THE EMERGING DOCTRINE OF STATE/MUNICIPAL LIABILITY

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INTRODUCTION

On March 6, 2015, a man named Tracy Tucker was arrested in Idaho on accusations of attempted strangulation and domestic battery.[1] Mr. Tucker was assigned a public defender but given no counsel at his initial appearance, where his bail was set at $40,000.[2] Unable to post bail or successfully argue for a reduced amount, Mr. Tucker remained in pre-trial custody for the next three months. During those three months, Mr. Tucker unsuccessfully attempted to contact his court-appointed attorney by phone more than fifty times.[3] When he pleaded guilty on June 2, 2015, he had met with his attorney "just three times, for a total of approximately [twenty] minutes."[4]

At the time of Mr. Tucker's case, the inadequacies of Idaho's public defense system were well known and well documented. In 2010, at the request of the Idaho Criminal Justice Commission (CJC), the National Legal Aid & Defender Association (NLADA) conducted an evaluation of Idaho's public defense system. Its findings were damning. The report found widespread inadequacies in Idaho's county-run programs. In Bonneville County, one of the sampled counties, investigators found a public defender's office of five attorneys handling work that "[eleven] attorneys would be reasonably expected to handle per national norms," assisted by only a fraction of the required support staff.[5] The attorney who dealt with the county's juvenile and municipal misdemeanor cases admitted to managing more than 1,400 cases per year—the workload of four full-time attorneys.[6] The office, which should have had four full-time investigators, had an investigation budget of only $6,000[7]—less than a fifth the salary of a single professional investigator.[8] At the time the NLADA's report was

1. Class Action Complaint for Injunctive and Declaratory Relief at 3, Tucker v. State, 394 P.3d 54 (No. CV-OC-2015-10240).
2. *Id.* at 4.
3. *See id.*
4. *Id.*
5. NAT'L LEGAL AID & DEF. ASS'N, THE GUARANTEE OF COUNSEL: ADVOCACY & DUE PROCESS IN IDAHO'S TRIAL COURTS iv (2010).
6. *Id.* at 19.
7. *Id.* at 20.
8. It is difficult to estimate the appropriate salary for an investigator for a public defender's office in Bonneville County. However, Kootenai County, Idaho, recently sought to hire a Senior Criminal Investigator for their public defender's office, and offered a full-time annual salary between $38,001.60 and $52,436.80, depending on experience. *Job Opportunities*, KOOTENAI COUNTY, IDAHO (Aug. 17,

published, Idaho was one of only seven states that forced counties to bear the entire burden of funding indigent defense.[9]

The NLADA's report held the state government responsible for the crisis. "By delegating to each county the responsibility to provide counsel at the trial level without any state funding or oversight," the report concluded, "Idaho has sewn a patchwork quilt of underfunded, inconsistent systems that vary greatly in defining who qualifies for services and in the level of competency of the services rendered."[10]

On June 17, 2015, the American Civil Liberties Union of Idaho filed suit against the State of Idaho, the Governor of Idaho, and the Idaho Public Defense Commission on behalf of Mr. Tucker and two similarly situated plaintiffs. Although the Idaho District Court recognized the widespread failures of Idaho's public defense system, it held that the court was powerless to require Idaho to reassess its delegation to the counties. "Plaintiffs do not argue that the statute delegating the duty to provide public defense is unconstitutional," the court wrote. "They simply argue that the county commissioners in some or all of the counties . . . have failed to protect their rights to counsel and a fair trial."[11] The court, rooting its opinion in the idea that the Separation of Powers doctrine bars courts from ordering the legislature to shift delegated power from one agency to another, ruled that "it is not the role of the courts, but of the political branches, to shape the institutions of government in such a fashion as to comply with the laws and the Constitution."[12]

The ACLU's case was revived on appeal and is still being litigated in Idaho's courts.[13] Underlying Mr. Tucker's case against the State of Idaho, however, is a seemingly straightforward question: if

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2018, 3:58 PM), https://www.governmentjobs.com/careers/kcgov/jobs/1997056/senior-criminal-investigator-pd?pagetype=jobOpportunitiesJobs [https://perma.cc/WV9H-KXNY].

9. NAT'L LEGAL AID & DEF. ASS'N, THE GUARANTEE OF COUNSEL: ADVOCACY & DUE PROCESS IN IDAHO'S COURTS 3 (2010).

10. *Id.* at 2.

11. Memorandum Decision and Order Granting Motion to Dismiss at 31, Tucker v. State, 2016 WL 917674 (Idaho Dist. Jan. 20, 2016) (No. CV-OC-2015-10240).

12. *Id.*

13. *See* Tucker v. State, 394 P.3d 54, 73 (Idaho 2017) (reversing the dismissal of Appellants' complaint as to the State of Idaho and the Public Defense Commission, but affirming dismissal as to Governor Otter.). The court remanded the case for further proceedings.

states delegate authority to municipalities,[14] when should they be required to remedy municipal violations of federal rights?

Although the question may seem straightforward, it is one that has resisted analysis. Even in the face of violations of federal rights, courts have been hesitant to modify or supervise state delegations of power to municipalities. Academia has struggled to identify common threads in the few decisions ordering such relief, in part due to the diverse circumstances in which states have been found liable for municipal violations of federal law.[15] No coherent doctrine has emerged.[16]

This Note proposes an answer to this important question: that courts should adopt a standard for judging state supervision of municipal delegations analogous to the standards for "supervisory liability" under 42 U.S.C. § 1983,[17] as developed by *Monell v. Dep't of Soc. Servs. of New York*[18] and subsequent case law. Specifically, this Note proposes that a state officer's action or inaction should be considered a violation of federal law for the purposes of seeking injunctive relief when the officer's supervision of delegated municipal power demonstrates a deliberate indifference to municipal violations of federal rights.[19] Further, this Note argues that a number of courts

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14. Black's Law Dictionary defines "municipality" as "[a] city, town, or other local political entity with the powers of self-government." *Municipality*, BLACK'S LAW DICTIONARY (10th ed. 2014). The municipalities discussed in this Note are all governed by elected officials with the discretion to legislate, regulate, or set policy within parameters set by state law.

15. *See* Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 864–68 (2017); *see also* Note, *The State's Vicarious Liability for the Actions of the City*, 124 HARV. L. REV. 1036, 1039 (2011) [hereinafter Note, *The State's Vicarious Liability for the Actions of the City*] (noting that current jurisprudence relating to state liability for city actions is "remarkably ill-defined").

16. *See* Weinstein-Tull, *supra* note 15, at 867 (noting that "[o]n the whole, abdication cases have not congealed into a consistent doctrine.").

17. 42 U.S.C. § 1983 (2012), often called "Section 1983," is a statute that provides a cause of action against anybody who violates an individual's federal rights "under color of state law." *See infra* Part III.A.

18. *See generally* Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 694 (1978) (holding that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents," but when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury," then under § 1983, the government as an entity may be seen as responsible).

19. *See* discussion *infra* Part III.A (discussing the development of § 1983's "supervisory liability" standards).

have already applied an analogous standard, and could easily adopt a doctrine explicitly based on supervisory liability within the bounds of established precedent.

This Note contributes to the literature in three ways. Part I of this Note defines and describes the targeted context, provides examples of state/municipal delegation, discusses the underlying tension between vindicating federal rights and respecting states' rights to structure their own internal governance, and observes that courts have taken a nuanced approach to resolving this tension analogous to § 1983's standards supervisory liability. Part II describes judicial approaches to state/municipal liability and analyzes two proposed theoretical frameworks. Part III examines the history and function of § 1983's "supervisory liability" standards, looks at recent state/municipal delegation cases through the lens of supervisory liability, and argues for the adoption of an analogous standard to govern state/municipal delegation.

I. DEFINING THE BOUNDARIES OF STATE/MUNICIPAL LIABILITY

State and local governments in the United States vary widely in the scope of their authority, but each is imbued with duties and powers that are relevant to the protection or vindication of federal rights. The Idaho Supreme Court's conclusion in *Tucker v. State* that state officials could be required to remedy county constitutional violations turned on delicate delineations of power and responsibility.[20] In examining state liability for delegated power, the question of boundaries and definitions becomes incredibly important; delegation, liability, and even remedies must all be defined. These definitions are crucial because, while the powers and duties of states and municipalities are intimately intertwined, courts have been incredibly reluctant to restructure the allocation of these powers and duties or to order state remedies for municipal rights violations.

Section A of this Part defines and describes the targeted context of "state/municipal delegation," while Section B discusses the concept of "state/municipal liability" in this context and the

20. For example, while the Governor of Idaho had a clear duty to ensure that the laws of the State of Idaho were constitutionally executed, the court determined that his formal powers did not grant him enough control over county public defense systems for the court to require him to fix them. Tucker v. State, 394 P.3d 54, 64–65 (Idaho 2017).

remedies plaintiffs seek from states to address municipal violations of federal rights. Section C describes the underlying tension between vindicating federal rights and respecting states' rights to structure their own internal governance, and outlines some of the boundaries the Supreme Court has placed on injunctive remedies for municipal misconduct. Finally, Section D gives a brief overview of judicial and academic attempts to resolve this tension, and proposes that courts *have taken* and *should take* a nuanced approach to resolving this tension that is analogous to § 1983's supervisory liability standards.

A. What is State/Municipal Delegation?

Federal laws and the United States Constitution often give states responsibilities related to the protection of federal rights. These state responsibilities may be as simple as making a "reasonable effort" to maintain accurate voter registration files,[21] or as resource-intensive as furnishing counsel to indigent criminal defendants.[22] The requirements federal laws place on states may be phrased as an active requirement to manage complex administrative programs, [23] or a passive obligation to refrain from violating federal rights in the day-to-day work of state governance.[24]

States, in turn, often hand the power to administer those responsibilities to other political entities—counties or municipalities.[25]

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21. 52 U.S.C. § 20507(a)(4) (2012); *see also* U.S. v. Missouri, 535 F.3d 844, 849–50 (8th Cir. 2008) (discussing the extent to which such an effort could be considered reasonable when voter files were, in fact, fairly inaccurate).

22. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that a criminal defendant's right to counsel was "made obligatory upon the States by the Fourteenth Amendment.").

23. *See, e.g.*, Supplemental Nutrition Assistance Program of 2009, 7 U.S.C. §§ 2011–2029, 2031–2036 (creating a complex structure of state-administered programs to provide federal and state funding for nutritional assistance).

24. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2012) ("no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

25. *See, e.g.*, Ohio Rev. Code Ann. § 3503.10 (2018) (requiring "designated agencies," including county treasurers, to administer "all aspects of the voter registration program for that agency as prescribed by the secretary of state,"); s*ee also* Richard Briffault, "*What About the "Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1318 (1994) ("Although local power is, at its source, a delegation from a state, that delegation is often quite broad

While from the perspective of the federal Constitution municipal authority is always, to some extent, a delegation from the state,[26] this Note does not attempt to address state liability for *any* municipal action. What this Note refers to as "state/municipal delegation" is, instead, the explicit assignment of state duties under federal law to quasi-independent state-created polities like counties, cities, or municipalities. This delegation has sometimes been referred to as "abdication," because states, while delegating responsibility, frequently disclaim any responsibility for ensuring that municipalities actually *carry out* those delegated federal responsibilities or protect relevant federal rights.[27] In the absence of state supervision and support, municipalities have wildly differing economic and institutional resources available to vindicate these federal rights.[28] As the NLADA documented in Idaho,[29] when local governments lack the capacity to effectively fulfill delegated responsibilities, municipal violations of vital federal rights are sometimes inevitable.

B. Liability in the Delegation Context

Litigants facing patterns of municipal misconduct frequently ask states to take action to prevent future violations of federal rights. As in *Tucker v. State*, these litigants often argue that a state's delegation of power, although not itself barred by federal law, sets municipalities up to violate federal rights.[30] Throughout this Note,

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and is rarely revoked. In most states, local governments operate in major policy areas without significant external legislative, administrative, or judicial supervision.").

26. Since the landmark case *Hunter v. City of Pittsburgh*, courts have regularly ruled that, from a constitutional perspective, "municipal corporations are subdivisions of the state," and the state has complete authority to expand or contract the authority of those subdivisions. Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907). *See also* Briffault, *supra* note 25, at 1305.

27. Weinstein-Tull, *supra* note 15, at 847–61 (outlining cases in which "the state delegated a federal responsibility down to its local governments" with little state supervision and then "argu[ed] that delegating the obligation exempted them from liability.").

28. Richard Briffault, *Our Localism: Part I-The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 19–20 (1990) [hereinafter Briffault, *Our Localism*] ("Interlocal differences in wealth are often enormous . . . [m]oreover, differences in local service needs are substantial . . . [t]ypically, the magnitude of local needs is totally unrelated to the extent of local resources.").

29. *See supra* notes 5–9 and accompanying text.

30. *See, e.g.*, Tucker v. State, 394 P.3d 54, 59 (Idaho 2017) (challenging the statewide delegation of indigent defense to the county level); United States v.

when courts address the question of whether states can be required to take action to respond to municipal violations of federal rights, that question is referred to as "state/municipal liability."

The extent to which litigants want states to constrain municipalities varies significantly. Frequently, litigants ask for injunctions requiring states to actively supervise their delegations.[31] In some instances, especially when challenging de facto segregation within the boundary lines of established municipalities or political districts, litigants have asked states to reshape the municipalities themselves.[32] In light of this broad range of possible state "liability," this Note considers a state to be held "liable" for the actions of municipalities if a court requires the state to exercise some formal power to remediate municipal violations of federal rights.

C. The Tension Between Federal Rights and Local Autonomy

Despite these expansive definitions of "state/municipal delegation" and "state/municipal liability," courts do not routinely require states to remedy municipal violations of federal rights.[33] It is a well-established principle that the restrictions the Constitution places on the exercise of state power apply to any possible exercise or delegation of that power.[34] Additionally, courts have regularly ruled

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Missouri, 535 F.3d 844, 851 (8th Cir. 2008) (challenging the adequacy of Missouri's system of delegating its duties under the National Voter Registration Act).

31. *See, e.g.*, Reynolds v. Giuliani, No. 98 CIV. 8877 (WHP), 2005 WL 3428213 (S.D.N.Y. Dec. 14, 2005), *rev'd*, 506 F.3d 183 (2d Cir. 2007) (ordering New York State to actively monitor New York City's compliance with the relevant federal laws and provide quarterly reports on the city's administration of food stamp and Medicaid programs); Armstrong v. Brown, 732 F.3d 955, 962 (9th Cir. 2013) (characterizing the lower court's injunction requiring California to supervise the treatment of disabled prisoners in county prisons as "minimal measures, consisting largely of notifications, collection of data, and reports to county officials.").

32. *See, e.g.*, Bradley v. Milliken, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974) (concluding that no desegregation plan was possible within the borders of existing school districts and ordering the creation of a regional multi-district remedial plan).

33. Briffault, *Our Localism*, *supra* note 28, at 94 ("Much as localities do not automatically enjoy state immunities, states are not automatically liable for the constitutional violations of their local governments.").

34. Standard Computing Scale Co. v. Farrell, 249 U.S. 571, 577 (1919) (stating that "the protection of the federal Constitution applies, whatever the form in which the legislative power of the state is exerted; that is, whether it be by a Constitution, an act of the Legislature, or an act of any subordinate instrumentality of the state exercising delegated legislative authority, like an

that, from a Constitutional perspective, "[m]unicipal corporations are political subdivisions of the state," and the state has complete authority to expand or contract the authority of those subdivisions.[35] However, courts are reluctant to reshape state/municipal delegations of power. [36] State/municipal delegation cases are litigated in the shadow of powerful and longstanding ideas of state and local autonomy.[37] Influenced by those ideas, the Supreme Court has set outer boundaries on remedial restructuring of localities.

In 1974 the Supreme Court articulated a vision of the state/municipal relationship that severely limited state liability. In *Milliken v. Bradley*, the District Court and the Court of Appeals held that the Detroit public school system was unconstitutionally segregated, and that no possible desegregation plan could be enacted within the borders of the affected districts.[38] Noting that local polities have long been considered arms of the state that lack independent sovereignty, the appellate court held that there was "no validity to an argument which asserts that the constitutional right to equality before the law is hemmed in by the boundaries of a school district."[39] The Supreme Court disagreed. The Court recognized that the state had the authority to set policies and draw boundaries for school districts in Michigan and accepted, *arguendo*, that the state-drawn boundaries

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ordinance of a municipality or an order of a commission."); *see, e.g.*, Cooper v. Aaron, 358 U.S. 1, 16–17 (1958) (holding that, since the Fourteenth Amendment restricted the actions of the States and States could only act through agents and agencies, it applied to the actions of any person "clothed with the State's power").

35. Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907).

36. *See, e.g.*, Armstrong v. Brown, 732 F.3d 955, 962 (9th Cir. 2013) (citing California's "prerogative to structure its internal affairs" as a principle limiting possible injunctive relief against California); Reynolds v. Giuliani*,* 506 F.3d 183 (2d Cir. 2007) (closely examining whether New York State's delegation of federal duties under the Food Stamp Act was sufficiently causally connected to New York City's noncompliance to grant relief against the state as a means of granting a "higher degree of deference" to governmental policies).

37. *See* Briffault, *Our Localism*, *supra* note 28, at 94–95 (1990) (describing how in *Milliken*, the Court's deference to principles of local control "operated as a brake on the lower court's remedial authority"); Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1037–39 (discussing historical theories of local autonomy in American law); *but cf.* Hunter, 207 U.S. at 178–79 (discussing the protection federal rights offer against *any* exercise of state legislative power).

38. Bradley v. Milliken, 338 F. Supp. 582, 595 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

39. Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

were responsible for segregated conditions in Detroit's schools.[40] However, it held that the courts had no power to create a multi-district remedy when the initial delegation of power was constitutional and the alleged unconstitutional conditions were limited to one jurisdiction.[41]

Just three years later, in *Rizzo v. Goode*, the Supreme Court again made a concession to local control. In the face of a "pervasive pattern of illegal and unconstitutional mistreatment [of minority citizens] by police officers" of the City of Philadelphia, the District Court of the Eastern District of Pennsylvania issued an injunction requiring the City Police Commissioner to put in place a detailed procedure for handling citizen complaints.[42] Pointing out that governments had "traditionally been granted the widest latitude"[43] in their choices about internal procedures and structures, the Supreme Court rejected that injunction as an "unwarranted intrusion by the federal judiciary into the discretionary authority committed to [the defendant city officials] by state and local law."[44] Although *Rizzo*, unlike *Milliken*, did not directly concern state/municipal liability, its message was the same: even in the context of protecting federal rights, state and local delineations of authority deserved special respect.[45]

Milliken and *Rizzo* fundamentally changed state/municipal liability doctrine.[46] Discussing this new municipal quasi-sovereignty, one scholar wrote that "[t]he Court's blessing of lines that were immune from desegregation orders provided the most effective means by which individuals seeking to avoid racially-integrated education

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40. *Milliken*, 418 U.S. at 748.

41. *Id.* at 748–49; *See also* Briffault, *Our Localism*, *supra* note 28, at 95 ("Despite the state's formal legal responsibility and its uncontested authority to redistribute power and restructure the school system, Michigan, in common with most states, provided for a large measure of local control. That local control deserved respect and operated as a brake on the lower court's remedial authority.") (internal quotations omitted).

42. Rizzo v. Goode, 423 U.S. 362, 366 (1976).

43. *Id.* at 378.

44. *Id.* at 366.

45. *See* Briffault, *Our Localism*, *supra* note 28, at 96 (characterizing the result of *Milliken* as requiring the federal courts to "respect existing local boundary lines, even if that made an effective remedy for school segregation in the metropolitan area impossible.").

46. *See* Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1041–42 (arguing that the *Milliken* Court was embracing a largely archaic concept of local autonomy); *See generally* Daniel Kiel, *The Enduring Power of Milliken's Fences*, 45 URB. LAW. 137 (2013) (discussing the long-term impact of *Milliken* on Fourteenth Amendment litigation).

could ensure that they would remain beyond the reach of a federal court order."[47] While this had immediate practical effects on the formulation of remedies for segregated school districts,[48] the impact of *Milliken* and *Rizzo* on state/municipal federalism was not missed. It quickly became apparent that finding state liability would be key to reshaping existing local institutions.[49] However, *Milliken* also emphasized that without a showing of interdistrict effects, finding states liable through theories of agency and vicarious liability would not be enough to effect interdistrict institutional change.[50] Justice Brennan, speaking in 1977, condemned the Court's deference to state delineations of municipal power. "Under the banner of the vague, undefined notions of equity, comity and federalism," Brennan said, citing *Rizzo*, "the Court has condoned both isolated and systematic violations of civil liberties."[51]

D. Toward a Unified Liability Doctrine

Following *Milliken* and *Rizzo*, courts have been reluctant to order states to modify or supervise otherwise valid delegations of power to municipal decisionmakers in the face of municipal violations of federal rights. When courts *do* approve such relief, their inquiries, tests, and justifications seem to vary widely, from explicit theories of non-delegable liability[52] to analogies to contract[53] to general principles

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47. Kiel, *supra* note 46, at 143.

