Policing State Police: System Reform Within the "Fiction" of *Ex parte Young*

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Abstract

Statewide police forces exist in nearly every jurisdiction in the United States. Like their local counterparts, state police officers regularly violate citizens' constitutional rights. Yet the overwhelming majority of police reform litigation has focused exclusively on damages actions against individual officers or prospective relief against municipal police departments. Liability standards under 42 U.S.C. § 1983 for municipal police agencies have therefore developed in cases that do not seek to hold state police accountable. When a plaintiff seeks an injunction to reform state police agencies on the basis of unconstitutional conduct by state police officers, what liability standard applies?

This is a surprisingly thorny question, and one that remains unanswered in precedential caselaw. Given the reach and power of state police, it is a question deserving of our attention. I argue that cases against state police agencies over the conduct of their officers require a different liability framework than traditional municipal liability. By examining the doctrine of municipal liability and comparing it to the Ex parte Young *exception to the Eleventh Amendment that permits lawsuits for prospective relief against state officials, I demonstrate that municipal liability standards have no place in equitable lawsuits against state police agencies. Instead, courts should adopt a liability standard for state police agencies that is derivative of* Ex parte Young *itself, and therefore unavailable in claims brought against municipal police departments: liability based on traditional tort principles requiring only a causational nexus between the agency head and the constitutional harm.*

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Introduction

State police hold tremendous power and authority over the public, just like their local counterparts. And they can exercise that power in harmful, unconstitutional ways. Take, for example, the case of Mark Erich and Shawna Maloney, who in 2018 were traveling in their RV with their kids through central Kansas from their home in Colorado to visit family in Alabama.[1]

The family was targeted by a Kansas Highway Patrol trooper, who followed Mr. Erich, induced him to drift over the fog line, and then pulled him over for doing so.[2] After finishing the business of the traffic stop, the trooper did the "Kansas Two Step," a maneuver ubiquitous within the Kansas Highway Patrol that is deliberately designed to trick drivers into sharing additional information after they *should* be free to go, in the hopes that the additional information will allow the trooper to detain the motorist(s) and search for illegal contraband and cash.[3] The trooper used this move to turn what should have been a basic traffic stop into a drug interdiction dragnet. Lieutenant Justin Rohr detained the Erich-Maloney family on the side of the road for an hour to conduct a canine sniff of their RV, and then conducted a full search of the entire RV—resulting in significant damage to the family's property.

The search of the vehicle turned up nothing. But it left the Erich-Maloney family traumatized. For years after this encounter, they were terrified of the police. They had to pay out of pocket to fix various parts of the RV that the trooper damaged during the search. They eventually ended up selling the RV shortly after returning home, once they found they were unable to overcome the discomfort and anxiety that their encounter with Lt. Rohr created.[4]

What happened to the Erich-Maloney family was not an isolated incident. As litigation in the Federal District Court for the District of Kansas demonstrates,[5] the Kansas Highway Patrol engage in this practice with

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[1] *See generally* Memorandum and Order, Shaw v. Jones, No. 19-1343, 2023WL4684682 (D. Kan. Nov. 20, 2023).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

alarming frequency as part of their intense focus on drug interdiction. After Colorado legalized recreational marijuana use in 2014, Kansas state troopers were trained to treat every traffic stop as a potential opportunity for a search and seizure and to focus on preventing the transportation of over state lines.[6] For years, encouraged by an intense focus on drug interdiction, the Kansas Highway Patrol had been detaining motorists To combat these abusive practices, the Erich-Maloney family joined two other sets of plaintiffs in a federal civil rights lawsuit seeking to end the "Two Step" and roadside detentions based on little evidence besides travel to or from Colorado. Prior to the Erich-Maloney family and others jointly litigating their case in court, the systemic use of the Two Step had been beyond reproach. Although individuals had challenged the Two Step in suppression motions in criminal prosecutions, these were the first plaintiffs to challenge this state police practice as a whole.

In late July 2023, federal district court judge Kathryn Vratil issued her opinion in the case, a nearly 80-page rebuke of the KHP's Two Step and roadside detention practices. Judge Vratil found that "in the name of interdiction, [the Kansas Highway Patrol] has waged a war on motorists" and that the Two Step maneuver led to unconstitutional detentions. A few months later, Judge Vratil granted the plaintiffs' request for injunctive relief, ordering the Kansas Highway Patrol to change policies and practices and undergo additional training designed to end these practices for good.[7]

Only an injunction can remedy the broader pattern that plaintiffs like the Erich-Maloney family have exposed. Yet a sweeping opinion and concrete injunction like Judge Vratil's decision is far from the norm—these cases are uncommon, and victories few and far between. Indeed, there has been very little litigation at all seeking to reform state (rather than local) police departments. Most litigation aimed at police practices pursues damages against individual officers or against municipalities for the actions of individual officers, rather than systemic reform. But every day, state police agencies engage in the same unlawful practices as their local counterparts. They are often trained the same way and, in some cases, by the same training entities, as their local counterparts. And because of the large role state police agencies play in policing interstate highways, they have the opportunity to engage in repeated unlawful policing practices: Pretextual traffic stops, drug interdiction, civil asset forfeiture, and surveillance of motorists using automated technology are endemic to modern day policing.[8] Traffic enforcement

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[6] *Id.*

[7] *See* Permanent Injunction, Dkt. # 582, Shaw v. Jones, No. 19-1343 (D. Kan. Nov. 20, 2023). The injunction has been stayed pending appeal at the 10th Circuit and has not been resolved as of publication. The question addressed in this paper, however, is not on appeal.

[8] *See, e.g.*, Rob Poggenklass, Reform Virginia's Civil Asset Forfeiture Laws to Remove the Profit Incentive and Curtail the Abuse of Power, 50 U. Rich. L. Rev. 75, 75–76 (2016) (Virginia State Police civil asset forfeiture); Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After* Whren v. United States*: The New York and New Jersey Responses*

alone carries a significant risk of police violence against motorists, particularly motorists of color. Philando Castile, Walter Scott, Ronald Greene, and so many more have died at the hands of police following routine traffic stops.[9] But this violence takes other, more subtle forms as well, such as subjecting drivers to unlawful detentions in remote rural areas, invasive questioning, and coercive requests to search the vehicle for drugs and cash.[10]

Since state police are as in need of reform as their local counterparts, it is important for litigators and the courts to understand the proper doctrinal vehicle for achieving this goal. Although at first blush we may think institutional reform litigation aimed at the state police should be identical to that aimed at municipal or county agencies, a closer look at precedent suggests otherwise. This is because suits against state agencies are brought under the *Ex parte Young* exception to Eleventh Amendment immunity, which interacts with, but is distinct from, 42 U.S.C. § 1983.[11]

Regarded as one of the most important doctrines in American constitutional law,[12] *Ex parte Young* is critically underdeveloped as a tool for policing state police agencies. To date, there is no clear precedent setting forth the standard a litigant must meet to prove an ongoing constitutional violation that can be attributed to a state police agency head under *Ex parte Young*. As a result, some courts may mistakenly fall back on applying standards derived from *Monell v. Department of Social Services of New York*,[13] the seminal case for municipal liability in local law enforcement misconduct cases. Interestingly, in the scholarship critiquing *Monell* and proposing alternative standards for municipal liability, the proper standard to apply in

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Compared, 63 Alb. L. Rev. 725, 743–46 (2000) (New Jersey State Police engaging in racially-motivate pretextual stops); Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637, 682 (2021) (noting that the incidence of racial profiling in stops by the Washington State Patrol increased after judicial restrictions on such were eased); Karl Baker, *Delaware State Police Showcased at Artificial Intelligence Conference*, Delaware Online (Jan. 19, 2018, 1:26 PM), https://www.delawareonline.com/story/news/2018/01/19/delaware-state-police-showcased-artificial-intelligence-conference/1023211001/ [https://perma.cc/AH2D-58PK] (Delaware State Police automated technology); Sandra Guerra, *Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. Crim. L. & Criminology 1109, 1113–14 (1992) (state police involved in drug interdiction missions).

[9] *A look at high-profile killings by U.S. Police*, Assoc. Press (June 9, 2022, 5:50 PM), https://apnews.com/article/death-of-daunte-wright-george-floyd-patrick-lyoya-politics-racial-injustice-08c05a3ffd769c0061ff62793286bb90 [https://perma.cc/5BV6-S9LP].

[10] *See* Sharon Brett, *Reforming Monetary Sanctions, Reducing Police Violence*, 4 U.C.L.A. Crim. J. L. Rev. 17, 20 (2020); *see also* Jeannine Bell, *The Violence of Nosy Questions*, 100 B.U. L. Rev. 935, 937 (2020) (discussing the "nosy questions" police ask during traffic stops and how those are a form of police violence); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Cal. L. Rev. 125, 128 (2016).

[11] *See* Ex parte Young, 209 U.S. 123 (1908).

[12] *See* Vikram David Amar, 17A Fed. Prac. & Proc. Juris. § 4231 (3d ed. 2023).

[13] 436 U.S. 658, 690 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.").

Ex parte Young lawsuits against the head of state police agencies remains unaddressed.[14]

The Erich-Maloney family's experience with the Kansas Highway Patrol exemplifies the promise and utility of *Ex parte Young* litigation for obtaining systemic reform of state police agencies. For reasons that will be further explained below, the trooper's actions against the Erich-Maloney family may not have satisfied the standard for department liability required by *Monell* because the trooper's actions—essentially manufacturing a minor traffic violation, then detaining the family without reasonable suspicion—were not sanctioned by a formal, written policy of the Kansas Highway Patrol. On paper, the troopers were instructed to follow the Constitution and not engage in suspicionless detentions. But the trooper's actions followed an unwritten playbook instead, passed down through training and conversations about drug interdiction work and what is valued within the agency. The result was a system of constitutional violations that occurred with the *knowledge* of the head of the state police agency, but without any formal practice or custom explicitly promulgated by the agency head. Applying *Monell*-like frameworks to the Erich-Maloney case might very well have precluded injunctive relief. And a damages claim against the individual officer would have been insufficient for systemic reform: The very same practices had been challenged in a damages lawsuit four years earlier, which settled for mid-five figures after the Tenth Circuit ruled that the driver's constitutional rights had been violated.[15] That prior ruling did not deter the Erich-Maloney stop—Kansas Highway Patrol continued to do the same thing to other motorists, and it would do so in perpetuity unless ordered to stop.[16]

Consequently, this article explores and offers an answer to the question of what liability standard should apply in these types of cases. I argue that

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[14] *See, e.g.*, Michael Wells, *The Role of Fault in § 1983 Municipal Liability*, 71 S.C. L. Rev. 293 (2019) (arguing for an objective deliberate indifference standard in cases against municipalities, but ignoring the application of such standards to *Ex parte Young* litigation); Avidan Y. Cover, *Revisionist Municipal Liability*, 52 Ga. L. Rev. 375 (2018) (proposing a remedial scheme for civil actions against local governments, but only in the damages context); David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 Fordham L. Rev. 2183 (2005) (advancing a theory of "public officer" liability and the reinstatement of *respondeat superior* liability, without consideration of how this should apply to state officials); Edward C. Dawson, *Replacing* Monell *Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C. § 1983 Litigation*, 86 U. Cin. L. Rev. 483 (2018) (proposing that municipal liability be available under *respondeat superior* with qualified immunity as a defense, but not discussing injunctive relief standards *or* appropriate standards for cases against state officials); Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 Minn. L. Rev. 2257 (2020) (providing extensive analysis of the myriad hurdles plaintiffs must face in suing the police for injunctive relief, including standing doctrine and municipal liability, but not discussing *Ex parte Young*).

[15] Vasquez v. Lewis, 834 F.3d 1132, 1138 (10th Cir. 2016).

[16] Memorandum and Order, *supra* note 1, at 67 ("Individual lawsuits against KHP tropers have not persuaded and evidently will not persuade the KHP to adopt permanent and comprehensive changes that are necessary to protect plaintiffs and similarly situated motorists from constitutional violations in the future."); *id.* at n.60 (describing how qualified immunity shields most damages lawsuits and "certainly does not initiate institutional reform.").

assuming *Monell*-like liability for equitable suits against state police agencies would produce an unworkable tension with *Ex parte Young*, a doctrine created by the Court to advance the principles of constitutional supremacy and federalism. Adopting *Monell*-like liability against state police agencies would be both counter to the fiction the Court created in establishing *Ex parte Young* as an exception to Eleventh Amendment immunity. As courts including the Tenth Circuit have recognized, the policy goals animating *Ex parte Young* and those animating municipal liability are different. *Monell* was intended to limit law enforcement liability, whereas *Ex parte Young* was intended to ensure a judicial backstop to prevent ongoing unconstitutional conduct by state actors. Thus, I argue that *Ex parte Young* mandates a less stringent standard to enjoin unconstitutional state police behavior than *Monell* requires for municipal law enforcement.

Part I begins with basic background information about the state police: how they were formed, what they do, and why it matters. In Part II, I examine the traditional vehicle for police reform—cases for injunctive relief brought under 42 U.S.C. § 1983—and the municipal liability framework developed in *Monell* and extended to suits for injunctive relief in *Los Angeles County v. Humphries.* In Part III, I turn to the procedural vehicle for prospective relief lawsuits against state agencies—the "fiction" of *Ex parte Young*. By examining *Ex parte Young*'s unique role as an exception to Eleventh Amendment immunity, I set forth reasons why institutional reform litigation against *state* police should be viewed as distinct from municipality-focused lawsuits. In Part IV, I bring these concepts together to demonstrate how current municipal liability standards are inconsistent with the text and intent behind the *Ex parte Young* fiction and lead to redundant causational standards. I conclude in Part V with a suggestion for a different standard for evaluating liability for state police agencies as compared to municipalities. I suggest that a "causational nexus" standard, rather than the standard from *Monell*, should govern constitutional tort claims brought under Section 1983 against the head of state law enforcement agencies. I argue that this standard is consistent with the Court's decision in *Ex parte Young*, *Humphries* notwithstanding, and that it is necessary to accomplish the important goal of ensuring that state police agencies do not operate above the federal constitution.

