could read the Takings Clause as requiring that the public physically use condemned property, but this would prohibit takings in order to build prisons, military bases, or other facilities not open to the public. Even the most vigorous advocates of restricting eminent domain resist this view and acknowledge that the public can “use” a facility within the meaning of the Takings Clause even when it is not open to the public.²⁵⁵ Once this type of indirect and metaphorical public use is accepted as consistent with the constitutional text, it becomes difficult to draw lines – in some sense the public “uses” the benefits of a redevelopment that lowers crime and generates new tax revenues just as it “uses” prisons and the military.²⁵⁶ The public makes the same metaphorical “use” of toll roads or utilities that acquire property by condemnation whether they are publicly or privately owned.²⁵⁷ For this reason, the opponents of condemnation for the benefit of a private party are forced to advocate all sorts of complicated tests to decide whether a particular condemnation for the purpose of eventually transfer to a private party is for a public use in the constitutional sense.²⁵⁸ Litigation governed by such standards would necessarily be complex,

Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005.

²⁵⁵ See, e.g., EPSTEIN, *supra* note 254, at 167 (1985).

²⁵⁶ For an argument about the difficulty of drawing principled distinctions in this area, see Thomas Ross, *Transferring Land to Private Entities By the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 369-80 (1983).

²⁵⁷ The use of eminent domain to acquire property for the use by a privately-owned utility is well settled. See, e.g., *Hendersonville Light & Power Co. v. Blue Ridge Interurban Ry. Co.*, 243 U.S. 563 (1917); (taking of property for construction of a dam operated by a utility company); *Mt. Vernon Woodberry Cotton Buck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916) (same).

²⁵⁸ See, e.g., *Kelo*, 125 S. Ct. at 2673-75 (O’Connor, J., dissenting) (permitting condemnation for the benefit of a private party when the property will be available for the public’s use or when the existing property inflicts an affirmative harm defined broadly to include blight or oligopoly); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 781-83 (Mich. 2004) (requiring public necessity, accountability of private party to the public, and when land is selected on the basis of a public concern); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L.J. 957, 987-92 (advocating inquiry into whether condemnation places an undue burden on the interests of property owners); Garnett, *supra* note 137, at 963-82 (advocating inquiry into nexus and proportionality). Nor does inquiry into the original meaning of the Takings Clause resolve the confusion. A case can be made that the Clause was intended to forbid condemnation for use by a private party, see *Kelo*, 125 S. Ct. at 2678-82 (Thomas, J., dissenting); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877; but there is also a strong case to be made that such condemnations are consistent with original meaning, based on the historical evidence that condemnation by or for the benefit of private parties was considered permissible, see Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204-12 (1978); Buckner F. Melton, *Eminent Domain, “Public Use,” and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59 (1996); and evidence that the public use requirement was intended to identify the one category of takings for which compensation was required, while other kinds of takings, such as taking by tort, taxation, or police power regulation, were excluded from the compensation requirement, see Matthew P. Harrington, *“Public Use” and the Original Understanding of the So-Called “Takings” Clause*, 53 HASTINGS L.J. 1245, 1278-301 (2002); Jed Rubinfeld, *Usings*, 102 YALE L.J. 1077, 1119-24 (1993). The latter view is also consistent with the text of the Takings Clause which, after all, does not say that

expensive, and prone to error. It would also be directed toward a policy question – the extent to which a given condemnation will ultimately yield sufficient public benefits – where judicial competence is at its nadir. Elected officials -- enmeshed as they are in the Darwinian world of electoral accountability – are far more likely to be able to assess the public’s interests than can judges. A far more reliable method than judicial review is to use the political price exacted by the compensation requirement to ensure that public resources are devoted only to public uses in the rather metaphorical sense of the Takings Clause.

3. *The standard for just compensation* – The political restraint imposed by the compensation requirement suggests that the measure of “just compensation” when property is condemned for the purposes of transfer to a private party should differ from the compensation owed for property that the government acquires for its own use.²⁵⁹ The condemning authority, when it assembles a large parcel for conveyance to a developer, may receive a price in excess of its costs of acquiring individual parcels; a large parcel invites a variety of intensive commercial or industrial uses that may possess far greater value than the price paid for the individual parcels from which it was assembled.²⁶⁰ Indeed, the need to assemble large parcels coupled with the holdout problems caused by the owners of individual parcels is one of the primary justifications for eminent domain.²⁶¹ In such cases, by offsetting its acquisition costs as it resells the property, the condemning authority mitigates the budgetary impact of condemnation; it could even turn a profit. In this fashion, the political check on overuse of eminent domain created by the compensation requirement is

takings are forbidden when not for a public purpose. The text suggests that compensation is required only when the legislature declares that the taking is for a public purpose; takings for other purposes are judged under other constitutional provisions. Indeed, the Supreme Court has acknowledged that the government is not “required to compensate an owner for property which it has lawfully acquired under the exercise of governmental authority other than the power of eminent domain.” *Bennis v. Michigan*, 516 U.S. 442, 452 (1996).

²⁵⁹ The ordinary measure of just compensation is the fair market value of the parcel at the time of the taking. *See, e.g., United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 (1984). In *Kelo*, the Court noted but reserved decision on the question of what the appropriate measure of just compensation should be in cases involving condemnation for redevelopment by a private party. *See* 125 S. Ct. at 2668 n.21.

²⁶⁰ *See* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 872-73.

undermined. But when one understands the just compensation requirement in terms of the political cost that the Takings Clause requires to be exacted in connection with condemnation, it follows that the requisite “just compensation” should include some proportioned measure of the premium that the government has or may obtain through a redevelopment project. In that fashion, the political restraint imposed by the compensation requirement is properly preserved. And if, as I have argued, the compensation requirement is properly understood as a political restraint on takings, then it is essential that this political restraint not be diluted by turning eminent domain into what could amount to a revenue center for government.

CONCLUSION

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

My ambition is also to argue the case for and against government tort liability with equal vigor. Tort liability imposes a serious cost on elected officials intent on deploying public resources to maximum political advantage. The fashionable academic skepticism about the efficacy of governmental tort liability is therefore quite misguided. But government tort liability also imposes a cost on innocent parties – not only the taxpayers, but also the most vulnerable among us who are generally in greatest need of governmental assistance, and most likely to lose out when public resources are diverted to the defense of litigation and the payment of judgments. An attractive account of government tort liability must pay close heed both of these costs. Tort liability properly restrains governmental misconduct; but too much of a good thing usually becomes a bad thing, and

²⁶¹ See, e.g., POSNER, *supra* note 91, at 55; Merrill, *supra* note 250, at 74-77.

tort liability is no exception. In an attractive and just regime of government tort liability, well tailored immunity rules are no less essential than a measure of liability itself.