48. Robert E. Buckholz, Jr. et. al., *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 869 (1978) (writing in 1978, a contemporary commentator noted that "both *Milliken* and *Rizzo* underscore the importance of balance in the formulation of remedies: the violation must be sufficiently extensive to support the extensiveness of the remedy, and, conversely, the remedy must not be disproportionate to the violation."); *see also* Note, *Power of Federal Courts to Order Interdistrict Relief for Intradistrict Segregation*, 88 HARV. L. REV. 61, 69 (1974) (highlighting the significance of the requirement that interdistrict remedies be linked to interdistrict effects).

49. *See* Steven E. Asher, *Interdistrict Remedies for Segregated Schools*, 79 COLUM. L. REV. 1168, 1175 (1979) (noting that to support interdistrict relief from segregation post-*Milliken*, there must be a state segregative action that is "more than mere inactivity and [has] consequences in at least one of the districts that the plaintiffs seek to integrate.").

50. *Id.*

51. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

52. *See* Henrietta D. v. Bloomberg, 331 F.3d 261, 284–87 (2d Cir. 2003).

53. *See* Armstrong v. Schwarzenegger, 622 F.3d 1058, 1063–64 (9th Cir. 2010).

of constitutional responsibility in the face of widespread violations of federal rights.[54] The few proposed theoretical models allow either the federal government[55] or the delegating states[56] to clearly determine allocations of liability.

All of the approaches described above represent attempts to resolve the underlying tension in state/municipal liability cases – the question of whether municipalities exercising delegated state authority should be treated as wholly controlled agencies of the state, autonomous quasi-sovereign lawmakers, or something in between. However, reviewing the body of caselaw holistically suggests that courts have taken a far more nuanced approach to this tension than any of the proposed models do. Instead of bluntly treating municipalities as either agencies or autonomous polities, courts frequently respect state decisions delegating duties to municipalities, but scrutinize state action or inaction relating to those delegations for deliberate indifference to federal rights.

Court opinions in this area are not as fragmented as previous scholarship suggests, and a coherent and workable doctrine for state/municipal liability is emerging. It is true that courts have used inconsistent language in their justifications for holding states liable, and that these cases rarely cite to each other in a meaningful way.[57] However, in cases in which the federal government has not created a specific statutory scheme for vindicating federal rights, a close examination of both the inquiries conducted and the remedies

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54. *See* Phillips v. State, No. 15CECG02201, 2016 WL 1573199, at *23 (Cal. Super. Ct. Apr. 11, 2016).

55. One alternate standard, the "nonabdication" doctrine, would look at federal law to determine the responsible party, and then hold that party liable for any noncompliance with that law. Weinstein-Tull, *supra* note 15, at 894, 896–97. *See also* Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1048–49 (arguing for a similar vicarious liability standard on the grounds that it would incentivize states to delegate power only to the actor most likely to protect federal rights).

56. Another standard that favors municipal autonomy would hold states liable only to the extent that they specifically control municipal actions. For instance, a state would be liable for violations of federal rights resulting from the location of a municipal school only if the state told the municipality where to build it. Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15 at 1054.

57. *See* Weinstein-Tull, *supra* note 15, at 864–68 (noting that in this area "opinions rarely cite to one another, and advocates only rarely cite to other areas of the law when facing abdication arguments").

ordered by courts suggests a surprisingly consistent approach that parallels 42 U.S.C. § 1983's emerging "supervisory liability" doctrine. Under this doctrine, states are held responsible for municipal violations of federal rights when they demonstrate deliberate indifference to widespread, longstanding, or notorious constitutional harms caused by their delegation of authority to municipal policymakers. [58] In many state/municipal delegation cases, courts seem to require states to supervise their delegations of power to municipalities and hold states liable when their deliberate indifference to that supervisory duty causes the violation of federal rights. This Note argues that adopting "supervisory liability" standards will give courts and litigants an effective way to restructure delegations of power that are deliberately indifferent to violations of federal rights.

II. JUDICIAL AND ACADEMIC APPROACHES TO STATE/MUNICIPAL LIABILITY

Perhaps the most important idea in *Tucker v. State* was the Idaho Supreme Court's conclusion that under the Idaho State Constitution, "it cannot be said that [Idaho's] counties are third parties acting independently of the State with respect to public defense. Instead, the counties are political subdivisions of the State."[59] Noting that the plaintiffs were alleging "longstanding, statewide deficiencies in the Idaho system, which result in actual and constructive denial of counsel across the state," the court pointed out that the obligation to redress systemic deficiencies in the public defense system *couldn't* be met by municipal delegatees, and so could not be entirely abdicated by the state defendants.[60] The Idaho Supreme Court's focus on (1) the state's relationship to the municipal delegatees and (2) the conspicuous lack of municipal capacity to actually fulfill delegated responsibilities allowed the Court to hold state officials liable for their *inaction* without rooting its opinion in vicarious liability or fundamentally restructuring the state's delegation of power.

Courts outside of Idaho have struggled to remedy violations of federal rights in state/municipal delegation contexts in the shadow of

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58. *See infra* Part III.a (describing standards for supervisory liability under 42 U.S.C. § 1983 (1996)).

59. Tucker v. State, 394 P.3d 54, 64 (Idaho 2017); *see also* IDAHO CONST. art. XVIII, § 1 ("The several counties of the territory of Idaho, as they now exist, are hereby recognized as legal subdivisions of this state.").

60. *Tucker*, 394 P.3d at 68.

the *Milliken* and *Rizzo* obligations to respect local power structures. While courts are forced to strike a delicate balance between crafting effective remedial orders and deferring to state delegations of power, academics have tended to argue for extremes—near-total liability for states or near-total independence for cities. Part II of this Note describes judicial approaches to state/municipal liability and the theoretical frameworks proposed so far. Although the relative rarity of delegation cases and their diverse contexts make specific categorization difficult, this Part describes three broad philosophical approaches that courts have taken. This Part also analyzes three proposals to unify state/municipal liability doctrine: "nonabdication" doctrine,[61] vicarious liability for city actions mandated by the state,[62] and strict state liability for the actions of cities.

A. Judicial Justifications for Liability

Given the diverse forms of state/municipal delegation, cases finding state/municipal liability resist simple categorization. Rather than strictly categorizing cases across at least half a dozen areas of law, this section points out some interesting trends in court rhetoric. Some courts, particularly in the context of Spending Clause agreements, have used the language of "non-delegable duties" to hold states liable for relatively isolated instances of municipal misconduct. Other courts have used broader terminology and looked for evidence of "widespread violations of constitutional rights" before requiring states to remedy them. Finally, in *Reynolds v. Giuliani*, the Second Circuit treated New York State as a municipal "supervisor" for the purposes of determining liability under 42 U.S.C. § 1983's "supervisory liability" standards.[63] Each of these approaches places subtly different restrictions on states attempting to delegate responsibility to municipalities, and each places subtly different burdens on plaintiffs seeking statewide remedies for rights violations.

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61. *See generally* Weinstein-Tull, *supra* note 15, at 839 (outlining "the contours of a 'nonabdication doctrine' that would be less solicitous and accommodating of existing state laws and more attentive to the language of federal laws.").

62. *See generally* Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1037 (arguing the best rule for vicarious liability "would hold the state vicariously liable only for those city actions that the state itself has mandated that the city perform.").

63. Reynolds v. Giuliani, 506 F.3d 183, 196 (2d Cir. 2007).

1. "Non-Delegable Duties" and Analogies to Contract

Perhaps the closest federal courts have come to mimicking *Tucker v. State*'s seeming indifference to the independent policymaking power of municipalities is in the area of so-called "non-delegable duties." In this series of cases, courts have identified violations of federal rights by municipal delegatees of state power, alongside some affirmative commitment by the state regarding that federal right. Frequently analogizing to the laws of contract, these courts have held delegating states liable for remedying municipal delegatees' violations of federal law without much inquiry into the adequacy of the state's supervision of any such delegations.[64]

In *Henrietta D. v. Bloomberg*, a group of plaintiffs sued New York City and the Commissioner of the New York State Department of Social Services (NYDSS) for violating the Americans with Disabilities Act and Rehabilitation Act by failing to provide equal access to social services for New York City residents with AIDS.[65] Under these acts, New York State had a federal statutory obligation to provide access to social services for all qualified recipients. However, New York was given a great deal of discretion to shape the bureaucratic structures that provided such access,[66] and delegated most of the day-to-day management of the programs to municipal bureaucracies.[67] The district court found for the plaintiffs, and among other relief required the Commissioner of the NYDSS to supervise New York City's compliance with the judgment and institute some procedural reforms to its supervisory processes. The Second Circuit affirmed the ruling, finding that the NYDSS Commissioner could be held liable for the actions of New York City, despite her argument that "neither the ADA nor the Rehabilitation Act require her to supervise the conduct of

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64. Analogies to contract have been more explicitly and frequently made when the federal right in question derives from a Spending Clause agreement between the state and the federal government. *See*, *e.g.*, Henrietta D. v. Bloomberg, 331 F.3d 261, 285 (2d Cir. 2003) (observing that Spending Clause legislation is "much in the nature of a contract," and that its "contractual nature has implications for our construction of the scope of available remedies.") (quoting Barnes v. Gorman, 536 U.S. 181, 186–87 (2002)); Robertson v. Jackson, 972 F.2d 529, 534 (4th Cir. 1992) (finding that the signed Spending Clause agreement between the state and the federal government created non-delegable responsibilities on the part of the state).

65. *Henrietta D.*, 331 F.3d at 264–65.

66. *Id.* at 265.

67. *Id.* at 266.

subsidiary governmental entities who are more directly delivering social services."[68]

The Second Circuit conceded that neither act included supervisory liability provisions. However, it held that because Congress had "explicitly directed the courts to create and administer a private right of action . . . a State that accepts funds under the Rehabilitation Act does so with the knowledge that the rules for supervisory liability will be subject to judicial determination."[69] The court, analogizing Spending Clause legislation to contracts between the federal government and the states, and likening state relationships with municipalities to contractor/subcontractor relationships, held that "New York State is . . . liable to guarantee that those it delegates to carry out its programs satisfy the terms of its promised performance . . . ."[70] Multiple circuits have applied a similar approach and have held that the delegation of statutory duties to third parties does not diminish the state's statutory obligations.[71] As a consequence, individual plaintiffs seeking state-level remedies under these decisions need only prove that municipal delegatees failed to vindicate the federal rights that the state had guaranteed.