I. The State Police

Who are the state police? The backdrop of these agencies—their historical origins, current form, and general responsibilities—is an important starting point for understanding how state police interact with the public and, therefore, why their actions may be the target of federal civil rights litigation.

The true historical origins of the state police model lie outside of the United States. State policing here was originally drawn from models in countries such as Ireland and Canada, which created militarized, centralized

police forces in the late 1700s and late 1800s, respectively.[17] The rise of a militarized state police force has been attributed, at least in part, to these international examples.[18]

The first state police agency in the United States was formed in 1905 in Pennsylvania. The Pennsylvania State Police were responsible for policing rural communities and served as a backstop for corruption and inefficiencies in local police forces.[19] New York, Colorado, Michigan, West Virginia, and Massachusetts soon followed suit, establishing their own statewide police forces. By 1941, only twenty-seven states had established state police forces, "but state highway patrols had become universal."[20]

These statewide agencies were quickly seen as some of the most elite law enforcement agencies in the country; they were disciplined, narrowly focused, and highly trained. In some places, they were a welcomed counterpart to local police forces that had been infused with corruption or that had become overly accommodating of political whims.[21] Professor Paul Musgrave, who has extensively studied the formation of state police agencies, describes these agencies as "bringing needed professionalization to policing" and representing "a progressive response to new forms of criminality and the new social landscape created by the automobile."[22] Yet, as Musgrave and others note, the development of state police agencies was also likely attributable in large part to pro-union labor uprisings.[23] Labor unions played a significant role in opposing the formation of statewide policing agencies. In some states, unions banded together with local law enforcement officials who feared usurpation of their role and authority,[24] or the loss of their ability to enforce local laws that might be deemed inappropriate by the state.[25] Separately, the formation of state highway patrols appears to be directly related to the rise in automobile usage in the early-to-mid 20th century.[26]

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[17] H. Kenneth Bechtel, State Police in the United States: A Socio-Historical Analysis 7–8 (1995).

[18] *Id.*

[19] *Id.*

[20] Paul Musgrave, *Bringing the State Police in The Diffusion of Statewide Policing Agencies 1919-1941*, 34 Studies in Am. Pol. Dev. 3, 3 (2020).

[21] *See, e.g.*, Theodore Roosevelt, *Introduction* to Katherine Mayo, Justice to All: The Story of the Pennsylvania State Police (4th ed., Houghton Mifflin 1920), viii ("The Pennsylvania State Police is a model of efficiency, a model of honesty, a model of absolute freedom from political contamination.").

[22] Musgrave, *supra* note 20.

[23] *See, e.g.*, Musgrave, *supra* note 20; Bechtel, *supra* note 17; Gerda W. Ray, *From Cossack to Trooper: Manliness, Police Reform, and the State*, 28 J. Soc. Hist. 565, 568 (1995) ("it was the labor and socialist opposition which provided the key to the successful marketing of the state police.").

[24] Bruce Smith, Rural Crime Control (Institute of Public Administration, Columbia University 1933).

[25] *Id.*

[26] August Vollmer & Alfred E. Parker, Crime and the State Police (1935).

Scholars have noted what appears to be a general lack of historical, socio-political, and sociological analyses of state police agencies, their origins, and their complexities—despite significant attention paid to municipal and county-level agencies.[27] The existing political science and historical literature focuses primarily on individual departments, rather than trends across state police forces.[28] Legal scholarship similarly fails to study state police forces in detail; most policing analyses from legal academics focus on constitutional or procedural issues in litigation against urban, metropolitan policing.[29] This focus, at the exclusion of the unique structural, legal, and jurisdictional differences inherent in state law enforcement agencies, limits our understanding of the form and function of these agencies. With such agencies covering the entirety of a state's territory (which, for some states like California, Texas, and Montana, includes hundreds of thousands of square miles), and charged with significant responsibilities like drug trafficking enforcement, these agencies are worthy of scholarly attention.

From what we do know about state police agencies, they appear to take many different forms. Like their local counterparts, state-level law enforcement agencies come in various shapes and sizes. Some jurisdictions have full-scale state police forces, which carry similar responsibilities and power as local agencies, but with a state-wide jurisdictional focus. Officers in these types of agencies execute warrants, investigate criminal activity throughout the state, partner with local and federal law enforcement agencies to carry out large-scale operations, and more. For some such agencies, officers may have authority to enforce certain criminal laws statewide, but not others.[30]

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[27] *See, e.g.*, Bechtel, *supra* note 17, at 3 ("Other than a mention of their existence and a brief description of their duties and jurisdiction, state police agencies are rarely given more than a cursory discussion in the criminal justice and law enforcement literature."); Musgrave, *supra* note 20 ("Over the succeeding decades, statewide policing agencies have become familiar, unexceptional, even dull through their ubiquity on the roads. Today, they rarely attract scholarly interest.").

[28] *See, e.g.*, Fabrice Hamelin & Vincent Spenlehauer, *Road Policing as a State Tool: Learning from a Socio-Historical Analysis of the California Highway Patrol*, 3 Policing & Soc. 16 (2006); David N. Falcone, *The Missouri State Highway Patrol as a Representative Model*, 4 Policing: An Int'l J. of Police Strategies & Mgmt. 24 (2001); David N. Falcone, *The Missouri State Highway Patrol as a Representative Model Archetypal*, 3 Police Quarterly 1 (Sept. 1998); M.G. Lindsey, *Localism and the Creation of a State Police in Arkansas*, 4 Ark. Hist. Quarterly 64 (2005).

[29] A notable exception is Samuel Gross and Katherine Barnes' article *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 Mich. L. Rev. 651 (2002), which focused on drug interdiction work by the Maryland State Police and the constitutional implications of the department's racial profiling practices. Yet, this article did not explore anything unique about the role of state police work or address the procedural barriers to challenging those practices in federal court. Rather, it focused on an empirical examination of the policing data from that department and the legal and social implications of the study's findings. *Id.* at 661.

[30] In Maryland, for example, the Department of State Police has statewide jurisdiction for narcotics-related crimes, but otherwise does not have general jurisdiction in incorporated municipalities. *See* Maryland Dep't of State Police, msa.maryland.gov/msa/mdmanual/23dsp/html/23agen.html [https://perma.cc/H9TS-XTYN].

Other state law enforcement agencies have a more limited focus on policing interstate highways. These agencies generally take the form of a highway patrol, with a more targeted focus on traffic enforcement, accident investigation, and criminal interdiction work. Still other types of state law enforcement agencies operate as a subdivision of the state Attorney General's office or as part of a state-local task force.[31] Professor Musgrave notes significant differences among the different forms of statewide police agencies.[32] Professor Musgrave defines "state police force" as "an agency that has both the legal authority and the actual ability to enforce all laws throughout the state (particularly or principally in rural areas)" and "state highway patrol" as "an agency that is limited either legally or in actual capability and practice to enforcing only, or almost exclusively, highway regulations and traffic laws."[33] The former is a full-fledged police force, usually with few restrictions on their ability to operate either geographically or substantively. State highway patrols, however, are focused on enforcing traffic laws, and may have limited enforcement powers for other types of criminal laws—predominately crimes committed on interstate highways, including drug interdiction and human trafficking. Regardless of agency type, many state police officers routinely work alongside their local counterparts during investigations, operations, and enforcement, and even train members of local agencies on statewide issues and law.[34]

State police agencies are generally part of the executive branch. Kansas Highway Patrol, for example, is a state agency, and the Superintendent is appointed by and serves at the pleasure of the Governor. The Massachusetts State Police is likewise part of the Executive Branch, situated as an agency within the statewide Office of Public Safety and Security.[35] The Governor's administration appoints the Colonel who leads the agency's efforts. For each of these agencies, then, the head policy maker is an executive branch law enforcement officer who is responsible for overseeing the policies, procedures, and operations of the entire force.

Even "limited" jurisdiction agencies like highway patrols carry significant power and authority. Highway patrols enforce traffic laws and respond to accidents, but they also see themselves as the first line of defense in the "war on drugs." Because these agencies are trained to engage in highway

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[31] *See, e.g.* New Hampshire Drug Task Force, Office of the New Hampshire Attorney General, https://www.doj.nh.gov/criminal/drug-task-force.htm. [https://perma.cc/3D3X-RT9N].

[32] Musgrave, *supra* note 20.

[33] *Id.*

[34] *See, e.g.*, Task Force Program, State of California Department of Justice, https://oag.ca.gov/bi/tfp [https://perma.cc/V5CG-4NJZ] (last visited Apr. 1, 2024) (describing statewide task force of law enforcement agencies at the state and local level). Similar operations exist, formally or informally, in virtually every state.

[35] Executive Office of Public Safety and Security, Mass. Gov, https://www.mass.gov/orgs/executive-office-of-public-safety-and-security [https://perma.cc/JX2M-S5KJ] (last visited Apr. 1, 2024).

interdiction work, they attempt to stop as many vehicles as possible and investigate each of them for possible trafficking of drugs, weapons, people, or cash.

As a result of this mission, state police officers may run afoul of constitutional limits in numerous situations. Unreasonable roadside detentions, discussed above, are one example. Another example is excessive civil asset forfeiture, which can be a lucrative business for states. In 2022, for example, law enforcement agencies in Kansas seized over four million dollars' worth of currency and property, nearly three and a half million of which was ultimately kept by the government through the forfeiture process.[36] KHP alone was responsible for seizing just over $600,000 that year—roughly 13% of the total amount seized by the 379 different law enforcement agencies operating in the state.[37] Between 2019 and 2021, law enforcement agencies seized $21.3 million from people in Kansas.[38] This reflects what happens nationwide: In 2018 alone, U.S. law enforcement agencies seized over three billion dollars through civil asset forfeiture.[39]

Public reporting has shed light on how highway interdiction work has harmful consequences. For example, a deep dive by the *Washington Post* in 2014 found that highway seizures and asset forfeiture programs result in numerous constitutional violations, without much legal recourse.[40] And Sarah Stillman's 2013 *New Yorker* article "Taken" thrust these practices into the national spotlight, revealing the abuses inherent in state police interdiction work and how the actions of overzealous law enforcement officers eager to make a bust can cause individuals to be swept up into years-long legal battles to recover their lawful property.[41]

Individual litigation on behalf of people who have had their assets seized by highway patrol troopers has likewise demonstrated how widespread these practices can be. The encounter of Stephen Lara, a former U.S. Marine, with highway patrol is one such case. In the winter of 2021, he was driving from his parents' home in Lubbock, Texas, to visit his daughters in California, just

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[36] Kansas Bureau of Investigation, State of Kansas 2022 Civil Asset Forfeiture Report 5 (2023), https://kasfr.kbi.ks.gov/protected/r/FkmBTc_C-GJ6iD28zx8OmGv96XQbVtGbKzBkxojMgqGm-D9Tm3bdBNDz3doqsr9uztIE08YodHcF5nF5TGelQg==/2022_Asset_Forfeiture_Legislative_Report.pdf [https://perma.cc/WS2D-HZLK].

[37] *Id.*

[38] Thomas Kimbrell, *Asset Seizures in the Sunflower State: How Civil Asset Forfeiture Imperils People's Rights in Kansas*, Americans for Prosperity Foundation (May 2022), https://americansforprosperity.org/wp-content/uploads/2022/05/Americans-for-Prosperity-Foundation-Kansas-civil-asset-forfeiture-report-2022.pdf [https://perma.cc/9NQZ-FWTQ].

[39] Lisa Knepper, Jennifer McDonald, Kathy Sanchez & Elyse Smith Pohl, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 5, Institute for Justice (Dec. 2020), https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf [https://perma.cc/8KNU-P85R].

[40] Michael Sallah, Robert O'Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize*, Wash. Post (Sept. 6, 2014), https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/ [https://perma.cc/24HY-RT4Q].

[41] Sarah Stillman, *Taken*, The New Yorker (Aug. 5, 2013), https://www.newyorker.com/magazine/2013/08/12/taken [https://perma.cc/TCV8-RTFL].

over the border from Reno, Nevada, when he was stopped by the Nevada Highway Patrol and subjected to virtually the same maneuver that Mr. Erich experienced in Kansas.[42] The Nevada Highway Patrol trooper manufactured a reason to search Mr. Lara's car and then seized the cash that Mr. Lara was transporting, despite Mr. Lara's ability to demonstrate that the cash belonged to him and he was not transporting drugs.[43] Mr. Lara filed a lawsuit, garnering significant press attention[44] and ultimately pressuring the government to return his money. But Mr. Lara's story is not unique. As organizations like the Institute for Justice have pointed out for years, these practices are endemic to the interdiction mission and purpose these agencies hope to fulfill.[45]

Regardless of their form and core responsibilities, each of these state law enforcement agencies interacts with the public in myriad ways, and each holds tremendous power and authority. Policing the state police, and employing the appropriate standard for doing so, therefore holds significant importance. Understanding how different police litigation frameworks came to be, and whether they are compatible with one another, helps us answer the question of *how* the courts should engage in this vital task.

II. The Road to Institutional Reform: Section 1983, *Monell*, and *Humphries*

Federal courts have long had the ability to step in and remedy systemic police misconduct, but modern-day police reform litigation did not take off until a series of court decisions in the late 1980s. And, even then, the courts have remained keen on constraining the ability of plaintiffs to seek relief, routinely limiting the circumstances under which courts will step in to prospectively prevent patterns of unconstitutional policing.

A. Section 1983 and Its Institutional Roadblocks

In 1871, President Ulysses S. Grant signed the Ku Klux Klan Act into law.[46] Section 1 of the Act, known today as 42 U.S.C. § 1983, empowers

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[42] Nevada Civil Forfeiture, Institute for Justice, https://ij.org/case/nevada-civil-forfeiture/ [https://perma.cc/LKY2-VC9V] (last visited July 17, 2023).

[43] *Id.*

[44] Matt Zapotosky, *A Former Marine Was Pulled Over for Following a Truck Too Closely. Police Took Nearly $87,000 of His Cash*, Wash. Post (Sept. 1, 2021, 10:30 AM), https://www.washingtonpost.com/national-security/stephen-lara-nevada-asset-forfeiture-adoption/2021/09/01/6f170932-06ae-11ec-8c3f-3526f81b233b_story.html [https://perma.cc/J7NZ-25HJ]; Wesley Hott & Daryl James, *Time to End the Fake Crime of Carrying Cash*, National Review (Mar. 5, 2023, 6:30 AM), https://www.nationalreview.com/2023/03/time-to-end-the-fake-crime-of-carrying-cash/ [https://perma.cc/6BD4-K7XP].