While these cases refer to contractual language, it would be an oversimplification to say that their approach is purely contractual.[72] In each of these cases courts require the state to restructure its supervision of delegated responsibilities, rather than assume sole administration of them. The court in *Henrietta D.*, holding that the NYDSS Commissioner had the authority to remedy municipal deficiencies through supervision, noted that New York State law

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68. *Id.* at 284.

69. *Id.* at 285.

70. *Id.* at 285–87.

71. *See, e.g.*, Robertson v. Jackson, 972 F.2d 529, 534 (4th Cir. 1992) (affirming an injunction ordering the state commissioner responsible for supervision of Virginia's food stamp program to ensure compliance by local agencies, under a theory that the signed agreement between the Federal Government and the state agency created an obligation to administer the program that was not diminished by delegation); *see also Armstrong I*, 622 F.3d 1058, 1069 (9th Cir. 2010) (holding that California could not "avoid its own obligations under federal law" by contracting with municipalities to hold state prisoners, but indicating that the state might *not* be required to secure ADA accommodations for non-state prisoners held by counties).

72. *But see* Weinstein-Tull, *supra* note 15, at 894 (citing *Armstrong* and *Henrietta D.* to suggest that courts using the language of contract are "consider[ing] local governments primarily as contractees with the state.").

"creates an interconnected and inextricable chain of authority, with ultimate power reposed in the State Department of Social Services ("DSS")."[73] In *Robertson v. Jackson* the court explicitly refused to make a determination that municipalities were simply agents of the state, even in the context of administering Virginia's food stamp program.[74] Although both courts held that state delegation to municipalities could not diminish the state's responsibilities under federal law, neither challenged the *fact* of those delegations.[75]

2. "Widespread Violations of Rights": A Flexible Approach

Other courts have held states responsible for widespread municipal violations of rights. In *Tucker v. State*, the Idaho Supreme Court concluded that the alleged "constructive denial of counsel" was both causally connected to and redressable by the State of Idaho because state actors had both the powers and duties to remedy statewide deficiencies in public defense systems, despite Idaho's policy of delegating responsibility for public defense to the counties.[76] While cases like *Tucker* sometimes include language like "non-delegable duties," the analysis applied by courts differs significantly from the results-oriented analysis discussed in *Henrietta D.* In *Henrietta D.*, the Second Circuit held that New York was completely liable to guarantee that its delegatees "satisfy the terms of [the state's] promised performance," even though the court did not find that the delegation

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73. *Henrietta D.*, 331 F.3d at 287 (quoting Thomasel v. Perales, 78 N.Y.2d 561, 571 (1991)).

74. *Robertson*, 972 F.2d at 533.

75. *See Henrietta D.*, 331 F.3d at 286 (requiring the state defendant to supervise the city delegatees' compliance with the District Court order and "institute a number of procedural reforms with respect to the fair hearing process it oversees."); *Armstrong I*, 622 F.3d at 1069–70 (requiring the state defendant to provide reasonable accommodations for disabled state prisoners if the state becomes aware that such an accommodation is lacking, and to remedy patterns of ADA noncompliance with disability accommodations for state prisoners in county facilities). In *Robertson v. Jackson* the district court ordered direct "street-level" bureaucratic action by the Commissioner of the Virginia Department of Social Services, in addition to ordering a restructuring of state training, management evaluation, and supervision policies. Robertson v. Jackson, 766 F. Supp. 470, 479 (E.D. Va. 1991), *aff'd*, 972 F.2d 529 (4th Cir. 1992). However, *Robertson* is distinguished from almost all state/municipal liability cases because the local agencies were not parties to the suit. On appeal, the Fourth Circuit concluded, after examination of the applicable state laws, that the Commissioner had sufficient power to cause the compliance sought. *Robertson*, 972 F.2d at 535.

76. Tucker v. State, 394 P.3d 54, 63–64 (Idaho 2017); *id.* at 68–69.

itself was improper.[77] However, in many cases states are not required to remedy individual violations of federal rights by their municipal delegatees.[78] Instead, courts look at whether the structure of the state's delegation *itself* is causally connected to the municipal deprivation of federal rights.[79] In some cases courts indicate that these "systemic deficiencies" might require a complete restructuring of state delegations of power.[80]

The distinction between delegated state responsibility and inherently municipal responsibility can be important. In *Harkless v. Brunner*, the Association of Community Organizations for Reform Now ("ACORN"), a nonprofit group that registered voters in Ohio, sued Ohio state officials under the National Voter Registration Act of 1993 ("NVRA") citing the "widespread noncompliance with the NVRA's requirements."[81] The district court dismissed complaints against the Ohio Secretary of State and the Director of the Ohio Department of Job and Family Services ("DJFS"), holding that neither statewide official was a proper party to the litigation because "the fact that plaintiffs

77. *Henrietta D.*, 331 F.3d at 286.

78. *See, e.g.*, U.S. v. Missouri, 535 F.3d 844, 851 (2008) (finding that local violations of the NVRA were relevant to, but not determinative of, the question of whether Missouri was meeting its *own* statutory obligation to reasonably oversee statewide programs).

79. *See, e.g.*, *Tucker*, 394 P.3d at 64–67 (discussing whether the alleged action or inaction of state defendants could satisfy the "causation" requirement of traditional standing doctrine when county delegatees had provided inadequate legal representation to indigent criminal defendants); Armstrong v. Brown, 732 F.3d 955, 961 (2013) (holding that although the state had statutorily assigned certain parolees to county custody, because "the instigation of parole revocation and the service of any jail time for revocations enforce state-imposed requirements and serve essentially state purposes," the state was partially responsible for county deprivations of the plaintiff-parolees' rights).

80. *See, e.g.*, *Tucker*, 394 P.3d at 68–69 (suggesting that if Idaho's system of public defense were found to be deficient state-wide, the state would be obligated to create a binding plan to mitigate those deficiencies, even though its constitution delegated the entire responsibility for public defense to the counties); *Missouri*, 535 F.3d at 851 (suggesting that a district court could order Missouri to rescind its delegation of administrative duties under the NVRA to local election agencies); Phillips v. State, No. 15CECG02201, 2016 WL 1573199 at *2 (Cal. Super. Apr. 11, 2016) (suggesting that California statutes purporting to guarantee the right to counsel, in combination with a system of delegation to allegedly deficient localities, might not adequately "[operate] to provide effective assistance of counsel to indigent criminal defendants").

81. *See* Harkless v. Brunner, 545 F.3d 445, 447 (6th Cir. 2008).

allege that counties are not complying with their duties under the law [was] insufficient to state a claim" against the state officials.[82]

Reversing, the Sixth Circuit conducted extensive analysis of the statutory language of both the NVRA and Ohio's implementing legislation, and concluded that the state defendants were responsible for supervising local compliance with the NVRA and were empowered by state law to fulfill that responsibility.[83] Still, the court's interpretation was shaded by policy concerns for widespread disregard of the state's statutory and constitutional responsibilities.[84] As the court put it, "if every state passed legislation delegating NVRA responsibilities to local authorities, the fifty states would be completely insulated from any enforcement burdens, even if NVRA violations occurred throughout the state."[85] The Sixth Circuit dismissed concerns that this interpretation of the NVRA undermined Ohio's autonomy to structure its internal affairs. Instead, because the Elections Clause placed explicit responsibilities on the states and allowed the federal government to define those responsibilities, it held that there was no requirement that Congress respect states' "traditional . . . core governmental functions."[86] Still, the court conducted an inquiry into whether existing Ohio law granted the defendants the power to address deficiencies at the county level, and found that it did.[87]

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82. Harkless v. Blackwell, 467 F.Supp.2d 754, 762, 769 (N.D. Ohio 2006).

83. *Brunner*, 545 F.3d at 451–58.

84. *See id.* at 452–53 (discussing the futility of much of the statutory language if states could "abdicate their responsibilities by delegating them to local officials"); *see also* Weinstein-Tull, *supra* note 15, at 867 (characterizing *Harkless* as a ruling made "on efficiency grounds.").

85. *Brunner*, 545 F.3d at 452.

86. *Id.* at 454–55.

87. *See id*. at 453 (holding that Ohio law "makes it abundantly clear that the Secretary is responsible for the implementation and enforcement" of the NVRA, and has the authority to do so); *id.* at 455 (finding that "Ohio law . . . makes the statewide DJFS, and thus the Director, responsible for supervising the distribution of voter registration materials by local DJFS offices," even though local authorities have the independent responsibility to comply with the NVRA). The identified powers, while not plenary, went *far* beyond the state officials' previous attempts to address local noncompliance. As the Sixth Circuit noted, the Ohio Secretary of State "has limited her activities to the maintenance of a toll-free telephone number that county DJFS offices may call to receive more voter registration application forms," while the statewide DJFS "denied legal responsibility for ensuring that voter registration services are available at public assistance agencies." *Id.* at 447.

Courts addressing systemic violations of the NVRA have not always showed such deference to formal state delineations of authority. In *United States v. Missouri* the Eighth Circuit held that certain sections of the NVRA create obligations specifically targeted at states, and even if the state had delegated the entire power to meet those obligations to local election agencies ("LEAs"), "Missouri may not delegate the *responsibility* to conduct a general program to a local official and thereby avoid responsibility if such a program is not reasonably conducted."[88] While the language of "non-delegation" in this opinion mirrors the Second Circuit's language in *Henrietta D.*, the inquiry was subtly but critically different. In *Henrietta D.*, the court's analogy to contract held New York responsible for *any* violations of federal statutory rights, while the Eighth Circuit in *United States v. Missouri*, focused on whether Missouri's overall system of delegation was reasonable. The court acknowledged that Missouri could not be required to enforce the NVRA against localities,[89] but still held that "any lack of LEA compliance remains relevant" to determining the reasonableness of Missouri's system of delegation.[90] In remanding the case to the district court, the Eighth Circuit suggested that if "lack of LEA compliance" prevented Missouri from meeting its *own* federal obligation to reasonably conduct a program of voter registration, the court could order Missouri to either develop supervisory methods that encouraged LEA compliance or rescind the delegation entirely.[91]

This approach has been applied in other contexts as well. In a series of cases collectively known as *Armstrong*, disabled prisoners in California, including some held in county-run facilities, sued the State of California alleging the denial of reasonable accommodations under the Americans with Disabilities Act ("ADA") and unconstitutional conditions of confinement.[92] Throughout the *Armstrong* litigation, federal courts repeatedly noted that although the plaintiff-inmates were directly harmed by county officials' denials of

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88. United States v. Missouri, 535 F.3d 844, 849–50 (8th Cir. 2008) (emphasis added).