[45] *See generally* Inst. for Just., Civ. Asset Forfeiture, https://ij.org/issues/private-property/civil-forfeiture/ [https://perma.cc/GN45-636U].

[46] Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173, 181 n.38 (2015); Monroe v. Pape, 365 US.

individuals to bring lawsuits against state and local government officials who violate their constitutional rights.[47] The law was intended to provide a right of action for those living under state and local governments that were unwilling or unable to enforce the law against racist, violent Klan members.[48] Proponents of the legislation argued that state officials could not be trusted to dutifully enforce federal rights.[49]

As enacted, Section 1983 provides, in relevant part, that "[a]ny person who, under color of any law . . . shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."[50]

Given the historical backdrop to its enactment and its broad language, Section 1983 held great promise. The Supreme Court has repeatedly recognized that Section 1983 was "intended to give a broad remedy for violations of federally protected civil rights."[51] Yet it remained largely dormant from its enactment in 1871 until 1961, when the Supreme Court decided *Monroe v. Pape.*[52] In that case, the Court reinvigorated the force of the statute, holding that government officials could be liable under Section 1983 for violations of constitutional law, even where their actions were permissible under state law.

Since then, Section 1983 has played an important role in giving meaning and purpose to constitutional rights. As the Court has recognized, Section 1983 is "a vital component of any scheme for vindicating cherished constitutional guarantees."[53] In adjudicating claims brought under Section 1983, the federal courts play "a paramount role in protecting constitutional rights."[54]

In the last decade, however, only a small number of Section 1983 cases have successfully resulted in systemic reform of police agencies. These have

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167, 171 (1961); Erwin Chemerinsky, Federal Jurisdiction 8.2 (4th ed. 2003) (reviewing history and purpose of Section 1983).

[47] Terence J. Corrigan, *Section 1983: Absolute Immunity for Police Perjury*, 9 S. Ill. U.L.J. 687, 687 n.9, 688 (1984).

[48] *See* Cady & Glazer, *supra* note 46, at 183–87.

[49] *See* Cong. Globe, 42d Cong., 1st Sess. App. 153 (1871).

[50] Pub. L. No. 42-22, § 1, 17 Stat. 13.

[51] Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 685 (1978); *see also* Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 505 (1982) (Section 1983 intended to be a broad remedy that gives individuals "threatened" with a "deprivation of constitutional rights . . . immediate access to the federal courts notwithstanding any provision of state law to the contrary."); Gomez v. Toledo, 446 U.S. 635, 639 (1980) (Section 1983 is to be construed "generously").

[52] 365 U.S. 167 (1961).

[53] Owen v. City of Independence, 445 U.S. 622, 651 (1980).

[54] *Patsy*, 457 U.S. at 503. *See also* Green v. Mansour, 474 U.S. 64, 68 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.") (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984)).

been important victories. In *Floyd v. City of New York*, for example, a group of plaintiffs sued the New York Police Department ("NYPD") over their stop-and-frisk program that resulted in the racist targeting of Black and brown New Yorkers without adequate reasonable suspicion.[55] Judge Shira Schindelin in the Southern District of New York entered judgment for plaintiffs on their claims, and issued a separate opinion regarding remedies.[56] The injunctive relief granted by the court was wide-ranging and detailed, including mandating the appointment of a federal monitor and ordering the city to revise certain policies and forms, require its officers to wear body cameras, and engage in a "joint remedial process" with the community and plaintiffs to develop and implement additional reforms.[57]

Similarly, in *Melendres v. Arpaio (Melendres II)*,[58] Judge G. Murray Snow of the District of Arizona issued findings of fact and conclusions of law regarding the Maricopa County Sheriff's Office's policy and practice of detaining individuals without adequate reasonable suspicion. In announcing detailed conclusions of law, the court also enjoined the Maricopa County Sheriff's Office from, among other things: "using Hispanic ancestry or race as any factor in making law enforcement decisions"[59]; "unconstitutionally lengthening stops unless during the legitimate course of the stop it develops reasonable suspicion, based on permissible factors, that a state crime is being committed"[60]; and "using reasonable suspicion of unauthorized presence, without more, as probable cause or reasonable suspicion that" certain criminal laws were being violated "to justify an investigatory detention or arrest."[61] The court then held a subsequent hearing that addressed how the Maricopa County Sheriff's Office would fulfill the terms of the injunction.[62]

These landmark examples notwithstanding, injunctions against law enforcement agencies are few and far between. Unfortunately, federal courts routinely and systematically sidestep the important role they must play in policing the police.

Meanwhile, the last ten years have ushered in a swell of attention to the institution of policing and the critical need for its reform. Reporters described the summer of 2020 as the "summer of racial reckoning,"[63] with a particular focus on the police's excessive use of force against communities of color. Cell phone video footage of police violence has propelled that violence into

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[55] 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013).

[56] *Id.*

[57] *Id.*

[58] 989 F. Supp. 2d 822 (D. Ariz. 2013).

[59] *Id.* at 895.

[60] *Id.* at 905-06.

[61] *Id.* at 907. *See also id.* at 912 (listing the full terms of the injunction).

[62] *Id.* at 912.

[63] Ailsa Chang, Rachel Martin & Eric Marrapodi, *Summer of Racial Reckoning*, Nat'l Pub. Radio (Aug. 16, 2020), https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit [https://perma.cc/D6FJ-YTKN].

the public consciousness, with members of the public most often calling for criminal prosecutions of involved officers or monetary compensation for the victims' families.[64] Broader calls for institutional reform of policing practices likewise has focused not only on the need to end police violence, but also on harms that are less directly obvious to the broader public, such as the proliferation of aggressive stop-and-frisk programs,[65] warrantless surveillance of homes using new technology,[66] the racialized use of pretextual stops,[67] and more.

Despite the public awakening to police abuse of power and systemic racism in the criminal legal system, meaningful change of police practices through litigation remains a hard-to-achieve goal. In the words of noted Fourth Amendment scholar Orin Kerr: "As a matter of history and practice, injunctive relief has been quite rare in Fourth Amendment cases."[68] Obtaining an injunction against a police department to prevent constitutional violations in the future is exceedingly difficult.[69]

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[64] Nicol Turner Lee, *Where Would Racial Progress in Policing be Without Camera Phones*, Brookings Institute (June 5, 2020), https://www.brookings.edu/blog/fixgov/2020/06/05/where-would-racial-progress-in-policing-be-without-camera-phones/ [https://perma.cc/68WH-BTAZ]; Nicole Aschoff, *Smartphones Have Transformed the Fight Against Police Violence*, Jacobin (June 15, 2020), https://jacobin.com/2020/06/video-recording-police-brutality-george-floyd [https://perma.cc/4K2Z-F9X4]; Jeannie Suk Gersen, *How the Charges Against Derek Chauvin Fit Into a Vision of Criminal-Justice Reform*, The New Yorker (June 17, 2020), https://www.newyorker.com/news/our-columnists/how-the-charges-against-derek-chauvin-fit-into-a-vision-of-criminal-justice-reform [https://perma.cc/4CHH-VHMT].

[65] *E.g.*, Henry F. Fradella & Michael D. White, *Reforming Stop and Frisk, in* 2 Reforming criminal justice: A report of the Academy for Justice on bridging the gap between scholarship and reform 51 (Erik Luna, ed. 2017); Stop and Frisk, ACLU of Illinois, https://www.aclu-il.org/en/campaigns/stop-and-frisk [https://perma.cc/72SU-NNNJ] (describing settlement agreement reached between ACLU of Illinois and Chicago Police Department regarding CPD's use of an unconstitutional stop-and-frisk program); Floyd v. City of New York, Civil Action No. 08-cv01034 (S.D.N.Y. 2008) (challenging New York Police Department's stop-and-frisk program).

[66] *E.g.*, *United States v. Moore*, *petition for cert. pending*, Nos. 19-1583, 19-1626 (1st Cir. June 23, 2022) (en banc) (order denying petition for rehearing) (regarding the warrantless use of pole cameras for surveillance); Dana Khabbaz, *Unmanned Stakeouts: Pole-Camera Surveillance and Privacy After the* Tuggle *Cert Denial*, 132 Yale L. J. Forum 105 (Oct. 10, 2022).

[67] Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 Case W. Rsrv. L. Rev. 931 (2016); Marsha Mercer, *Police 'Pretext' Traffic Stops Need to End, Some Lawmakers Say*, Stateline (Sept. 3, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/03/police-pretext-traffic-stops-need-to-end-some-lawmakers-say [https://perma.cc/2BRZ-XECG].

[68] Orin S. Kerr, *The Limits of Fourth Amendment Injunctions*, 7 J. Telecomm. & High Technology L. 127 (2009).

[69] Some litigants have been successful, but injunctions against the police by private parties seem to be the exception rather than the rule. *See, e.g.*, Lankford v. Gelston, 364 F.2d 197, 201 (4th Cir. 1966) (reversing and remanding the district court's denial of an injunction in plaintiffs' favor because plaintiffs were entitled to their requested injunctive relief where the police department practice permitted unlawful searches); Barajas v. City of Rohnert Park, No. 14-CV-05157-SK, 2019 WL 13020803, at *8 (N.D. Cal. Jan. 16, 2019) (partially granting plaintiffs' permanent injunction that sought to improve police officer training in a separate proceeding, after a jury found in plaintiffs' favor); Cole v. City of Memphis, 108 F. Supp. 3d 593, 611 (W.D. Tenn. 2015) (granting plaintiffs' permanent injunction to enjoin the City of Memphis and

Non-Section 1983 methods for achieving police reform have likewise been limited. A public corollary to Section 1983's private right of action—the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (recodified as 34 U.S.C. § 12601)—has had some limited success in this arena. That statute allows the Attorney General of the United States to investigate and pursue injunctive relief against state and local law enforcement agencies that engage in a pattern or practice of violations of constitutional or statutory law.[70] The Department of Justice ("DOJ") has initiated pattern or practice investigations into dozens of law enforcement agencies, resulting in court-enforceable consent decrees aimed at reforming departments' operations,[71] although the efficacy of these decrees is not beyond dispute.[72]

But DOJ investigations are the exception, rather than the rule: As of January 2017, the DOJ had entered into only 40 reform agreements (either out-of-court settlements or court-enforceable consent decrees) with police departments across the country.[73] In the five years since, the DOJ has entered

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its agents from engaging in a practice of ordering all persons to immediately leave sidewalks and street in entertainment district without consideration about whether conditions throughout street area posed an existing, imminent, or immediate threat to public safety); Floyd v. City of New York ("Floyd II"), 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013) (granting permanent injunction after finding "prevalence of the practices leading to those [constitutional] violations creates a likelihood of future injury").

[70] Interestingly, the initial legislation that went on to become §14141 included a private right of action for individuals, as well as the federal government, to seek injunctions based on patterns and practices of constitutional violations. But "pressure from police groups and opposition from George H.W. Bush's Justice Department led the House to drop individual victims' right to seek injunctions from the bill." Joanna Schwartz, Shielded: How the Police Became Untouchable 172 (2022). The bill was then abandoned under the threat of a veto and filibuster and was reintroduced in 1993, this time only including the cause of action for the U.S. Attorney General. *Id.*

[71] The history of the Violent Crime Control and Law Enforcement Act offers insight into the infrequency of institutional reform litigation against the police that is brought by private citizens. In 1991, the beating of Rodney King by Los Angeles Police Department officers sparked national outrage. The officers involved were later acquitted of state charges brought against them, setting off a series of riots in the summer of 1992. This led to the creation of an independent commission to consider what the federal government could do to address police misconduct, and eventually, the passage of the Violent Crime Control and Law Enforcement Act in 1994, granting the Attorney General the authority to take action when the Department of Justice uncovers patterns or practices of police misconduct at the state, county, or local level. *See generally* U.S. Dep't of J., *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present*, 3 (Jan. 2017), https://www.justice.gov/crt/file/922421/download [https://perma.cc/V4M7-J98J]. The creation of Section 14141 was seen as a necessary step to ensure police departments could be held accountable.

[72] Zachary A. Powell, Michele Bisaccia Meitl & John L. Worrall, *Police Consent Decrees and Section 1983 Civil Rights Litigation*, 16 Criminology & Pub. Pol'y 575 (2017) (noting that the relationship between consent decrees and reduction in civil rights violations is "largely untested" but finding that such decrees "may be associated with modest reductions in the risk of civil rights filings."); Noah Kupferberg, Comment, *Transparency: A New Role for Police Consent Decrees*, 42 Colum. J. L. & Soc. Probs 129 (2008) (concluding, from a sample of three consent decrees, that consent decrees have "no cognizable effect on racial disparity in policing").

[73] U.S. Dep't of J., *supra* note 71.

into a reform consent decree in only one additional jurisdiction.[74] There are over 18,000 independent law enforcement agencies across the country, and the DOJ "identifies far more jurisdictions that meet the basic criteria for opening an investigation than it is able to investigate."[75] Additionally, as of April 2024, DOJ has only initiated one investigation into a *state* police agency for patterns or practices of constitutional violations.[76] All of the DOJ's other police investigations have involved county or city police.

Section 1983 therefore remains the primary vehicle for seeking structural reform of the police. But the Supreme Court's Section 1983 jurisprudence has created an intricate web of doctrinal barriers that, in conjunction with one another, routinely prevent plaintiffs from obtaining injunctive relief intended to spur reform. Standing doctrine, discussed more fully in Part IV.c, makes it difficult to obtain an injunction, except in the limited circumstances where there is a substantial likelihood that the plaintiff will suffer the same injury again.[77] Abstention doctrine plays a similarly harmful role, effectively cutting off access to the federal courts to remedy constitutional violations perpetrated by police so long as such violations can be addressed in the context of the underlying state criminal case, such as in, for example, a motion to suppress.[78] The Court has also ratcheted up the standard that plaintiffs must meet to obtain a permanent injunction,[79] while federal courts have become increasingly wary of ordering reforms of police departments

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[74] Press Release, U.S. Dep't of J., Justice Department Reaches Agreement with City of Springfield to Reform Police Department's Unconstitutional Practices (Apr. 13, 2022), https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-springfield-reform-police-department-s [https://perma.cc/KD9J-WP7L].

[75] U.S. Dep't of J., *supra* note 71, at 6.

[76] Press Release, U.S. Dep't of J., Justice Department Announces Investigation of the Louisiana State Police (June 9, 2022), https://www.justice.gov/opa/pr/justice-department-announces-investigation-louisiana-state-police [https://perma.cc/HU7T-AASS].

[77] *See infra* Part IV.c, discussing City of Los Angeles v. Lyons, 491 U.S. 95 (1983).

[78] *See* Younger v. Harris, 401 U.S. 37 (1971); *see also* Fred O. Smith, Jr. *Abstention in the Time of Ferguson*, 131 Harv. L. Rev. 2283 (2018) (analyzing how *Younger* abstention has affected the ability to vindicate civil rights violations related to one aspect of the criminal legal system — the imposition of fines, fees, and bail). *Younger* abstention is, interestingly, a byproduct of the Court's decision to allow litigation for prospective relief against state officials following *Ex parte Young*. After a number of lawsuits were brought under *Ex parte Young* to stop state criminal prosecutions, the doctrine of *Younger* abstention developed as a means of re-calibrating the federalism interests that were implicated by such lawsuits. *See* Owen M. Fiss, *Dombrowski,* 86 Yale L.J. 1103, 1104–05 (1977); Douglas Laycock, Federal Interference with State Prosecutions: The Cases Dombrowski Forgot, 46 U. Chi. L. Rev. 636, 645–59 (1979). Although a full discussion of *Younger* abstention is beyond the reach of this Article, its implications for the development of institutional reform litigation in the criminal justice sphere, including litigation brought under *Ex parte Young*, are substantial. In fact, some scholars were worried that *Younger* and its immediate progeny, which forcefully embraced notions of federalism, would lead to the overturning of *Ex parte Young*. *See* Aviam Soifer & H.C. Macgill, The Younger Doctrine: Reconstructing Reconstruction, 55 Tex. L. Rev. 1141, 1141–43 (1977).

[79] *See* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). Although *eBay* was a patent infringement case, federal courts have applied the four-factor test for obtaining a permanent injunction to a host of other claim types. *See generally* Glenn. A. Guarino, et al.*, Pre-eBay and post-eBay standards for permanent injunction*, 19 Fed. Proc., L. ed. § 47:13 (Mar. 2023).

via permanent injunctions.[80] Individuals wishing to band together to obtain an injunction to resolve ongoing issues within a department—and therefore clear other justiciability hurdles like standing—must also meet high thresholds to proceed as a class action.[81]

Scholars have shown the interwoven nature of many of these doctrines, and the myriad ways—both intentional and coincidental—that they come together to prevent plaintiffs from prevailing on their claims for structural reform.[82] Recent work from Professor Joanna Schwartz, for example, discusses how these doctrinal barriers have resulted in a lack of qualified litigators who are willing to bring these claims to court.[83] Schwartz points to how difficult it is to win these cases and, even if victory is achieved, to then obtain fees and costs, despite the fee-shifting provisions of 42 U.S.C. § 1988. Schwartz notes that with so many cases dismissed on justiciability or immunity grounds, many lawyers cannot afford to represent plaintiffs on a contingency fee basis. And, for the very few cases that are able to clear those hurdles and win on the merits, courts frequently reduce fee awards for civil rights lawyers,[84] such that aggressively pursuing these claims to trial results in a financial loss. Because of this, Schwartz argues that the lack of representation available to litigants with meritorious claims against the police has "negative downstream effects," including reinforcing bad law and failing to create new precedent that is more protective of civil rights.[85]

Rather than trace the lineage and details of all the various remedy-constraining doctrines applicable to Section 1983 cases, this paper explores one particularly relevant doctrine: the standards a plaintiff must meet to hold

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[80] *See* Patel, *supra* note 14, at 2263 n.24 (pointing out that "the total number of section 1983 police misconduct claims brought each year is not reflected in available data, let alone data reflecting cases brought for purposes of equitable relief or structural reform" but pointing to data from a study of a sample of district courts which indicates that 8.4% of cases were brought solely against municipalities and/or sought only equitable relief) (citing Joanna Schwartz*, How Qualified Immunity Fails*, 127 Yale L.J. 2, 27 (2017)). *See also* O'Shea v. Littleton, 414 U.S. 488 (1974) and its progeny.

[81] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); *see generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729 (2013) (arguing that changes to class action law and doctrinal developments have made it more difficult for plaintiffs in a wide variety of settings to obtain class certification and class-wide relief).

[82] *See* Patel, *supra* note 14, at 2272–74 (examining several doctrines that preclude structural reform litigation against the police).

[83] Joanna C. Schwartz, *Civil Rights Without Representation,* 64 William & Mary L. Rev. 641, 652–63 (2023) (describing how issues such as fee shifting law and a lack of nonprofit attorneys trained to handle these types of cases contribute to the lack of attorneys available to take on Section 1983 litigation, and consequently, the persistence of bad law in many circuits).

[84] *See, e.g.*, Christopher Dunn, *Column: A Darker Picture for Attorney's Fees in Civil Rights Cases (New York Law Journal)*, NYCLU, https://www.nyclu.org/en/column-darker-picture-attorneys-fees-civil-rights-cases-new-york-law-journal [https://perma.cc/PE52-34RG] (discussing how Second Circuit fee guidance "spell[s] trouble for civil rights litigators").

[85] Schwartz, *supra* note 83, at 694–700.

a municipality liable for police misconduct pursuant to *Monell*,[86] and the extension of those standards to cases for injunctive relief in *Humphries*.[87]

Below I examine these two cases and the policy concerns animating the Court's rulings. Understanding these cases and inconsistencies between their reasoning and that of *Ex parte Young* is critical to understanding why municipal liability standards are inapplicable in state police reform cases, as discussed in Part IV.

B. Monell v. Department of Social Services of New York

Section 1983's causational language—"shall subject, or cause to be subjected"—is equivalent to common-law proximate cause.[88] Section 1983 must be interpreted "against the background of tort liability" that makes a person "responsible for the natural consequences of his [or her] actions."[89] Numerous courts have recognized as much, discussing concepts like proximate cause and superseding cause in their Section 1983 decisions.[90]

Yet, the Supreme Court struggled when applying these concepts to government entities rather than individual government officials, first flip-flopping about whether a municipality could be a "person" under Section 1983 and then, if so, what showing might be necessary to prove the municipality is the proximate cause of the complained-of injury.

The Supreme Court's struggle began in *Monroe v. Pape*, the 1961 decision noted earlier that breathed life back into then-dormant Section 1983. The Court held that municipalities were not "persons" within the meaning of Section 1983 and therefore were not subject to liability for constitutional torts.[91] Nearly two decades later, the Court reversed course. In 1978, in *Monell*,[92] the Court offered for the first time a standard for holding municipalities accountable for the tortious actions of their employees. Although the Court was clear in both *Monell* and subsequent cases that municipality liability was *not* intended to create automatic supervisory liability under the traditional tort principle of *respondeat superior*,[93] the ruling opened the possibility of obtaining an injunction to remedy broader patterns of

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[86] 436 U.S. 658, 690 (1978).

[87] 562 U.S. 29, 36 (2010).

[88] Sanchez v. Pereira-Castillo, 590 F.3d 31, 50 (1st Cir. 2009); Cyrus v. Town of Mukwonago, 624 F.3d 856, 864 (7th Cir. 2010); Murray v. Earle, 405 F.3d 278, 290 (5th Cir. 2005); McKinley v. City of Mansfield, 404 F.3d 418, 438 (6th Cir. 2005).

[89] Monroe v. Pape, 365 U.S. 167, 187 (1961); *see also* Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011) ("[W]e start from the premise that when Congress creates a federal tort it adopts the background of general tort law.").

[90] *Infra* note 209 (collecting cases).

[91] 365 U.S. 167, 191–92.

[92] 426 U.S. at 690 (Stevens, J., dissenting).

[93] *Id.* at 691. *Respondeat superior* is "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." Black's Law Dictionary (11th ed. 2019).

constitutional violations caused by inadequate policies, procedures, and practices. In this way, *Monell* was revolutionary: It held the promise of a pathway towards institutional reform.[94]

In the years following *Monell*, subsequent decisions made clear that such a path would be difficult to travel. As one group of practitioners put it, "[T]he Supreme Court has made at least one thing clear: plaintiffs that bring municipal liability claims will not have an easy go of it."[95] Indeed, "*Monell* confines entity liability in a manner that is unique to [Section] 1983 and exists in no other area of the law."[96]

Under *Monell*, to challenge a police department's unconstitutional conduct, a plaintiff must prove the deprivation of a federal right by a person acting under color of state law[97]; and either (1) the "existence of a municipal policy or custom,"[98] (2) an action by a municipal official authorized to make "final policy,"[99] (3) a custom or practice so widespread that it essentially operates like an official policy, or (4) some *inaction* by the government, such as failing to properly train or supervise officers.[100] As noted by experts, in Section 1983 litigation, "it is unclear whether these standards are alternative ways of articulating common-law proximate cause or are intended to impose a more stringent causation requirement" for municipal liability

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[94] *But see* Achtenberg, *supra* note 14, at 2196–228 (tracing the origins of *respondeat superior* liability and arguing that *Monell* got the historical origins wrong when ruling that this avenue of liability should be inapplicable against municipalities in Section 1983 litigation).

[95] Matthew J. Cron, Arash Jahanian, Qusair Mohamedbhai & Siddhartha H. Rathod, *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement*, 91 Den. U. L. Rev. 583, 584 (2014). *See also* Achtenberg, *supra* note 14, at 2191 (noting that the Supreme Court's *Monell* line of cases created a "conglomeration of standards" that is "idiosyncratically protective of the municipal pocketbook.").

[96] Achtenberg, *supra* note 14, at 2191.

[97] This is the basic underlying standard to prove a violation of 42 U.S.C. § 1983 – that a constitutional violation occurred. The standards for proving constitutional violations committed by the police, specifically in the Fourth Amendment context, are extremely arduous in and of themselves. To even pass this preliminary threshold is difficult for many litigants given how deferential courts tend to be towards the training, experience, and decision making of law enforcement. The broad language of the Fourth Amendment means that it is under near-constant interpretation and reinterpretation, and its contours are rarely static for long. *See* Erwin Chemerinsky, *Law Enforcement and Criminal Law Decisions*, 28 Pepperdine L. Rev. 517, 523–24 (2001) ("In an era in which the Supreme Court's docket is dramatically shrinking, the number of Fourth Amendment cases is, if anything, increasing.").

[98] Bryson v. City of Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010) (citing City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) and City of Canton v. Harris, 489 U.S. 378, 388-91 (1989)). This can include a formal policy or statement, an "informal custom amounting to a widespread practice that . . . is so permanent and well settled as to constitute a custom or usage with the force of law," the decisions of employees with final policymaking authority, and the failure to train or supervise which results from "deliberate indifference to the injuries that may be caused" by such a failure. *Id.*

[99] Whether a government actor is the "final policymaker" is generally a question of state law. *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988) (plurality opinion).

[100] *See* Hurd v. District of Columbia, 997 F.3d 332, 337 (D.C. Cir. 2021); Horton by Horton v. City of Santa Maria, 915 F.3d 592, 602–04 (9th Cir. 2019).

cases.[101] And, of course, to *enjoin* that ongoing unconstitutional conduct, a plaintiff must meet the already burdensome standing requirements from *City of Los Angeles v. Lyons*.[102]

The standards of municipal liability that have developed over time have become quite restrictive. As the Supreme Court has noted, its disavowal of *respondeat superior* liability in the municipal liability context for constitutional torts means that plaintiffs must meet "rigorous standards of culpability and causation" on behalf of the municipality in order to hold the municipality itself accountable.[103]

For the most part (although there are certainly quite a few exceptions), police departments do not maintain facially unconstitutional policies. Proving municipal liability, or *Monell* liability, therefore requires proving more than just the existence of an unconstitutional policy committed to paper.[104] Litigants in Section 1983 cases against police departments are frequently forced to prove that the municipality, by way of the agency, has an *unwritten* or *informal* policy or "custom" that operates in such a way as to routinely violate community members' constitutional rights. Proving the existence of an informal policy or custom is "exceptionally difficult."[105]

Under a "custom-based theory" of municipal liability, the municipality can be held liable if its employees acted pursuant to an informal custom or practice. But the custom must be so persistent and widespread that it "constitutes the standard operating procedure of the local governmental entity."[106] Proving a widespread practice of constitutional violations is difficult and costly. In many cases, documentation of constitutional violations may not exist. In others, seeking out such documentation and analyzing it requires protracted discovery and motions practice, statistical analysis, expert reports, and significant litigation resources. The average plaintiff may not be able to afford the costs of pursuing such a claim. *Monell* standards—among numerous other procedural barriers—therefore actively discourage robust litigation against law enforcement that is aimed at reforming systems, rather than recovering monetary compensation for past injuries.[107]

In cases where there is not a specific policy, custom, or final municipal decision challenged, the liability standard is unquestionably more arduous

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[101] Martin A. Schwartz, Section 1983 Litigation 93 (3d. ed. 2014).

[102] *See* 461 U.S. 95 (1983); *see also infra* Part IV.c.

[103] Bd. Of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997).

[104] For a detailed discussion of the various forms of *Monell* liability, and the differences between direct versus indirect *Monell* liability, see Wells, *supra* note 14.

[105] Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 Fordham L. Rev. 1813, 1920–21 (2007).

[106] Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701, 737 (1989) (citations omitted).