89. "The plain language of the NVRA provides a right of enforcement to only two categories of plaintiffs—the United States and '[a] person who is aggrieved by a violation of [the NVRA].'" *Id.* at 851 (quoting 42 U.S.C. § 1973 gg–9(a), (b)).

90. *Id.*

91. *Id.*

92. *See* Armstrong v. Schwarzenegger, 622 F.3d 1058, 1063–64 (9th Cir. 2010) (summarizing the then 16-year history of the case).

ADA accommodations, that harm was ultimately caused by systemic deficiencies in the state defendants' interactions with county delegates, including failures to assert any influence over the treatment of disabled prisoners assigned to county custody.[93] This standard, which acknowledges a zone of local independence, makes statewide remedies to individual rights violations contingent on proving more than just the underlying rights violation. To seek statewide relief, plaintiffs must argue that the state, in delegating responsibility to municipalities, retained specific obligations that were not met.

3. Reynolds v. Giuliani: Applying "Supervisory Liability" Doctrines

At least one court has directly inferred a duty on the part of states to supervise at least some delegations of power to municipalities. In *Reynolds v. Giuliani*, the Second Circuit heard an appeal from a suit against New York City and New York State for improper denial of Food Stamp Act and Medicaid Act benefits. These Acts authorized states to delegate responsibility for the day-to-day administration of the benefit programs to localities[94] and gave specific supervisory duties to the states that chose to delegate.[95] Following protracted litigation, the district court found that both defendants were liable for the alleged failure of administration, and ordered New York

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93. Armstrong v. Brown, 857 F. Supp. 2d 919, 937 (N.D. Cal. 2012), *order enforced* (Aug. 28, 2012), *order aff'd, appeal dismissed*, 732 F.3d 955 (9th Cir. 2013) ("The Court finds that the harm experienced by class members is caused not only by Defendants' statewide policies (or lack thereof) regarding the housing of *Armstrong* class members in county jails, but also by Defendants' ongoing failure to train, supervise, and monitor CDCR employees and agents concerning their responsibilities, ongoing failure to communicate with county jails regarding the known needs of class members, and ongoing failure to take responsibility for and to assert influence over county jails through contracts, regulations, letters, meetings, or other communications. The Court therefore finds that only system-wide injunctive relief could prevent *Armstrong* class members from experiencing future ADA violations when housed in county jails.").

94. *See* 7 U.S.C. § 2012(n) (1999) (defining State agency to include counterpart local agencies "in those States where such assistance programs are operated on a decentralized basis"); 42 U.S.C. § 1396a(a)(5) (2003) (requiring each state to designate a "single State agency" to "administer or to supervise the administration of [the State's] plan").

95. *See, e.g.*, 7 C.F.R. § 275.5 (2007) (making delegating states responsible for monitoring and evaluating local agencies' performances); 42 C.F.R. § 435.903(a) (2006) (requiring delegating state agencies to monitor "the adherence of local agencies to the State plan provisions").

City to comply with state and federal laws and regulations. In the judgment, the state defendants were directed to conduct specific monitoring and evaluation of New York City's compliance with the applicable laws.[96]

On appeal, the state defendants argued that "whatever injury plaintiffs . . . suffered as a result of a violation of their rights under [the Food Stamp and Medicaid] Acts [was] a subject for redress from the City of New York," and that the state defendants were not liable for the actions of the city.[97] The plaintiffs argued that the state defendants were liable under 42 U.S.C. § 1983 either because (a) state policies or customs had resulted "in the violation of plaintiffs' federal rights," or (b) state defendants had a non-delegable liability for compliance with federal welfare laws.[98]

With respect to the second argument, the court concluded that applying the "non-delegable duty theory" from *Henrietta D.* would impose "*de facto respondeat superior* liability" on the state defendants—a result already rejected by the Supreme Court in the § 1983 context.[99] However, the court seemed to take the first argument seriously. The court applied § 1983's *Monell* doctrine, first articulated in *Monell v. Department of Social Services of the City of New York*, which holds supervisors or policymakers liable for deliberate indifference to violations of federal rights by their supervisees.[100] Although the court ultimately concluded that the plaintiffs had not met the burden of proof required for § 1983 liability under *Monell*, it did not accept the state defendants' assertion that such liability was impossible. The court instead conducted an extensive inquiry into the associated facts, treating the state defendants as "policymakers" or "supervisors" *vis a vis* the municipality.[101]

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96. Reynolds v. Giuliani*,* 506 F.3d 183, 189 (2d Cir. 2007).

97. *Id.*

98. *Id.* at 190.

99. *Id.* at 193–94; *see also* City of Canton, Ohio v. Harris, 489 U.S. 378, 392 (1989) (rejecting the imposition of *de facto respondeat superior* liability on municipalities); Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 693–94 (1978) (concluding that § 1983 did not impose *respondeat superior* liability on government actors and expressing doubt that such an imposition would be constitutional).

100. *Reynolds*, 506 F.3d at 193.

101. *Id.* at 195–97.

Reynolds provides a substantially different model for understanding state liability towards individuals whose rights are violated by municipalities acting with delegated state power. Under *Henrietta D.* and the "non-delegation" cases, individual plaintiffs seeking state action must prove that the delegating state had guaranteed federal rights, and that the municipal delegatee had not vindicated those rights.[102] Under *U.S. v. Missouri*, plaintiffs must prove that the delegating state retained specific unmet federal obligations, independent of municipal violations.[103] However, while the standards are different, both cases required explicit state obligations: either a quasi-contractual obligation under the Spending Clause,[104] or a retained obligation to "conduct a general program" that vindicates the violated rights.[105] *Reynolds v. Giuliani* outlines another, less explicit obligation—the obligation of states to "supervise" municipalities to which they delegate discretion. By applying an approach that leans on constitutional tort law and treating delegation as supervisory "policy or custom,"[106] *Reynolds v. Giuliani* provides a way to articulate the extent of state liability even in the absence of specific state obligations.

B. Academic Theories of Liability

Prior scholarship has attempted to categorize state/municipal liability cases based on a number of factors. Professor Justin Weinstein-Tull's 2017 survey of the field points to a handful of different justifications used by courts, but concludes that so far the courts have generated "an incoherent set of opinions."[107] He notes that cases can be divided along a number of axes, distinguishing between (1) statutory and constitutional duties, (2) whether the duties are general or directly targeted towards states, (3) how compliance with the federal duties in question is funded, and (4) the cause of action that brings the case to

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102. *See supra* Part II.A.1 (outlining the "non-delegation" cases).

103. *See supra* Part II.A.2 (describing the approach articulated in *U.S. v. Missouri* and similar cases).

104. Henrietta D. v. Bloomberg, 331 F.3d 261, 285–87 (2d Cir. 2003); *see supra* text accompanying note 64 (describing the Second Circuit's quasi-contractual approach in *Henrietta D.*).

105. United States v. Missouri, 535 F.3d 844, 850 (8th Cir. 2008); *see supra* text accompanying note 87 (describing Missouri's obligations under the NVRA).

106. *Reynolds*, 506 F.3d at 190; *see supra* text accompanying notes 94–101 (discussing the holding in *Reynolds*).

107. Weinstein-Tull, *supra* note 15, at 893–94.

court.[108] However, Weinstein-Tull makes little attempt to link his proposed theoretical approach to existing doctrines. "[T]he doctrine courts use to resolve abdication arguments, to the extent it exists at all," he concludes, "is more a collection of vague arguments than a stable set of principles."[109] Another approach categorizes state/municipal liability cases based on outcome – whether or not the court found states liable for the actions of municipalities.[110] This approach places opinions in rough groups that either "rely on the idea that the state should not be able to insulate itself from liability arising from responsibilities delegated to the city" or "rely on the intuition that protecting the state from liability will promote local autonomy."[111]

Despite the difficulty of categorizing existing opinions, legal scholars have proposed several models to unify state/municipal liability doctrine. Citing broad concerns with the use of delegation by states to escape their federal responsibilities, Weinstein-Tull argues for what he calls a "nonabdication" doctrine.[112] Other authors propose "that the state be vicariously liable only for city actions that the state has mandated that the city perform."[113] Finally, there is the argument that states should be held strictly liable for municipal violations of federal rights. This Section analyzes these three theories.

1. "Nonabdication doctrine"

One of the more compelling alternate standards that has been proposed is what Weinstein-Tull calls a "nonabdication" doctrine. This doctrine would require courts, in evaluating state abdication arguments, to first look at whom the relevant federal law gives responsibility to, and then hold that party liable for any noncompliance with the federal law.[114] In cases where the target of the federal law is

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108. *Id*. at 864–66.

109. *Id*. at 868.

110. *See generally* Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1039–42 (describing how, in the specific context of respondeat superior, no general jurisprudential consensus exists but most cases can be grouped on whether the court decided to insulate the state from liability).

111. *Id.* at 1039–41.

112. *See generally* Weinstein-Tull, *supra* note 15, at 839 (arguing that in order to promote effective enforcement of federal laws, courts should reject state arguments that enforcement responsibility lies solely with local government).

113. Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1054.

114. Weinstein-Tull, *supra* note 15, at 894–98.

unclear, courts would hold states responsible for local actors when the local actors have acted as agents in the administration of a state-ordered program.[115] Other authors have proposed a similar approach on efficiency grounds, arguing that "[t]he broad extension of vicarious liability to the state can . . . help ensure that the state has the appropriate incentives to minimize the losses associated with public undertakings."[116] This mirrors the courts' inquiries in "non-delegation" cases like *Henrietta D.* and *Armstrong I*, in which state remedies were ordered in response to individual violations of rights, regardless of state/municipal delegation.[117]

This approach remedies what many have seen as the core injustice of state/municipal delegation—the ability of states to reduce their own obligations and liability towards their citizens by delegating responsibility to municipal policymakers.[118] A nonabdication doctrine approach addresses concerns about the delegation of powers to local governments with narrow constituencies[119] by allowing Congress or the courts to assign responsibility without crafting elaborate assignments of liability for each state's internal structures.[120] While this doctrine is described as a "nonabdication" doctrine, it preserves the states' capacity to delegate responsibility for the administration of programs to whatever entities they choose, as long as they are willing

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115. Weinstein-Tull cites the Eighth Amendment as an example of a federal right that does not distinguish between state and municipal actors. *Id.* at 898.

116. Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1049.

117. *See supra* note 75 (highlighting cases in which states were held liable for municipal violations of individual rights, without inquiry into the adequacy of their delegations).

118. *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 648 (1983) ("[A] state or state instrumentality certainly should not be allowed to prevent desegregation by invoking the state's own delegation of autonomy to local school boards when the state has used its very power over localities to facilitate segregation.").

119. *See* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1868 (1994), who notes that although "[t]he legitimacy of power residing in one democratically governed body does not guarantee the legitimacy of that body's delegation of power to another body, especially if the delegate is a narrow sub-part of the body originally holding power," the Supreme Court has treated delegations of state decision-making powers to municipal decision makers as unproblematic.

120. *Cf.* U.S. v. Missouri, 535 F.3d 844, 848–50 (8th Cir. 2008) (describing the National Voter Registration Act's complex scheme that imposes "different levels of obligations for various requirements" in the statute).

to accept liability for those entities' actions.[121] Finally, this policy incentivizes states to delegate federal responsibilities only when the delegatee can effectively vindicate federal rights, and to provide resources alongside delegations of responsibility.[122]

However, this doctrine presents some clear disadvantages. First, Weinstein-Tull is unclear about what form state liability would take, absent a failure of state policy. Weinstein-Tull acknowledges that "[t]his approach may result in state liability for local conduct that state officials feel they have little control over," but suggests that, at worst, increasing the number of organizations responsible for federal law would allow that law to be more easily enforced.[123] A "nonabdication" doctrine may in fact hurt federal rightsholders. In the context of government liability, neither injunctive liability nor damages liability is likely to have straightforward deterrent effects when applied to a network of state actors, municipal actors, and street-level bureaucrats. A study of Washington State's governmental liability laws, which can be described as "forc[ing] program improvements by penalizing government conduct and policies," noted that governments rarely have the same flexibility as private actors to reduce risks, and that their response to liability is limited by the fact that "staff, resources, and level of service are largely fixed by budgets and statutes."[124]

It is also unclear what effect shifting the burdens of remedying constitutional torts will have. Professor Daryl Levinson argues that "[g]overnment actors respond to *political* incentives, not *financial* ones–votes, not dollars,"[125] and increasing a government's financial liability will not predictably result in a reduction of rights

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121. *See* Cooper v. Aaron, 358 U.S. 1, 17 (1958) (citing court decisions noting the importance of a state's prerogative to structure its internal administration).

122. *See* Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1048 (arguing that a doctrine imposing liability on the state, regardless of who they delegate authority to, encourages delegating states to "provid[e] the corresponding means for the city to perform these functions at an optimal level."); *see also* Briffault, *supra* note 28, at 20 (noting that dramatic differences in the resources available to local governments can result in significant inequities in local administration).

123. Weinstein-Tull, *supra* note 15, at 898.

124. Michael Tardif & Rob McKenna, *Washington State's 45-Year Experiment in Governmental Liability*, 29 SEATTLE U. L. REV. 1, 46–47 (2005).

125. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000) (alteration in original).

violations.[126] While Professor Myriam Gilles argues that governments *will* react in response to liability suits, the argument rests on the fact that current governmental liability doctrines are *not* vicarious, and require "fault-fixing" that makes politically motivated actors more likely to respond.[127] Nonabdication doctrine requires no finding of fault, and it is not clear that voters will force state actors to account for municipal decisions. In fact, centralizing liability might diminish the extent to which local agents internalize the political costs of their own negligence[128]—that is, local political actors like county sheriffs may feel less political pressure to avoid violating individual rights when they carry out state programs if they know that any related lawsuit will ultimately be characterized as the state's problem.

Both Gilles and Levinson argue that injunctive relief is crucial to remedying violations of federal rights.[129] However, dramatically broadening the scope of injunctive relief, as Weinstein-Tull proposes, may in fact deter its use. A rule holding states liable for every breach of federal rights by a municipal employee might impose significant costs on non-violating municipalities and employees. The higher cost of broader injunctive relief (an injunction requiring state-mandated standards for *all* county public defenders, rather than a change in the standards of one violating county, for instance) may make courts reluctant to grant injunctive relief at all.[130] In any case, courts have placed a large value on municipal autonomy.[131] The Supreme Court's defense of municipal decision-making independence in *Milliken*

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126. *Id.* at 384–87 (arguing that it's hard to determine how a system of street-level government employees governed by political actors and mediated by a managing bureaucracy will react to traditional tort incentives).

127. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 858–65 (2001).

128. Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1051.

129. Levinson, *supra* note 125, at 416–17; Gilles, *supra* note 127, at 875–76.

130. Gewirtz, *supra* note 118, at 604 ("Where effective remedies conflict with . . . interests that are not relevant to the question of whether a right has been violated," consideration of those interests might "override the value of remedying violations of the right." The larger the scope of injunctive relief, the more those third-party interests create "pressure to accept constraints on relief"); *see also* Levinson, *supra* note 125, at 417 (noting that injunctive "[s]tructural reform brings enormous difficulties and costs . . . and may only be worthwhile in circumstances of severe and pervasive government wrongdoing.").

131. *See* Ford, *supra* note 119, at 1875–77 (discussing the Court's deference to local autonomy).

represents a determination that remedying widespread segregation was not worth the chilling effect of broad injunctive relief on municipal autonomy. [132] This prioritization of municipal autonomy makes Gewirtz's "third-party constraints" all the more likely to weigh against injunctive relief if the relief is necessarily broad.[133]

Finally, in the absence of explicit federal duties it remains unclear how Weinstein-Tull's agency theory would actually work. Typical ideas of "agency" aren't clearly applicable to state/municipal relationships,[134] and it's not obvious where the boundaries of municipal agency lie.[135] Under *Hunter,* the state retains a theoretically limitless amount of control over the "work" of a city, and under traditional theories of agency "[t]he scope of the city's employment, and therefore of the state's vicarious liability, would be effectively boundless."[136] Weinstein-Tull proposes allocating liability to states when localities are acting as agents in the administration of a state-ordered program,[137] but almost any municipal activity could be interpreted as occurring under a state-ordered program. Such an expansive liability standard could constrain municipal decision-making across all areas – not just those obviously implicating federal rights.

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132. Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) (finding that "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and the quality of the educational process."); *see also* Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2014–16 (1998) (noting that any decision "must balance . . . costs of overdeterrence against the benefits of compensation, loss-spreading, prevention, and respect for the rule of law").

133. *See* Gewirtz, *supra* note 118, at 605.

134. Ford, *supra* note 119, at 1864 ("Local government exists in a netherworld of shifting and indeterminate legal status. Although local government is officially defined as a mere delegate of state authority, at times the law treats local governments as autonomous "city-states" with rights against outsiders and against centralized authority."); *see also* Briffault, *Our Localism*, *supra* note 28, at 8 ("A local government is like a state administrative agency, serving the state in its narrow area of expertise, but instead of being functional specialists, localities are given jurisdictions primarily by territory . . . ."). Briffault, however, goes on to discuss the nuances that make simple theories of agency poor descriptors of state/municipal relationships.

135. *See* Buck v. State, 96 N.Y.S.2d 667, 673 (Ct. Cl. 1950) (discussing when and whether a New York school district can be said to be an agent of New York State).

136. Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1053; *see also supra* note 26 and discussion (holding that the State has complete control over municipal corporations and the powers conferred on them).

137. Weinstein-Tull, *supra* note 15, at 897.

2. Vicarious Liability for City Actions Mandated by the State

Another suggested rule is "that the state be vicariously liable only for city actions that the state has mandated that the city perform."[138] This rule would hold states liable for delegations that require specific actions, regardless of whether state or federal law makes those actions non-discretionary.[139] There are two main advantages to this approach. First, this policy avoids the tangled incentives created by a "nonabdication" doctrine.[140] Instead, it presents what is, on the surface, a clear delineation of liability and incentives: states are responsible for the things that they explicitly tell municipalities to do; municipalities are responsible for acts taken of their own initiative. Although Levinson's arguments about the limits of relief against government actors are still relevant,[141] political as well as financial and injunctive pressures might be applied under this model because, although it is *described* as "vicarious liability," state liability for the consequences of acts the state *requires* the city to perform fits naturally into Gilles' "fault-fixing" framework.[142] Second, this policy conforms to judicial norms prioritizing local autonomy, and avoids running into the boundaries set by *Milliken*.[143] This adherence to precedent means that a lower court, without opposing a long-standing Supreme Court ruling, could immediately apply such a policy in a practical setting.

Still, this rule has its own flaws. Most crucially, this policy seems to assume a very straightforward relationship between states and municipalities, with states either mandating action or allowing discretion. In the absence of such a direct relationship, however, it's not at all clear how such a policy would be applied.

Take, for example, *Armstrong*, the litigation about the rights of disabled parolees in California's county-run prisons. In *Armstrong*, California revoked prisoners' parole and assigned them to the

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138. Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1054.

139. *Id.*

140. *See supra* notes 117–22 and accompanying text.

141. *Supra* notes 124–27 and accompanying text.

142. *See supra* note 127 and accompanying text.

143. *See supra* Part I.C. *See also* Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1055 (discussing the priority this model places on local autonomy).

jurisdiction of county facilities without telling the facilities about the parolees' disabilities, and, as a result, municipal prison employees refused to accommodate those disabilities.[144] Although California mandated the parolees' imprisonment, municipal negligence combined with state inaction resulted in the violation of those prisoners' rights. Similarly, in *Tucker v. State*, the Idaho Supreme Court noted that Idaho had assigned the task of public defense to its counties, but had given the counties broad discretion in fulfilling that task.[145] Although the plaintiffs in *Tucker* alleged that every Idaho county had failed to provide adequate defense, if one county had succeeded by adopting reasonable measures and the others had adopted cheaper, ineffective systems because they couldn't afford more robust ones, the violation of federal rights would have plausibly sprung from either the state's delegation of a non-discretionary duty or the municipality's abuse of its delegated discretion. Without a clear way to distinguish between situations in which a municipality is exercising discretion and situations in which a state is mandating a specific course of action or outcome, the core virtues of this approach are undermined—the delineation of liability and incentives between state and municipal actors becomes muddled, and the policy becomes much more complicated to adjudicate.