[107] Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 Hastings L.J. 499, 569 (1993) (describing how *Monell* standards discourage litigation, and how plaintiff-side litigators must "be aware of these sobering realities before filing or pursuing a Monell claim in a police misconduct case").

to meet—it is one of *deliberate indifference*. In *City of Canton v. Harris*, the Supreme Court held that there are "limited circumstances" in which inadequate training can be the basis for liability under Section 1983.[108] Only where "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact" will this form of *Monell* liability be viable.[109] This imposes an objective obviousness standard—negligent or even *grossly* negligent training will not amount to deliberate indifference.[110] And subsequent opinions, including *Connick v. Thompson*,[111] make clear how strict this standard is: In all but rare cases, plaintiffs must demonstrate a pattern of *similar* constitutional violations *and* that the city was on actual or constructive notice of those violations before they are entitled to relief on a *Monell* failure-to-train claim.

The "deliberate indifference" component of municipal liability standards for failure-to-act claims (such as failure to train or supervise) essentially requires that a municipality have "actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation" and that the municipality "consciously or deliberately chooses to disregard the risk of harm."[112] This often requires being able to point to previously litigated cases demonstrating that the conduct at issue is unconstitutional *plus* a pattern of conduct that is ongoing and pervasive enough that the municipality should have been aware of the issue and taken steps to fix it.[113] But either way, these elements make clear that municipal liability will attach in only the most pervasive, egregious circumstances.[114]

The *Monell* court explicitly rejected a *respondeat superior* theory of municipal liability out of fear that it would subject municipalities to significant damages awards without any meaningful culpability on behalf of municipal officials.[115] But as some scholars have pointed out, the *Monell* Court appeared to be applying a balancing test, weighing the interest in upholding the value of constitutional rights against the interest in protecting municipalities

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[108] 489 U.S. at 387.

[109] *Id.* at 388.

[110] *Id.* at 390.

[111] 563 U.S. 51, 61–62 (2011).

[112] Bryson v. City of Okla. City, 627 F.3d 784, 789 (10th Cir. 2010). *See also* Finch v. Rapp, 38 F.4th 1234, 1244 (to prove a *Monell* claim, the Plaintiff must show a policy or custom, which can include something "so entrenched in practice as to constitute an official policy," and that the municipality was "deliberately indifferent to constitutional violations that were the obvious consequence of its policy", meaning the municipality "had actual or constructive notice that its action or failure to act [was] substantially certain to result in a constitutional violation.").

[113] Although plaintiffs can technically prove deliberate indifference without a pattern of prior misconduct, in those circumstances they must meet an even higher threshold showing that the violation of a federal right is "highly predictable" or "plainly obvious" consequence of the municipality's action or inaction. *See Brown*, 520 U.S. at 409.

[114] As one scholar notes, it is "significantly easier to hold an employer liable for punitive damages under either the majority or Restatement [of Torts] rules than it is to hold one liable for compensatory damages under *Monell*." Achtenberg, *supra* note 14, at 2194–95.

[115] *Monell*, 436 U.S. at 693–94.

from the "social costs" of *respondeat superior* liability where the municipality's responsibility for the harm is attenuated.[116] Yet, as Professor Michael L. Wells argues, to the extent that *Monell* established a balancing test, the Court's decisions following *Monell* have not struck the proper balance.[117] Instead, the Court's fixation on avoiding imposing *too much* responsibility on municipalities has resulted in an overcorrection: It has become exceedingly difficult to hold municipalities accountable, even when there is a pattern of abuse by the jurisdiction's law enforcement personnel.

Others point out that the *Monell* Court's decision was based entirely on a faulty reading of the legislative history behind Section 1983,[118] and that the *Monell* rule is inconsistent with what Congress was attempting to achieve in enacting the statute's broad language.[119] For this reason, the *Monell* Court's decision to explicitly rule out municipal liability based on *respondeat superior*[120] was, and remains, controversial. At least four Supreme Court justices have previously called for reexamination of this point.[121] Law in several states also allows, and in some cases, mandates, indemnification of officers who are sued in their personal capacity for damages incurred as a result of the officer's conduct.[122] Scholars are quick to point out that this is just a roundabout way of achieving the same effect as *respondeat superior* liability: forcing the employer to pay for the employee's misdeeds.[123] But that ignores the reality that it is very difficult to obtain damages against

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[116] Wells, *supra* note 14, at 315.

[117] *Id.* at 323.

[118] Jack M. Beerman, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 Stan. L. Rev. 51, 52 (1999) (collecting scholarship attacking the Court's interpretation of § 1983 in various cases).

[119] *See Brown*, 520 U.S. at 431 (Breyer, J., dissenting) (describing how *Monell* relied heavily on the fact that Congress rejected the Sherman Amendment in enacting § 1983, which would have made municipalities vicariously liable for the tortious acts of private citizens, but arguing that rejection of that amendment does not mean Congress rejected vicarious liability for the tortious act of municipal employees).

[120] *Monell*, 436 U.S. at 691.

[121] Achtenberg, *supra* note 14, at 2184–85.

[122] *E.g.*, Colo. Rev. Stat. § 13-21-131(4)(a) (2023); Mass. Gen. Laws ch. 258, § 9A (2023); 65 Ill. Comp. Stat. 5/1-4-6 (2023); *see also* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 912 (2014) ("In stark contrast to assumptions underlying civil rights doctrine, law enforcement officers employed by the eighty-one jurisdictions in my study almost never contributed to settlements and judgments in police misconduct lawsuits during the study period."); *id.* at 890 ("Police officers are virtually always indemnified.").

[123] Schwartz, *supra* note 122, at 890 ("Although the Court's municipal liability doctrine rests on the notion that there should not be *respondeat superior* liability for constitutional claims, blanket indemnification practices are functionally indistinguishable from *respondeat superior*."); *id.* at 944 ("[M]unicipalities virtually always satisfy officers' settlements and judgments, amounting to de facto *respondeat superior* liability."); Teressa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 Vill. L. Rev. 839, 841–42 (2017) ("[M]unicipal decision to indemnify police officials for constitutional torts have a similar effect as vicarious liability—the employer, not the employee, incurs the cost of the tortious conduct.").

individual officers—indemnified or not—because of qualified immunity.[124] Regardless of whether a back-door *respondeat superior* framework actually exists in practice, "fidelity to this rule against *respondeat superior* liability [in Section 1983 lawsuits] has led [federal courts] to formulate far more burdensome standards" for prevailing on a Section 1983 claim in federal court than traditional tort principles would mandate.[125]

C. Los Angeles County v. Humphries

If the heightened standards for culpability and causation in the municipal liability context are driven by a desire to keep plaintiffs out of city coffers, then limiting relief to cases where there is a very direct, egregious city action or inaction accomplishes this same goal.[126] Indeed, as scholars have pointed out, *Monell*'s adoption of a heightened causation standard came from concern that municipalities would be on the hook for damages for the tortious acts of rogue employees, rather than only for injuries truly caused by the municipality itself.[127] Although the legitimacy of such a goal is certainly worthy of debate, it at least makes sense for lawsuits seeking remedies at law.

For three decades, *Monell* was so limited. Then, in 2010, the Court extended *Monell* to cases seeking only injunctive relief in *Los Angeles County v. Humphries*.[128] This case arose in a peculiar way. Plaintiffs obtained declaratory relief from the Ninth Circuit, as well as an order that they were prevailing parties for purposes of recovering attorneys' fees under 42 U.S.C. § 1988(b).[129] The county defendant was ordered to pay a portion of this amount and appealed that order, arguing that it was not liable for

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[124] Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1245 (2015); *see generally* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 Touro L. Rev. 633 (2013).

[125] Matthew J. Cron, Arash Jahanian, Qusair Mohamedbhai, and Siddhartha H. Rathod, *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement*, 91 Den. U. L. Rev. 583, 586 (2014).

[126] *But see* Schwartz, *supra* note 122, at 885 ("[P]olice officers are virtually always indemnified. During the study period, governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement.").

[127] Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. Cal. L. Rev. 539, 542 (1989); Karen M. Blum, *From* Monroe *to* Monell*: Defining the Scope of Municipal Liability in Federal Courts*, 52 Temp. L.Q. 409, 413 n.15 (1978); George D. Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on* City of Oklahoma City v. Tuttle *and* Pembaur v. City of Cincinnati*—The "Official Policy" Cases*, 27 B.C. L. Rev. 883, 896 (1986).

[128] 562 U.S. 29 (2010). Prior to *Humphries*, there was a circuit split regarding whether *Monell* applied to cases seeking only injunctive relief. *Id.*

[129] *Id.* at 32.

the plaintiffs' harm because there was no municipal policy or custom that deprived the plaintiff of a federal right.[130]

Holding that "nothing in the text of § 1983 suggests that the causation requirement contained in the statute should change with the form of relief sought," the Court held that the "policy or custom" language from *Monell* applied in equal force to suits for injunctive relief.[131] The Court was preoccupied with the idea that whether a particular act or omission was the municipality's fault depended on the nature of the act or omission rather than the type of relief sought.[132]

The Court's analysis in *Humphries* consisted of only a few pages. First, the Court rejected, without much explanation or support, the idea that *Monell* was animated by a desire to prevent economic liability for municipalities.[133] Then the Court sidestepped plaintiffs' arguments that the arduous standing requirements for injunctive relief that the Court had created through other cases made the application of *Monell* to injunctive relief claims unnecessary. The Court merely noted that if respondents were right on that point, the holding in *Humphries* "may have limited practical significance."[134]

In fact, the opposite is likely true. Commentators have noted that it is far more difficult to prove municipal liability under the *Monell* standard than it is to overcome qualified immunity.[135] Interestingly, very few, if any, scholars have directly considered the implications of *Humphries* and whether it makes sense given the policy concerns animating the original development of municipal liability doctrine.[136] Perhaps that is because *Humphries* was a unanimous decision (with Justice Kagan abstaining), providing little fodder for academic debate. But the decision merits scrutiny: The Court appeared to engage in a very strict textual reading of Section 1983 but based its analysis

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[130] *Id.*

[131] *Id.* at 37.

[132] *Id.* at 38.

[133] *Id*.

[134] *Id.* at 39.

[135] Brian J. Serr, *Turning Section 1983's Protection of Civil Rights into an Attractive Nuisance: Extra-Textual Barriers to Municipal Liability Under* Monell, 35 Ga. L. Rev. 881, 883 (2001) (noting that proving municipal liability is so difficult that it is "practically unavailable to litigants."). *See also* Joanna C. Schwartz, *Municipal Liability*, 109 Va. L. Rev. 1181, 1187 (2023) ("It is far more difficult for plaintiffs to prove Monell claims against municipalities than it is for plaintiffs to defeat qualified immunity when raised by individual government defendants."); *id.* at 1200 (collecting commentary regarding the difficulty of meeting *Monell*); *id.* at 1235 (noting that the combination of standing doctrine and *Humphries* makes injunctive relief cases against law enforcement "especially hard to bring.").

[136] A Westlaw search for law review citations to the *Humphries* decision produced only 65 results; nearly all of these articles merely cite *Humphries* in passing. None analyzed the doctrinal significance or policy implications of the *Humphries* Court's extension of *Monell*. *See*, *e.g.*, Justin F. Marceau, *The Fourth Amendment at a Three Way Stop*, 62 Ala. L. Rev. 687, 722 n.165 (2011); Fred Smith, *Local Sovereign Immunity*, 116 Colum. L. Rev. 409, 459 (2016) (same); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 Colum. L. Rev. 1601, 1619 n.85 (2011) (same).

on its prior decision in *Monell*—a case that sidestepped the direct text of Section 1983 in favor of a historical analysis of the statute's enactment.

The bottom line is that following *Humphries*, *Monell*'s heightened standards apply with equal force to all Section 1983 cases against municipalities, regardless of the remedy sought.[137] Section 1983 was enacted specifically to ensure that there is a remedy available when state actors violate the constitution.[138] Given the purpose of Section 1983, its reach should be at its apex when constitutional violations are *ongoing* and therefore merit injunctive relief.[139] Whatever one might think about heightened causational requirements to obtain municipal liability for damages, such requirements are an inappropriate gatekeeper for lawsuits aimed solely at prospective relief.

Although a full repudiation of *Humphries* is beyond the scope of this Article, it is relevant to consider how the extension of *Monell* liability standards to the injunctive relief context severely and inappropriately restricts the ability of plaintiffs to seek institutional reform except in cases where they challenge an official, formally approved department policy. In most cases where there is an odious practice of misconduct *not* enshrined in official policy, plaintiffs may have a difficult time proving entitlement to injunctive relief against a municipality or county engaged in unconstitutional policing.

But even assuming for the sake of argument that *Humphries* was correctly decided, it should not be assumed that the municipal liability standards from *Monell* must apply to *state* police agencies as well. Given what we know about state police,[140] institutional reform litigation against those agencies is just as important as it is against those of cities and counties. It is therefore worth exploring how the standards of *Monell* should, or should not, apply in litigation against state police, as set forth below. To get there, however, we must first examine the procedural vehicle for obtaining institutional reform of state police—lawsuits brought under *Ex parte Young*—and whether it is possible to square the rationale animating the *Ex parte Young* exception to general Eleventh Amendment immunity with the rationales that led to *Monell* and *Humphries*.

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[137] *Humphries*, 562 U.S. at 29 (a plaintiff seeking equitable relief must still meet *Monell* "policy or custom" liability standard).

[138] *See* Karen M. Blum, *Section 1983 Litigation: The Maze, The Mud, and The Madness*, 23 WM. & MARY BILL RTS. J. 913, 913–14 (2015) ("There is a growing consensus among practitioners, scholars, and judges that Section 1983 is no longer serving its original and intended function as a vehicle for remedying violations of constitutional rights, that it is broken in many ways, and that it is sorely in need of repairs.").

[139] Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 49–50 (1980).

[140] *See* Part I above.

III. The "Fiction" of *Ex parte Young* and Its Application to State Police Reform Litigation

The Eleventh Amendment to the U.S. Constitution prohibits federal courts from granting both monetary relief (relief "in law") and prospective relief (relief "in equity," such as injunctions and declaratory relief) against states.[141] Literal construction of the Amendment's terms, without exception, would place an absolute bar to litigation against a state in all circumstances—even when the state violated the federal Constitution. But principles of federal constitutional supremacy, and a general recognition that federal courts should not be powerless to enforce the supreme law of the land, created an inherent tension in need of a solution.

In 1908, the fix was found. In *Ex parte Young*, the Supreme Court sidestepped the categorical reading of the Eleventh Amendment to avoid the unjust result it created and held that prospective relief against state officials for violations of federal law is permissible, despite the Eleventh Amendment. The Court did so by reasoning that state officials are "stripped of [their] official or representative character"—and therefore no longer acting on behalf of the state—when they violate federal law.[142] Accordingly, the fiction of *Ex parte Young* allows for suits against state officials in their official capacity when the state's actions run afoul of federal law.[143]

Ex parte Young represents a clear policy choice by the Supreme Court: When a state is violating federal law, there must be a judicial remedy available to hold them liable for doing so.[144] The Supreme Court said as much in a subsequent case further refining the contours of the doctrine: "The *Young* doctrine rests on the need to promote the vindication of federal rights."[145] As scholars have noted, *Ex parte Young* was not merely a case interpreting the contours of Eleventh Amendment immunity; rather, it laid down a marker regarding the availability of a key remedy in equity—a

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[141] Cory v. White, 457 U.S. 85, 91 (1982).

[142] Ex parte Young, 209 U.S. 123, 160 (1908); Papasan v. Allain, 478 U.S. 265, 276–79 (1986) (plurality opinion) (Young "was based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity"); Pennhurst St. Sch. & Hosp. v. Halderman, 465 U.S. 89, 102–05 (1984).

[143] Practically speaking, an injunction against a state official requiring them to conform their conduct to the requirements of the federal constitution in their running a state agency is, at bottom, an injunction against the agency itself. Hence why courts and scholars alike describe *Young* as fictitious; it is based on a wink and a nod, when the effect of the doctrine is clear as day. *See* 33 Charles Wright & Arthur Miller, Fed. Prac. & Proc. Judicial Review § 8352 (2d ed. 2019); 13 Charles Wright & Arthur Miller, Fed. Prac. & Proc. Juris. § 3524.3 (3d ed. 2008); 72 Am. Jur. 2d States, *Etc*. § 106.

[144] See Vicki C. Jackson, Seminole Tribe, *the Eleventh Amendment, and the Potential Evisceration of* Ex parte Young, 72 N.Y.U. L. Rev. 495, 495 (1997) ("The availability of such equitable relief, under the so-called Ex parte Young doctrine, has long been accepted as a necessary counterbalance to the states' Eleventh Amendment immunity from federal jurisdiction.").

[145] Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984).

federal injunction—against a state official who violates federal law.[146] Some describe it as "one of the most important decisions ever rendered by the Supreme Court."[147]

A. The Contours of Ex parte Young

Ex parte Young is solely relevant in the context of injunctive relief. Claims for retrospective monetary relief against the state remain immunized from suit, perhaps as a way of reconciling the tension inherent in opening the state up to liability. State actors *can* be compelled to course-correct when their actions are violating the Constitution; the state *cannot* be compelled to pay for wrongs its employees committed in the past.[148] But sometimes the distinction between prospective relief and monetary relief is less than clear. At times, implementing injunctive relief—for example, orders directing the state to create new programs that will help it comply with the Constitution in the future—comes with significant costs to be paid from the state's budget. Yet, the Court has held that federal courts may order "state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."[149]

Although the *Ex parte Young* fiction is over a century old, it is still alive and well, and it remains a useful tool for litigants to hold state agencies accountable through agency heads who may be sidestepping their obligation to ensure their agency follows constitutional and federal law. The most recent substantive discussion of the doctrine appeared in *Whole Women's Health v. Jackson*, where the Supreme Court held that state court judges did

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[146] John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989, 990 (2008); *see also* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 174 (1996) (Souter, J., dissenting) (describing the Young doctrine as a necessary ingredient of a constitutional system, not merely a convenient "fiction" created by the Court).

[147] Martin A. Schwartz, Section 1983 Claims and Defenses, § 8.04 (4th ed., 2023 Supplement); *see also* 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedures § 4231, at 559 (1988); *see also* Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982) (plurality opinion) ("There is a well-recognized irony in *Ex parte Young*; unconstitutional conduct by a state officer may be 'state action' for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh. Nevertheless, the rule of *Ex parte Young* is one of the cornerstones of the Court's Eleventh Amendment jurisprudence.").

[148] Edelman v. Jordan, 415 U.S. 651, 668–69 (1974); Scheuer v. Rhodes, 416 U.S. 232, 238 (1974) ("*Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury."), *overruled on other grounds*, Davis v. Scherer, 468 U.S. 183 (1984).

[149] Milliken v. Bradley, 433 U.S. 267, 289 (1977); Missouri v. Jenkins, 495 U.S. 33, 56 n.20 (1990) (costs of securing compliance with federal desegregation order are not barred under Eleventh Amendment and are attendant to injunctive relief). This seems at least somewhat consistent with other judicial doctrines that bar monetary relief from government officials, including most notably, the doctrine of qualified immunity. The through-line of each of these doctrines appears to be a strict, almost paternalistic, unwillingness on the part of judges to open government defendants up to financial liability for constitutional violations, while still maintaining some—albeit limited, and frequently unavailable—avenue for prospective relief.

not fall under the limited exception *Ex parte Young* provides.[150] Nevertheless, writing for the majority, Justice Gorsuch made clear that the Court's recent precedents did not "suggest any disagreement with *Ex parte Young*."[151] Even more recently, in *Reed v. Goertz,* Justice Kavanaugh rejected without hesitation the state's sovereign immunity argument, stating that *Ex parte Young* allowed the suit because it was against a state official and sought declaratory and injunctive relief.[152]

The contours and reach of the exception, however, may eventually change, depending on whether the Supreme Court becomes more inclined to narrow *Ex parte Young's* scope. For example, in *Idaho v. Coeur d'Alene Tribe of Idaho*, two justices advocated for a narrower application of the doctrine. Justice Kennedy, joined by Chief Justice Rehnquist, advocated for considering whether certain factors were met prior to exercising federal jurisdiction over a prospective relief case against a state official. Such factors included whether a state forum is available to hear the federal claim, the importance of the federal forum to vindicate the federal right at issue, and whether "special factors" counseled against the exercise of federal court jurisdiction.[153]

For now, applying the doctrine remains straightforward. When "determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."[154] Importantly, the Court stressed that "whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim."[155] But there is some measure of causation baked into this threshold showing: Plaintiffs must plausibly allege that the defendant in an *Ex parte Young* suit has "a measure of proximity to and responsibility for the challenged state action," so that an injunction against that person will be effective for resolving the underlying claim.[156]

B. The Intersection of Ex parte Young *and 42 U.S.C. § 1983*

How does *Ex parte Young* apply when a plaintiff sues a state official in his official capacity under Section 1983 for violations of constitutional rights?

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[150] 142 S. Ct. 522 (2021).

[151] *Id.* at 533–34.

[152] 143 S. Ct. 955, 960 (2023).

[153] 521 U.S. 261 (1997).

[154] Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 645 (2002) (internal quotation marks omitted).

[155] *Id.* at 647.

[156] James W. Moore et al., 17A Moore's Fed. P. Civil ¶ 123.40(3)(a)(v) (3d ed. 1999).

In *Will v. Michigan Department of State Police*, one of the few Section 1983 lawsuits brought against a state police agency, the Supreme Court held that state agencies and officials are not "persons" subject to suit under Section 1983. In a footnote, however, the Court qualified its ruling, explicitly incorporating *Ex parte Young*'s fiction: "Of course, a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the state.'"[157] Therefore, state officials sued in their official capacity for *prospective* relief are "persons" under Section 1983; state officials sued in their official capacity for *retrospective* relief are not "persons" and are thus not proper defendants. In this way, the *Will* Court imported the *Ex parte Young* distinction into the statutory law of Section 1983.[158]

Although everyone seems to recognize that properly pled prospective relief lawsuits against state officials are, in fact, lawsuits against the state agency itself, courts still insist on the formality of naming the state official in his or her official capacity as defendant, rather than the agency or component of state government that the official runs.[159] This sets Section 1983 lawsuits under *Ex parte Young* apart from municipal liability lawsuits, which typically proceed against the municipality as the named defendant.[160]

The *Ex parte Young* carve-out from Eleventh Amendment immunity is derived from the same rationale as Section 1983 itself: the protection of constitutional rights. A leading expert on Section 1983 litigation, Martin A. Schwartz, recognized this in his thorough treatise on Section 1983 Litigation Claims and Defenses, noting that the Eleventh Amendment and Section 1983 were meant to protect distinct interests:

> The Eleventh Amendment is designed to protect state sovereignty, while the Fourteenth Amendment and § 1983, are designed to protect individuals against state action that infringes upon their constitutional rights. The Eleventh Amendment seeks to protect the states from federal court liability, while the Fourteenth Amendment imposes substantial obligations upon the states . . . [and] § 1983 authorizes judicial enforcement of these obligations, principally in the federal courts. Little wonder, then, that Eleventh Amendment

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[157] 491 U.S. 58, 70 n.10 (1989).

[158] Of course, state officials can always be sued in their personal capacity for damages resulting from constitutional violations. *See* Hafer v. Melo, 502 U.S. 21, 25 (1991). But these lawsuits may not result in meaningful recovery, particularly for judgment-proof state officials, and will not have the impact of reforming policies and procedures agency-wide, as is often the goal in system reform litigation against the police. *See* Joanna Schwartz, Shielded: How the Police Became Untouchable (2023).

[159] James W. Moore et al., 17A Moore's Fed. P. Civil ¶ 123.40 (3d ed. 1999).

[160] *See* Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985) ("There is no longer a need to bring official-capacity actions against local government officials, for under *Monell* . . . local government units can be sued directly for damages and injunctive or declaratory relief.").

> decisional law reflects the compromises necessary to resolve the tension between [the amendment and the statute].[161]

In the policing context, the constitutional protections embedded in the Fourth, Fifth, Sixth, and Fourteenth Amendments are fundamental. The abuse of those protections by law enforcement officers at all levels of government has led to centuries of police violence, predominantly against low-income people of color. The availability of federal courts to bring litigation against state law enforcement agencies under *Ex parte Young* is a vital mechanism for accountability and reigning in systemic abuse of power by the state.

This is especially true because monetary relief is an unavailable remedy in suits against the state. Individual officers may be sued for damages in their personal capacity, but suits against individual officers are not lawsuits against the state. In many cases against individual officers, relief is blocked by qualified immunity. And even if damages are available, such remedies do little, if anything, to deter broader patterns of misconduct or jumpstart much-needed reforms. Abusive officers rarely feel the impact of judgments ordered against them, as many are indemnified by their employer for any damages levied against them in litigation.[162] And because payouts are hard to obtain, or small in comparison to state police budgets, the deterrent effect of monetary relief in Section 1983 lawsuits against state law enforcement is negligible. Such lawsuits also frequently prevent plaintiffs from exposing larger patterns of misconduct that merit broader, agency-wide reform. Individual damages cases against patrol officers therefore provide little incentive for individual officers to change how they police.

Injunctions against state officials engaging in constitutional violations are therefore quite important. The Supreme Court consistently recognizes that federal courts have a strong interest in adjudicating serious constitutional claims through injunctive relief.[163] Indeed, "[i]n carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in Section 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress."[164]

In addition to its express language, Section 1983's history reflects the importance of injunctions. The statute expressly permits equitable relief, including injunctions, precisely because of congressional concerns "that state instrumentalities could not protect [federally created] rights; [Congress]

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[161] Martin A. Schwartz, *Section 1983 Litigation Claims and Defenses* § 8.02 (4th ed., Aspen Publishers [2023 Supplement]).

[162] *See supra* note 122 and surrounding text.

[163] *See, e.g.,* Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'").

[164] *Id.*

realized that state officers might, in fact, be antipathetic to the vindication of those rights."[165] Section 1983, therefore, works to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."[166] Indeed, Section 1983 "is a powerful legislative 'sword' providing injunctive relief for the benefit of citizens whose Federal Constitutional rights have been violated."[167]

These general principles apply in equal force to *all* Section 1983 lawsuits, whether brought against municipalities or under *Ex parte Young* against a state official. But unlike in a traditional *Monell* context, the Court has not cabined relief against the heads of state police agencies to only those cases where the *Monell* standard is met.

In the absence of Supreme Court precedent addressing the issue, plaintiffs bringing equitable claims against the heads of state police agencies for the unconstitutional acts of state police officers must help the court navigate an essential question: What standard should the court apply to determine the state police agency's liability for the actions of its officers? Implicit in this question is an even thornier one: Why should the court not simply treat state police agencies like local police departments, and accordingly apply the Monell standard?

IV. Clarifying the Distinction Between *Young* and *Humphries*

As discussed above, plaintiffs in police misconduct claims against *municipalities* must meet arduous standards of causation and liability, derived from *Monell*, in order to prevail. By contrast, existing doctrine governing state defendants shows why courts must reject any proposed application of *Monell* standards in *Ex parte Young* litigation against state officials. Below, I present three reasons why superimposing *Monell* onto *Ex parte Young* is untenable given the contours of civil rights enforcement doctrine: (1) doctrinal indications that the two contexts are jurisprudentially distinct; (2) an incongruity between the rationales animating *Monell* and *Ex parte Young*; and (3) the confusing causational redundancy that would result from applying *Monell* in the *Ex parte Young* context.

A. Doctrinal Distinctions

Only one appellate case has directly addressed the application of *Monell* to *Ex parte Young* lawsuits, and the court rejected the state official's

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[165] *Id.*

[166] Wyatt v. Cole, 504 U.S. 158, 161 (1992) (citing Carey v. Piphus, 435 U.S. 247, 254–57 (1978)).