3. The Road Not Taken: Strict Liability for the Unconstitutional Actions of Cities

Finally, there is a theoretical approach that courts notably *have not* taken—finding states liable to remedy *all* municipal actions in violation of federal law under the theory that, from the perspective of the United States Constitution, they are agencies of the state.[146] Since the landmark case *Hunter v. City of Pittsburgh*, courts have regularly ruled that, from a federal constitutional perspective, "[m]unicipal corporations are political subdivisions of the state," and the state has complete authority to expand or contract the authority of those subdivisions.[147] Additionally, it is a well-established principle

144. *See supra* note 93 and discussion (introducing the *Armstrong* litigation).

145. *See supra* Introduction.

146. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062 (1980) ("Cities have only those powers delegated to them by state government . . . . Moreover, city authority exercised pursuant to unquestionably delegated powers is itself subject to absolute state control.").

147. Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907).

that the restrictions the Constitution places on the exercise of state power apply to any possible exercise or delegation of that power.[148] It has been argued that, following the logic of *Hunter*, "states cannot justify their failure to review local government policies on the grounds that local governments are autonomous, because local government policies, are, for constitutional purposes, state policies."[149]

While the Supreme Court has clearly rejected state-level remedies for violations of federal rights by municipal decision makers,[150] a number of authors have argued that this boundary-driven,[151] fault-based approach is insufficient to protect against institutional violations of rights.[152] Under *Hunter*, courts have recognized that states have the ability to reshape municipal powers and even boundaries.[153] Given the extent of state power and the pervasiveness of state regulations of municipalities, state *inaction* in the face of municipal constitutional harms might reasonably be considered a sufficient basis for requiring the state to remedy those

148. Standard Computing Scale Co. v. Farrell, 249 U.S. 571, 577 (1919) (stating that "the protection of the federal Constitution applies, whatever the form in which the legislative power of the state is exerted; that is, whether it be by a Constitution, an act of the Legislature, or an act of any subordinate instrumentality of the state exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission"). *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 16–17 (1958) (holding that, because the Fourteenth Amendment restricted the actions of the states and because states can only act through agents and agencies, the Fourteenth Amendment applied to the actions of any person "clothed with the State's power.").

149. Ford, *supra* note 119, at 1865. Ford goes on to note, however, that the Supreme Court's jurisprudence has not been driven by *Hunter's* logic in the desegregation context. "If cities were mere agents of state power . . . [t]he state as a whole would therefore bear responsibility for remedying the discriminatory practices: an apportionment of blame and responsibility within the state would be arbitrary and any such apportionment that hindered effective desegregation would be unacceptable." *Id*. at 1875.

150. *See supra* Part I.C.

151. Daniel Kiel, *The Enduring Power of Milliken's Fences*, 45 URB. LAW. 137, 138 (2013) ("To many commentators, district boundaries made sacrosanct by *Milliken* represent a major impediment to confronting the persistent gap in educational opportunity.").

152. *See generally* Susan Bandes, *Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct*, 68 BROOK. L. REV. 1195, 1207 (2003) (criticizing the application of notions of individual moral blame to institutional reform litigation).

153. *See supra* note 26 and accompanying text.

harms.[154] Allowing courts to require a statewide response to *any* municipal violation of federal rights would ignore the Supreme Court's rejection of governmental *respondeat superior*.[155] However, principles of governmental *respondeat superior* could dramatically increase the effectiveness of street-level government administrators[156] and would place the task of remedying "systematically preventable constitutional harm[s]" on the actors best positioned to make systematic changes.[157]

A standard imposing strict vicarious liability on states for municipal violations of federal rights is unlikely to emerge, given the Supreme Court's current doctrines. However, it represents an interesting extreme—the complete displacement of cities from federal rights laws.

III. APPLYING 42 U.S.C. § 1983 "SUPERVISORY LIABILITY" STANDARDS TO STATE/MUNICIPAL DELEGATION

All of the approaches described in Part II represent attempts to strike a compromise between treating municipalities as agencies of the state or autonomous quasi-sovereign lawmakers, while balancing the vindication of federal rights with respect for local autonomy. Although each theoretical model has its virtues, courts have started to apply a far more nuanced approach than any of the proposed academic theories.

The Second Circuit's treatment of the state/municipal relationship in *Reynolds v. Giuliani* subtly resolved the tension between autonomy and agency. A contemporary analysis in the *Harvard Law Review* noted the novelty of applying § 1983 standards for determining the extent of municipal liability for the actions of

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154. Bandes argues that tying state liability for constitutional harms to state actions that increase the harms "insulates government from responsibility for its complicity, or its contribution to constitutional injury. In state action language, the question should not be simply whether the harm would have occurred without private action, but whether the government's acquiescence in that action infringed constitutional rights." Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2292–93 (1990).

155. *See infra* Part III.A.

156. *See* Note, *Government Tort Liability*, *supra* note 132, at 2018 (arguing that individual liability for government officers results in those officers "engag[ing] in self-protective behavior at the cost of vigorous performance of their duties.").

157. *Id.* (arguing that governments as a whole are better positioned to address "systematically preventable" official misconduct than individual administrators).

public employees to state/municipal liability.[158] However, the paper went on to frame the *Reynolds* court's discussion of *respondeat superior* as an attempt to reconceptualize the relationship between states and municipalities in a "principle-agent" context.[159] While intellectually interesting, this analysis misses the more immediate significance of *Reynolds* by mischaracterizing § 1983 "supervisory liability" as a doctrine of *vicarious* liability. The court in *Reynolds* did not simply analyze New York State's vicarious responsibility for New York City's actions without further inquiry. Rather, in *Reynolds*, the Second Circuit explicitly accepted a concept that could form a guiding principle for state/municipal abdication cases: that a state could be liable for facially valid delegations of power from states to municipalities if the state's supervision of that delegation (or lack thereof) demonstrated deliberate indifference to municipal violations of federal rights.[160]

Part III of this Note proposes that courts should adopt a standard for judging state supervision of municipal delegations that is analogous to "supervisory liability" under 42 U.S.C. § 1983. Specifically, a state officer's action or inaction should be considered a violation of federal law for the purposes of applying the *Ex parte Young* doctrine when their supervision of delegated municipal power demonstrates a deliberate indifference to municipal violations of federal rights.[161] This Part outlines § 1983's supervisory liability standards, examines recent state/municipal delegation cases through the lens of supervisory liability, and makes a normative argument for the adoption of § 1983's supervisory liability standards to govern state/municipal delegation.

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158. Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1041–42 ("While it is not clear that a doctrine governing municipal liability would have any bearing on the question of the liability of a state for the actions of a municipality, the Second Circuit saw the issue as being entirely straightforward."). Weinstein-Tull, on the other hand, notes *Reynolds* largely as an example of a court accepting an "abdication" argument from a state. Justin Weinstein-Tull, *supra* note 15, at 867–68.

159. Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1043–44.

160. Reynolds v. Giuliani, 506 F.3d 183, 192–93 (2d Cir. 2007).

161. *See infra* notes 190–91 and accompanying text (describing the doctrine of Ex parte Young, 209 U.S. 123 (1908)).

A. Understanding "Supervisory Liability" Under 42 U.S.C. § 1983

Before discussing the applicability of §1983's "supervisory liability" standards to state/municipal delegations, it is important to define the nature of this liability. 42 U.S.C. § 1983 is a widely used statute designed to allow courts to enforce federal rights in the face of state infringement.[162] Section 1983 creates a federal cause of action for relief against any person who, acting under color of state law, deprives another person of rights afforded to them by the Constitution or federal statutes.[163] While § 1983 can be applied to public officials, the Supreme Court has noted that § 1983 does not itself override the states' sovereign immunity,[164] and that neither a state nor a state official acting in their official capacity is subject to suit under §1983.[165]

One of the most misleading characterizations of § 1983 decisions finding municipalities liable for the actions of their employees is that the decisions represent a standard of *vicarious* liability. The Supreme Court has vigorously rejected reading any kind of vicarious liability into § 1983. In *Monell v. Department of Social Services of New York* the Supreme Court held that although a local government might be held liable under § 1983 for "monetary, declaratory, or injunctive relief" in response to their employees violation of federal rights, liability attaches only when the employee's actions were caused by the policies or customs of the municipality.[166]

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162. *See* Monroe v. Pape, 365 U.S. 167, 173 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658 (1978) (discussing the legislative purpose behind the creation of § 1983).

163. 42 U.S.C. § 1983 (1996).

164. *See* Edelman v. Jordan, 415 U.S. 651, 677–78 (1974) (holding that, unless sovereign immunity was specifically waived or abrogated, claims under § 1983 were governed by the doctrine of *Ex parte Young*); *see also* Quern v. Jordan, 440 U.S. 332, 341 (1979) ("[N]either the reasoning of *Monell* or of our Eleventh Amendment cases subsequent to *Edelman*, nor the additional legislative history or arguments set forth in Mr. Justice BRENNAN's concurring opinion, justify a conclusion different from that which we reached in *Edelman*.").

165. Will v. Mich. Dept. of State Police, 491 U.S. 58, 66, 71 (1989). However, the Court in *Will* noted that suits for prospective injunctive relief against state officers are not considered actions against the state, and so do not implicate state sovereign immunity. *See id.* at 71 n.10. For more discussion of the circumstances in which § 1983 applies to states, see IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1.8, Westlaw (database updated June 2018).

166. *Monell*, 436 U.S. at 694–95 ("We conclude . . . that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether

The Court elaborated on *Monell* in *City of Canton v. Harris*, holding that municipal *inaction* could also result in municipal liability under § 1983 when the municipality's failure to train or supervise its employees amounted to "deliberate indifference to the rights of persons with whom [those employees] come into contact."[167]

Standards for supervisory liability under 42 U.S.C. § 1983 are currently in flux, following the Supreme Court's holding in *Ashcroft v. Iqbal.* In *Iqbal*, the Supreme Court held with respect to *Bivens* liability that:

> Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.... [b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution. The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.[168]

Many, including Justice Souter in his dissent, have interpreted this as a complete elimination of "supervisory liability" for acts in which the supervisor was not personally involved.[169] However, the circuit courts have taken a variety of approaches,[170] and "absent further clarification from the Supreme Court, the decision need not be interpreted as a wholesale rejection of the lower courts' approach to

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made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

167. City of Canton v. Harris, 489 U.S. 378, 388 (1989).

168. Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009).

169. *Iqbal*, 556 U.S. at 691–95 (Souter, J., dissenting); *see also* Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29, 53 (2010) (acknowledging Justice Souter's claim in his dissent that supervisory liability was eliminated by the majority's reasoning in *Iqbal*).