[167] Leuallen v. Paulsboro Police Dep't, No. CIV. 99-4353(JBS), 2001 WL 1700432, at *7 (D.N.J. Dec. 5, 2001).

attempt to conflate these two doctrines. In *Rounds v. Clements*,[168] an unpublished Tenth Circuit opinion written by Justice Gorsuch before he ascended to the Supreme Court, the court considered whether a plaintiff must prove the state official engaged in a "policy or custom" of violating state law. Although then-Judge Gorsuch's analysis was primarily focused on whether Mr. Clements, the state official, was immune from suit, the court specifically addressed the applicability of *Monell*'s liability standard to *Ex parte Young* lawsuits:

> Separately still, Mr. Clements argues that when a plaintiff sues a state employee in his official capacity, he must prove some "policy or custom" played a role in the alleged violation of federal law. But at least two problems attend this line of argument. First, the "policy or custom" standard is a standard for determining liability under § 1983, not immunity from suit under the Eleventh Amendment. And, of course, the only question over which we have jurisdiction in this interlocutory appeal is the question of immunity, not the merits which even the district court has yet to reach. Second, the "policy or custom" standard isn't just a liability standard, it's a liability standard for suits against municipalities—entities not immune from suit under the Eleventh Amendment—and it has no applicability to state officers who are immune from suit for damages but susceptible to suit under *Ex parte Young* for injunctive relief.[169]

This is the clearest indication in an *Ex parte Young* opinion about the inapplicability of *Monell* liability standards to litigation against state officials: The traditional *Monell* "policy or custom" test "has *no applicability to state officers*" in an *Ex parte Young* lawsuit for injunctive relief.[170]

Then-Judge Gorsuch's reasoning is in fact derived from language in *Monell* itself: The holding of *Monell* "is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes."[171] As far back as 1890, the Court recognized that municipalities are distinct from states and are treated differently under the Eleventh Amendment.[172]

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[168] 495 Fed. App'x 938 (10th Cir. 2012).

[169] *Id*. at 941 (internal citations omitted).

[170] *Id.* (emphasis added). Although the court did not reach the question of whether Mr. Clements was in fact liable for the injury sustained by Mr. Rounds, the court unambiguously stated that the proper standard for evaluating liability in an *Ex parte Young* lawsuit would not be the "policy and custom" liability standard derived from *Monell*.

[171] *Monell*, 436 U.S. at 690 n.54; *see also* Chaloux v. Killeen, 886 F.2d 247 (9th Cir. 1989) (cited with approval in Santiago v. Miles, 774 F. Supp. 775, 792–93 (W.D.N.Y. 1991) (rejecting argument by defendant state officials that they were not liable "unless the Court finds that defendants acted pursuant to [a] policy or custom," and finding that defendants were liable because "Plaintiffs have convinced me that these officials were responsible, under *Williams v. Smith* principles, for the federal law violations relating to discrimination at the prison")).

[172] Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

At least one district court decision has picked up on this distinction as well, finding that the lawsuit against a municipality would have been decided differently if it had been against a state instead. *Garnett v. Zeilinger* was a Section 1983 case concerning compliance with statutory deadlines for distribution of federal food stamp benefits.[173] Judge Christopher Cooper granted summary judgment to the defendants, noting that some minimal degree of untimeliness in the delivery of benefits did not rise to the level of a "persistent, pervasive practice, attributable to" a government policy maker.[174] However, Judge Cooper noted that had the defendant (the District of Columbia) been a state rather than a municipality, summary judgment would not have been granted, because the "deliberate indifference" standard that applied to D.C. as a municipality would not be applied to a state defendant.[175]

Others have noted the distinction between *Monell* and *Ex parte Young* too. For example, the plaintiffs in *Humphries* commented on this distinction in their briefs. They pointed to the fact that, should *Monell* be expanded to prospective relief lawsuits against municipalities, those municipalities would be subject to a stricter standard of liability than state governments, as state officials would be governed only by *Ex parte Young*.[176] Although the Supreme Court eventually ruled against the plaintiffs, it did so without engaging with the plaintiffs' points on this subject.

Additionally, the Supreme Court has signaled that it may be unwilling to graft *Monell* onto *Ex parte Young*. In *Quern v. Jordan*, the Court took issue with an argument made by the respondent that the Court's earlier ruling in that case, *Edelman v. Jordan*, was no longer good law after *Monell*.[177] In *Edelman*, the Court had held that a lower court's order directing the state to pay retroactive welfare benefits to plaintiffs violated the Eleventh Amendment because it was akin to a damages action against the state.[178] The issue in *Quern*, then, was whether the court could order the state to send an explanatory notice to welfare recipients regarding the administrative procedures they could utilize to determine if they were entitled to retroactive benefits.[179] In rejecting the respondents' arguments that *Monell* controlled, the Court explicitly affirmed that *Monell*'s holding was directed *only* to municipal governments—not the state—and therefore did not call into doubt the court's prior ruling from *Edelman*.[180] The *Quern* Court ultimately sided with

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[173] 485 F. Supp. 3d 206, 210, 232 (D.D.C. 2020).

[174] *Id.* at 232.

[175] *Id.* at 210.

[176] Reps. Brief at 40–42, Cnty. Of Los Angeles v. Humphries, No. 09-350 (June 28, 2010), 2010 WL 2602008.

[177] Quern v. Jordan, 440 U.S. 332, 338 (1979) (citing Edelman v. Jordan, 415 U.S. 651 (1974).

[178] *Edelman*, 415 U.S. at 651.

[179] *Quern*, 440 U.S. at 334.

[180] *Id.* at 338.

the respondents and held that the relief ordered by the lower court—sending out a notice regarding eligibility for benefits—was prospective relief properly ordered under *Ex parte Young*.[181] The Court got there by reinforcing its prior ruling in *Edelman*, indirectly suggesting that *Monell* had no significance to the issue at hand because *Quern* involved a state agency.

Quern is a powerful example of a Supreme Court opinion that suggests a clear distinction between lawsuits brought against municipalities under *Monell*, and lawsuits brought against state officials under *Ex parte Young*.

B. Motivational Incongruity

Examination of *Monell* and *Ex parte Young* suggests that the motivational underpinnings of these cases are categorically distinct. As leading practitioners have noted, injunctions serve a vital role in ensuring that state actors do not flout federal constitutional requirements with impunity: "The effect *of Ex parte Young* is to bring within the scope of federal judicial review actions that might otherwise escape such review, and to subject the states to the restrictions of the United States Constitution that they might otherwise be able safely to ignore."[182] As discussed above, this is an important facet of the court's general equitable power and authority: the ability to stop violations of federal law in their tracks and to ensure that they do not continue in the future.[183]

When the Court created the *Ex parte Young* exception to state sovereign immunity, it recognized the importance of prospective relief from violations of constitutional rights.[184] The Court was clearly concerned that holding otherwise would preclude federal court review of unconstitutional state action—a result that is incompatible with federal constitutional supremacy.

Unlike in *Ex parte Young*, the Court in *Humphries* said it was concerned primarily with textualism and ensuring doctrinal simplicity: It wanted the same rule to apply in damages cases as in equitable relief cases, because it did not see a textual reason in 42 U.S.C. § 1983 to hold otherwise.[185] The Court's consideration of policy rationales that would point to the opposite result were summarily dismissed with little engagement. The Court did not stop to consider its prior proclamations about the importance of equitable

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[181] *Id.* at 342–49.

[182] § 4231 Ex Parte Young, 17A Fed. Prac. & Proc. Juris. § 4231 (3d ed.) (emphasis added). *See also* James W. Moore et al., 17A Moore's Fed. P. Civil ¶ 123.40 (3d ed. 1999) ("Thus, when a plaintiff alleges a continuing or future violation of federal law, the federal government's interest in ensuring compliance with federal law predominates, and a federal court has jurisdiction to enjoin the violation.").

[183] *See* Part III.b, *supra*.

[184] "[W]hen a plaintiff alleges a continuing or future violation of federal law, the federal government's interest in ensuring compliance with federal law predominates, and a federal court has jurisdiction to enjoin the violation." 6 James W. Moore et al., Moore's Federal Practice ¶ 123.40 (3d ed. 1999).

[185] *Humphries,* 562 U.S. at 37–38.

relief under Section 1983 or of the federal judiciary's role as a backstop to prevent and end ongoing, repeated violations of federal rights. Instead, the Court seemed most concerned with internal consistency, even if it meant foreclosing relief for deserving plaintiffs.

Some evidence suggests that *Humphries* was not truly about creating a uniform rule for Section 1983 litigation against municipalities but was rather an extension of the paternalistic desire to protect local budgets from having to pay for reforms except in the most extreme circumstances. The extension of *Monell* to prospective relief cases came before the court only because the Humphries had the right to seek attorneys' fees once they prevailed on their claim in the lower courts, and the county objected to paying. The county defendant was not objecting to the injunction itself; it was objecting to the plaintiffs' prevailing-party status under Section 1988(b).[186] Recognizing that with prevailing-party status the city will, in a backward way, have to pay monetarily for its transgressions even in a case for prospective relief only, the Court may have wanted to extend *Monell* to protect the city budget. This would be aligned with the rationale from *Monell*: ensuring that municipalities do not pay when they are not directly responsible. Justice Scalia posited as much during oral argument, musing, "I suspect . . . the case is mostly about attorneys' fees."[187]

If we take the *Humphries* opinion at its word, however, the Court's desire for uniformity does not square with the robust approach the Court took in forming its exception to state sovereignty decades earlier in *Ex parte Young*.[188] There, the Court was more than willing to bifurcate the standard for evaluating claims for damages and claims for equitable relief against the state. It held that claims against the state for damages were absolutely barred under the Eleventh Amendment, yet claims for injunctive relief *could* proceed against state officials in their official capacity. Although it did so by creating the legal fiction that claims against state officials in their official capacity were not actually claims against the state, the decision nonetheless demonstrates that the Court was serious about ensuring an avenue to prospective relief for violations of federal law—even at the cost of doctrinal simplicity.

And, as noted earlier, the Court has recognized that states are inherently different from municipalities and therefore deserve a different status for purposes of the Eleventh Amendment.[189] Motivations guiding decisions in one realm should not necessarily guide the resolution of cases in the other. Modern precedent from *Rounds* and *Quern*, discussed above, suggests that

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[186] 42 U.S.C. § 1988(b) (allowing for the award of attorneys fees to a plaintiff that is a prevailing party).

[187] Transcript of Oral Argument at 4, Los Angeles Cnty. v. Humphries, 562 U.S. 29 (2010) (No. 09-350).

[188] *See* Part III.b, *supra.*

[189] *See, e.g.*, Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (counties are distinct from states, and capable of being sued without running afoul of the Eleventh Amendment).

the Court may be willing to stick to its original motivation from *Ex parte Young*, more recent rights-constricting decisions notwithstanding.

In sum, the motivation behind *Ex parte Young* is one of equity and federal supremacy. Superimposing *Humphries*—which, whatever its true motivation, was certainly not about opening the courthouse doors to protect federal interests—makes no sense. Even in the present world of increasing disinterest by the highest court in upholding individual rights, *Ex parte Young* remains important law, and the motivational incongruity between these two sets of doctrines further supports the theory that *Monell* has no place in an *Ex parte Young* suit.

C. Causational Redundancy

Another reason to reject *Monell* liability in *Ex parte Young* litigation is that *Ex parte Young* litigation already contains multiple overlapping causational standards. Adding more via *Monell* is simply unnecessary.

Litigants seeking an injunction under *Ex parte Young* must overcome procedural barriers to suit in three stages. First, plaintiffs must make a threshold showing that the defendant they named is a proper defendant, in that they are in part responsible for carrying out the challenged practice, and that the suit is for prospective relief only.[190] Second, to survive a motion to dismiss, the plaintiff must demonstrate that they have standing to seek prospective relief.[191] Third, they must actually prevail in showing the constitutional violation, *and* that they are entitled to the specific relief they seek, i.e., that they are entitled to a permanent injunction.[192]

To proceed in a lawsuit against a state official, the plaintiff must allege "an ongoing violation of federal law" and "seek relief properly characterized as prospective."[193] Inherent in these requirements is a showing that the harm is continuous. The suit must be about more than a single past incident of misconduct, of which a state official might not be aware. And the defendant must have "a measure of proximity to and responsibility for the challenged state action," so that an injunction against that person will be effective for resolving the underlying claim.[194] This ensures some causal connection sufficient to overcome any (legitimate or not) concern about avoiding vicarious liability for state officials.[195]

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[190] *See* Part III.a, *supra*.

[191] *See* Lyons v. City of Los Angeles, 461 U.S. 95, 112 (1983).

[192] eBay Inc. v. MercExchange L.L.C., 547 U.S. 388, 391 (2006).

[193] Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 645 (2002) (internal quotation marks omitted).

[194] 6 James W. Moore et al., Moore's Federal Practice ¶ 123.40(3)(a)(v) (3d ed. 1999).

[195] *See* Peterson v. Martinez, 707 F.3d 1197, 1205 (2013) (holding that the Executive Director of the Colorado Department of Public Safety was not properly sued under *Ex parte Young* because he had no causal connection to enforcement of the challenged law).

On top of that, standing doctrine is generally applicable to all cases seeking to enjoin a particular police practice. It is part of the Court's Article III jurisprudence and based on the Court's interpretation of the "case or controversy" requirement.[196] Section 1983 standing doctrine, following the Court's 1983 landmark decision *City of Los Angeles v. Lyons*,[197] created a causational hurdle that plaintiffs must overcome to obtain an injunction against the police. In that 5-4 decision, the Court found that Mr. Lyons did not have standing to seek an injunction against the Los Angeles Police Department (LAPD) because Lyons—who had previously been placed in a chokehold by an LAPD officer—could not demonstrate that he would be subjected to a chokehold again in the future.[198] To possess standing for injunctive relief, Lyons needed to show "either, (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner."[199]

Lyons, like *Monell*, is a heavily critiqued decision.[200] Injunctions to protect constitutional rights carry significant importance,[201] yet many recognize

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[196] *Lyons*, 461 U.S. at 112.

[197] *Id.* at 95.

[198] *Id.* at 105–08.

[199] *Id.* at 106.

[200] *See* Patel, *supra* note 14, at 2272 (describing how Justice White's rationale in *Lyons* created three separate barriers to structural reform: "the repeated harm, speculative harm, and innocence barriers"); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Limiting Remedies*, 2005 U. Ill. L. Rev. 1199, 1233, 1236–37 (2005); Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 Yale L.J. 1836, 1859–62 (2015); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 Calif. L. Rev. 1387, 1416 (2007); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 Buff. L. Rev. 1275, 1334 (1999); William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty*, 65 Ala. L. Rev. 277, 281 (2013) (critiquing Supreme Court standing decisions); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 Stan. L. Rev. 1, 58–64 (2009); Michael J. Schmidtberger, *No Holds Barred in* City of Los Angeles v. Lyons*: Standing to Seek Injunctions in Federal Court Against Municipalities*, 15 Colum. Hum. R. L. Rev. 183, 196 (1984). Professor Richard Fallon pointed out in his article published the year after the *Lyons* decision came down that the Court's ruling essentially entrenched a requirement that plaintiffs prove "remedial efficacy"—or remedial standing—as a prerequisite, which is contrary to established law. *See* Richard Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. Rev. 1, 23 (1984) ("arguments of precedent and constitutional policy establish that remedial standing should not be regarded as a mandatory precondition of judicial relief under article III . . . the constitutionalization of remedial standing intrudes into the domain of mootness . . . [and] diminishes the power of courts, and potentially the capacity of Congress, to protect federal rights and to provide remedies for their violation.").

[201] Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"). "In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress." *Id.* Section 1983, therefore, works to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed

that *Lyons* unduly forecloses structural reform by the federal courts—even though that is an important promise inherent in the plain language of Section 1983.[202]

So, plaintiffs seeking to enjoin misconduct by the state police must demonstrate they are properly proceeding under *Ex parte Young*, and that they have standing for an injunction. But that's not all. To obtain a permanent injunction, a plaintiff must show both success on the merits of their claim and that (1) the plaintiff has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) the balance of hardships warrants a remedy in equity; and (4) the public interest would not be disserved by an injunction.[203] This standard requires the courts to undergo a balancing test to determine whether an injunction is appropriate, which necessarily requires consideration of the culpability of the party against whom the court might issue the injunction. The details of any prospective relief granted by the court must be tied to "the nature and scope of the constitutional violation" and not burden "governmental units that were neither involved in nor affected by the constitutional violation."[204] Once again, this imports a quasi-causational element—an injunction cannot be issued against a government official if they were not *involved in or affected by* the constitutional violation.

To be sure, the elements of standing and entitlement to an injunction apply in equal force to suits for injunctive relief against municipalities *and* against state officials. These causational redundancies are therefore not unique to *Ex parte Young* lawsuits.[205] But only in *Ex parte Young* lawsuits do litigants also need to show that the defendant had some level of responsibility for the challenged law or practice. That causational element is unique to *Ex parte Young* and would render an imposition of the *Monell* standard superfluous. Moreover, when combined with the doctrinal distinctions and motivational incongruities described above, it is clear that the *Monell* heightened causation standard should be inapplicable in *Ex parte Young* actions,

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rights and to provide relief to victims if such deterrence fails." Wyatt v. Cole, 504 U.S. 158, 161 (1992) (citing Carey v. Piphus, 435 U.S. 247, 254–57 (1978)).

[202] *See* Fallon, *supra* note 200, at 8 ("Also relevant to the appropriateness of equitable restraint, and also ignored by the *Lyons* majority, are the substantive policies underlying Congress's decision to authorize equitable relief under 42 U.S.C. § 1983"); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1386 (2000) ("We have lost, in the post-*Lyons* world, the powerful force of the citizenry as a direct agent in effecting meaningful social change through America's courts."). As Giles points out, plaintiffs from landmark institutional reform litigation pre-*Lyons*, such as *Brown v. Board of Education*, *Roe v. Wade*, *Hutto v. Finney*, and more, would not have met the heightened threshold created by the *Lyons* Court. *Id*.

[203] eBay Inc., 547 U.S. at 391 (citing Weinberg v. Romero-Barcelo, 456 U.S. 305, 311–13 (1982) and Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987)).

[204] Miliken v. Bradley, 433 U.S. 267, 282 (1977).

[205] This is perhaps one of the strongest arguments why *Humphries* was wrongly decided—it completely ignores the reality of the multiple interlocking doctrines that already preclude injunctive relief in a large number of cases.

even without a total repudiation of *Humphries*—no matter how warranted that may be.

V. Toward a "Causal Nexus" Theory

There is no shortage of proposals aiming to reform (or abandon) *Monell*. Although some have advocated for a reversal of *Monell*'s anti-*respondeat superior* holding[206] or for the application of negligence principles to *all* municipal liability cases (regardless of whether they seek damages or injunctive relief),[207] the proposal inherent in this Article is more nuanced. Given the current caselaw regarding the appropriate standard in *Ex parte Young* litigation against state police (sparse though it is) and the clear division between *Monell* and *Ex parte Young* in terms of the types of defendants to which they apply, courts can and should reject attempts by litigants to graft municipal liability frameworks onto actions brought against state officials for prospective relief.

Instead, traditional principles of causation derived from tort law should govern in suits against state officials that seek prospective relief. Lawsuits brought under 42 U.S.C. § 1983 are constitutional tort claims.[208] This has led courts across different circuits to apply basic tort law principles of causation in examining liability for a Section 1983 defendant.[209] So applying a more basic tort causational standard is consistent with the original purpose and language of Section 1983. And, in this limited context, a "causational nexus" liability meets the goals and language of *Ex parte Young* without unduly creating liability for municipalities based solely on the conduct of individual bad actors.

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[206] *E.g.*, Blum, *supra* note 134, at 963–64; Steven Stein Cushman, *Municipal Liability Under § 1983: Toward A New Definition of Municipal Policymaker*, 34 B.C. L. Rev. 693, 728–29 (1993); Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. Chi. L. Rev. 1449, 1462 n.70 (2009) ("Virtually from the time it was decided, scholars have criticized Monell's rationale for exempting municipalities from *respondeat superior* liability.").

[207] Wells, *supra* note 14, at 323; Larry B. Kramer & Alan O. Skyes, *Municipal Liability Under 1983: A Legal and Economic Analysis*, 1987 Sup. Ct. Rev. 249, 251 (1987); Moshe Zvi Marvit, Comment, *Who's Afraid of Municipal Liability? The Supreme Court's Strange Exclusion of § 1983 Respondeat Superior Municipal Liability*, 37 Ohio N.U. L. Rev. 461, 486–88 (2011).

[208] *See Monroe*, 365 U.S. at 187 (Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.").

[209] Scott Michelman, Civil Rights Enforcement 207 (Aspen 2020); Malley v. Briggs, 475 U.S. 335, 344 n.7 (1986) (holding that a judge's decision to issue an arrest warrant does not break the causal chain between an officer's constitutionally defective warrant application and the ensuing arrest); Powers v. Hamilton Cty. Pub. Def. Comm'n, 501 F.3d 592, 609 (6th Cir. 2007) ("Even if an intervening third party is the immediate trigger for the plaintiff's injury, the defendant may still be proximately liable, provided that the third party's actions were foreseeable."); Herzog v. Vill. of Winnetka, 309 F.3d 1041, 1044 (7th Cir. 2002) (holding that a § 1983 defendant can be liable for any "foreseeable consequences" of the unconstitutional conduct because "the ordinary rules of tort causation apply to constitutional tort suits liability"); *cf.* Murray v. Earle, 405 F.3d 278, 290–91, 292 n.51 (5th Cir. 2005) (noting that "[a] corollary of these background tenets of tort law relieves tortfeasors from liability if there exists a superseding cause").

As leading commentators have noted, principles of proximate causation animate the threshold showing a plaintiff must make to prevail under *Ex parte Young*: "[T]he requirement that the defendant have a measure of proximity to and responsibility for the challenged state action ensures that a federal injunction will be effective with respect to the underlying claim."[210] Caselaw supports this reading. In *Peterson v. Martinez*, the Tenth Circuit dismissed an *Ex parte Young* lawsuit holding that the state official defendant had no duty with regard to the challenged law, so a lawsuit against him was improper.[211] And the Sixth Circuit in *Top Flight Entertainment Ltd. v. Schuette* likewise recognized the proximate cause standard that is inherent in *Ex parte Young*, describing it thusly: The "plaintiff must allege facts showing how a state official is connected to, or has responsibility for, the alleged constitutional violations."[212]

A causational nexus standard respects the balancing concerns that seemed to animate the *Monell* court's rejection of *respondeat superior* liability *and* the federalism concerns driving *Ex parte Young*. First, it would provide a reasonable avenue for relief for plaintiffs who are able to meet the already difficult standards of proving a constitutional violation occurred, that the state official was (at least in part) to blame for the violation, and that the violation is sufficiently "ongoing" to confer standing for injunctive relief. But it would also provide a deterrent effect by encouraging state police leaders to be aware of the goings-on of their agencies—i.e., to remain vigilant, rather than complacent, in their leadership. And, because there is no avenue for damages against a state official under this standard, the same fiscal concerns of *Monell* are not present in an *Ex parte Young* suit—suggesting that a heightened causation standard is not necessary as a protectionary mechanism. To hold the state official accountable, the plaintiff would need to show that the official had oversight over the individual tortfeasors, that the tortfeasors committed a constitutional violation, and that there is a causal connection between the lack of oversight and the constitutional violation.

A causational nexus standard has the added benefit of being a clear descendent of the basic common-law tort principles that *should* animate Section 1983 litigation, but that in recent decades have become divorced from the doctrine surrounding interpretation of that statute. The basic elements of a tort action are familiar to any law student or litigator: The defendant owed a duty to the plaintiff; the defendant breached that duty; the breach of that duty caused an injury to plaintiff; that injury is a tangible

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[210] 6 James W. Moore et al., Moore's Federal Practice ¶ 123.40(3)(a)(v) (3d ed. 1999); Ex parte Young, 209 U.S. at 157 ("The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.").

[211] 707 F.3d 1197, 1205 (10th Cir. 2013).

[212] 729 F.3d 623, 634 (6th Cir. 2013).

harm. These essential elements even make up model jury instructions for Section 1983 cases.[213] Arguably, with each of the decisions noted above in *Monell* and its progeny, we have moved further and further away from the basic tort origins of Section 1983. Adoption of a causational nexus standard in the *Ex parte Young* context would have the benefit of bringing the law back in line with the principles from which Section 1983 was originally derived,[214] while not requiring the reversal of precedent already entrenched in the federal courts.[215]

Normatively, the causational nexus standard could move state officials in the direction of affirmatively and proactively policing their own departments. Knowing that the agency head could face an injunction for not course-correcting ongoing constitutional violations could induce that official to take action *in advance* of litigation—benefiting the general public, increasing public confidence in law enforcement, and avoiding costly litigation. Although the causational nexus standard on its own may be insufficient to spur internally driven reforms—certainly other factors, including deep cultural resistance within law enforcement, have precluded such changes previously—it could move the needle ever so slightly toward embodying the promise behind the enactment of Section 1983.

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[213] *See, e.g.*, 9th Cir. Model Civ. Jury Instr. §9.3 (revised Sept. 2020); 11th Cir. Model Civ. Jury Instr. (Civil Rights – 42 U.S.C. § 1983 – Fourth Amendment Claim – Private Person Alleging Unlawful Arrest, Unlawful Search, or Unlawful Terry Stop). Those instructions state that the elements for a Section 1983 claim include that the defendant was acting under color of state law (i.e., he had a duty to follow the law derived from his position as a member of the government); and his act/failure to act (i.e., his breach) deprived the plaintiff of his or her particular rights under the laws of the United States (i.e., the breach was cause of the deprivation of rights). *Id.* Case law discusses how plaintiffs in Section 1983 suits must prove both causation-in-fact and proximate causation, two elements of tort law. *See, e.g.*, 11A Wright & Miller, Fed. Prac. & Proc. Civ. § 2948.1 (3d ed. 2020) ("When an alleged deprivation of a constitutional right is involved, . . . most courts hold that no further showing of irreparable injury is necessary."); Harper v. City of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008); Jackson v. Sauls, 206 F.3d 1156, 1168 n.16 (11th Cir. 2000). Finally, in Section 1983 cases, courts have recognized in the injunctive relief context that the deprivation of a constitutional right constitutes a harm in and of itself, regardless of whether there is any other physical or emotional injury as a result of the deprivation. *See e.g.*, Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1236 (10th Cir. 2005) ("[T]he district court did not abuse its discretion in concluding that plaintiffs suffered irreparable injury through the loss of their First Amendment rights."); RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1210 (10th Cir. 2009) (plaintiff satisfies irreparable harm requirement by demonstrating "a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages."); *see also* Kansas v. United States, 171 F. Supp. 3d 1145, 1155 (D. Kan. 2016) (same), *aff'd in part sub nom.*, Kansas by & through Kansas Dep't for Child. & Fams. v. SourceAmerica, 874 F.3d 1226 (10th Cir. 2017); Schell v. OXY USA, Inc., 822 F. Supp. 2d 1125, 1142 (D. Kan. 2011), *amended*, No. 07-1258-JTM, 2012 WL 3939860 (D. Kan. Sept. 10, 2012); Adams By & Through Adams v. Baker, 919 F. Supp. 1496, 1505 (D. Kan. 1996) ("A deprivation of a constitutional right is, itself, irreparable harm.").

[214] *See* Part II above.

[215] The full scope of arguments in favor of overturning *Monell* exist in scholarship and legal opinions, both majority and dissenting, and are beyond the scope of this article, although are worthy of exploration alongside a deeper critique of *Humphries.*

Conclusion

State law enforcement—just like local law enforcement—retains significant power and authority over the communities they police. When that power is abused repeatedly in a way that confers standing for injunctive relief, no additional judicially created doctrinal hurdles should stand in a plaintiff's path to obtaining reform of that abusive behavior. Standards originally developed to reduce the risk of subjecting *cities* to *monetary* judgments—a remedy that is entirely unavailable against the states per the Eleventh Amendment—without a heightened showing of fault on the city's behalf should not be assumed to apply against the state.

Although plaintiffs seeking injunctions against local law enforcement must contend with *Monell*—the problematic extension of *Monell* in *Humphries* sealed that fate—there are no doctrinal, normative, or historical reasons to graft *Monell* liability onto *Ex parte Young* lawsuits against state police. Then-Judge Gorsuch's proclamation that *Monell* liability "has no applicability to state officers who are . . . susceptible to suit under *Ex parte Young* for injunctive relief"[216] should carry the day—leaving open the possibility that state police routinely violating the federal constitution will be within the reach of federal courts.

[216] Rounds v. Clements, 495 Fed. App'x 938, 941 (10th Cir. 2012).