170. *See* William N. Evans, *Supervisory Liability After* Iqbal*: Decoupling* Bivens *from Section 1983*, 77 U. CHI. L. REV. 1401, 1402–03 (2010) ("The Seventh and Tenth Circuits have followed *Iqbal*'s express language by abandoning supervisory liability entirely under both § 1983 and *Bivens*. The Ninth Circuit has . . . apparently construe[d] *Iqbal*'s discussion as dicta."). *See also* William N. Evans, *Supervisory Liability in the Fallout of Iqbal*, 65 SYRACUSE L. REV. 103, 107 (2014) (noting that *Iqbal* can be and has been plausibly interpreted in a number of ways).

supervisory liability."[171] *Iqbal* might plausibly be interpreted as nothing more than an emphatic restatement of *Monell*'s principle that "government officials should be held liable only for their own constitutional wrongdoing."[172] As of today, in the context of "failure to supervise" claims, most circuits post-*Iqbal* require "evidence that the defendant had knowledge of a pattern of constitutional wrongdoing or ignored an obvious risk."[173]

Despite this debate, all of these holdings attribute municipal liability under *Monell* and its progeny not to the municipality's relationship with its employee, but rather to the acts of the municipality itself. As the court in *Reynolds v. Giuliani* put it, "*Monell*'s policy or custom requirement is satisfied where a local government is faced with a pattern of misconduct and does nothing, compelling the conclusion that the local government has acquiesced in or tacitly authorized its subordinates' unlawful actions."[174] Setting aside the ultimate fate of supervisory liability, some courts have approached state/municipal delegation as if they were applying supervisory liability based on a "deliberate indifference" standard. As a practical matter, most state defendants in state/municipal delegation cases have knowledge of municipal deficiencies well before any litigation,[175] and it is not clear that the resolution of *Iqbal*'s ambiguity one way or the other would affect the application of supervisory liability standards to state/municipal delegations.

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171. Kit Kinports, Iqbal *and Supervisory Immunity*, 114 PENN ST. L. REV. 1291, 1314 (2010).

172. Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in A Post*-Iqbal/Connick *World*, 47 HARV. C.R.-C.L. L. REV. 273, 276 (2012) ("[S]upervisors who fail to train, supervise, or discipline subordinates have breached their constitutional duty. In addition, when supervisors 'cause the deprivation' of federal rights by improperly training, supervising, or disciplining their subordinates, their wrongdoing is an abuse of government power that violates substantive due process.") (quoting County of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998)).

173. IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, 1 STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:5, Westlaw (database updated June 2018).

174. Reynolds v. Giuliani, 506 F.3d 183, 192 (2nd Cir. 2007).

175. *See*, *e.g.*, *supra* notes 1–11 and discussion (laying out the notorious failings of Idaho's county-run public defense systems).

B. Framing Existing Jurisprudence Through a Supervisory Liability Lens

In the absence of complex federal remedial schemes, many courts seem to have conducted something like a § 1983 "supervisory liability" inquiry to determine whether states are responsible for violations of federal rights by municipal delegatees. After identifying a state official with a duty related to the rights violations, these courts look for (1) a pattern of misconduct by localities, (2) inaction or dramatically insufficient action on the part of state authorities to remedy that misconduct, and frequently (3) an explicit state denial of responsibility for remedying municipal misconduct—acquiescence per se.[176]

The *Armstrong* litigation surrounding the rights of disabled Californian prisoners provides an almost perfect example of the "deliberate indifference" standard being applied to a state's delegation of power. The plaintiffs in *Armstrong* claimed that California's treatment of disabled prisoners was "violative of the [Americans with Disabilities Act], the [Rehabilitation Act], and the Due Process Clause of the Constitution." [177] Throughout the next nineteen years of litigation, the prisoner-plaintiffs demonstrated that California's county jails' denials of accommodations to prisoners were "systemwide and extensive." [178] However, instead of remedying these denials, California engaged in extensive legislative "realignment," with the apparent goal of disclaiming responsibility for at least some of those

176. *See, e.g.*, Harkless v. Brunner, 545 F.3d 445, 457–58 (6th Cir. 2008) (looking to Ohio laws that explicitly gave the state defendants duties related to the supervision of localities, even though those localities had independent and parallel duties under state law); Tucker v. State, 394 P.3d 54, 62–64 (Idaho 2017) (noting that although Idaho's Constitution placed counties entirely in charge of providing public defense, Idaho bore ultimate responsibility for the provision of counsel under the Sixth Amendment of the United States Constitution and state officials had some power to affect county public defense schemes); s*ee infra* notes 181, 189–90 and accompanying text (outlining the requirements of a claim brought under *Ex parte Young*).

177. Armstrong v. Schwarzenegger, 622 F.3d 1058, 1063 (9th Cir. 2010) (summarizing the history of the case since 1994).

178. Armstrong v. Brown, 732 F.3d 955, 960 (9th Cir. 2013) (noting that the denial of mobility devices, tapping canes, and other accommodations left disabled prisoners in "the vulnerable position of being dependent on other inmates to enable them to obtain basic services, such as meals, mail, showers, and toilets.").

disabled prisoners.[179] Noting that the state defendants were "well aware of the history of ADA violations and degradations visited on parolees in county jails," the Ninth Circuit directly analogized California's actions to previous cases where a deliberate indifference standard was applied to state delegators.[180] In a somewhat exasperated holding, the court ruled that "the state cannot house persons for whom it is responsible in jails where the state reasonably expects indignities and violations of federal law will continue to occur, turn care over to county custodians, and then disown all responsibility for their welfare."[181]

The remedies ordered in *Armstrong* are entirely consistent with the idea that California was liable for inadequacies in its supervision of its delegations, rather than the actual violations of county delegatees. The district court ordered California to 1) communicate information about known parolee disabilities to the county prisons directly responsible for their welfare, 2) establish a system that allowed parolees to report county misconduct, 3) review misconduct reports for "patterns of non-compliance," and 4) notify counties about these patterns and suggest possible remedies.[182] This structure suggests that the court's goal was to hold California liable for remedying systemic inadequacies, rather than individual county violations of federal rights, because the nature of the state-level remedies focused on communication, monitoring, and reporting about county practices rather than the direct administration or regulation of parolee detention facilities.

In *Tucker v. State*, the Idaho Supreme Court engaged in a very similar inquiry. Noting that (1) the Idaho Public Defense Commission (PDC) was aware of systemic inadequacies in the public defense systems of multiple counties, and (2) the PDC had the power to regulate training and caseload requirements for county public defenders, but had refused to do so, the court held that injuries caused by deficiencies in the county-run public defense schemes were "fairly

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179. *See* Cal. Penal Code § 3056 (West 2012) ("[w]hen housed in county facilities, parolees shall be under the sole legal custody and jurisdiction of local county facilities.").

180. *See* Armstrong v. Brown, 732 F.3d at 961 (citing Tamas v. Dep't of Soc. & Health Servs., 630 F.3d 833, 844 (9th Cir. 2010) (applying a deliberate indifference standard to determine state liability for its assignment of custody to an abusive foster parent)).

181. *Id.* at 961–62.

182. *Id.* at 962.

traceable to the PDC."[183] The remedies suggested by the court in *Tucker* also point to concerns about the state's supervision of its delegation. While *Tucker* has not yet been adjudicated on the merits, the Idaho Supreme Court held that creating statewide "(1) training requirements for public defenders; and (2) caseload and workload reporting requirements" had "a substantial likelihood of remedying the injuries alleged."[184]

This approach has been supported in a number of other contexts.[185] Even *Milliken v. Bradley*[186] can fit into the "supervisory liability" framework. In *Milliken*, the Supreme Court rejected a district court proposal to remedy segregation in Detroit schools by restructuring the organization of regional school districts.[187] Although the Supreme Court certainly did not have § 1983 supervisory liability in mind when they limited the injunctive relief in *Milliken*,[188] their rejection of this remedy focused on whether the state's initial structuring of the local school districts demonstrated either an intent to segregate the districts or an indifference to widespread patterns of local segregation. Accepting *arguendo* that Michigan bore some responsibility for the segregation of school districts in Detroit simply because the districts were political subdivisions of the state, the Court refused to order an interdistrict remedy without a finding that either

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183. Tucker v. State, 394 P.3d 54, 66–67 (Idaho 2017). It is worth noting that in *Tucker v. State* the Idaho Supreme Court held that the Governor of Idaho's "general duty to enforce state law does not establish causation" necessary to meet the traditional requirements of standing. *Id.* at 66. Although the court makes no mention of the case, this approach is consistent with the doctrine of *Ex parte Young*, which holds that a general duty to enforce state law does not allow a state official to be sued absent a specifically challenged action. *See* Richard D. Freer & Edward H. Cooper, *Avoiding Sovereign Immunity: The Doctrine of Ex parte Young*, *in* 13 FED. PRAC. & PROC. JURIS. § 3524.3 (Charles Alan Wright et al. eds., 3d ed. 2017).

184. *Tucker*, 394 P.3d at 69.

185. *See, e.g.,* Harkless v. Brunner, 545 F.3d 445, 454–58 (6th Cir. 2008) (noting that state defendants could be liable for their failure to supervise local agencies, even though local agencies had independent state law duties to ensure compliance with the National Voter Registration Act).

186. *See supra* notes 32, 37–49 and accompanying text (discussing Milliken v. Bradley, 418 U.S. 717 (1974)).

187. *Milliken*, 418 U.S. at 744–45.

188. Although the law now known as 42 U.S.C. § 1983 has been in effect since the Civil Rights Act of 1871, modern standards of supervisory liability were not articulated until the Supreme Court's 1978 holding in Monell v. Department of Soc. Servs. of the City of New York, 436 U.S. 658, 694–95 (1978). These standards continue to be modified. *See supra* notes 149–65 and accompanying text.

(1) the delegation itself had a segregative purpose or (2) there was a pattern of segregative effects across districts that demonstrated systemic, interdistrict violations of federal rights.[189] This closely parallels the Court's subsequent insistence that § 1983 "supervisory liability" must spring from the culpable action or inaction of a municipal supervisor rather than the mere fact of their supervisory relationship with a culpable employee.[190] As under the "supervisory liability" standard, the *Milliken* Court explicitly refused to adjust state delegations of power to remedy constitutional violations without assigning some culpability to that delegation itself, even when the court accepted *arguendo* a supervisory relationship between the state and the locality.

C. The Case For Formalizing State/Municipal "Supervisory Liability"

As the previous section argues, existing jurisprudence has laid the groundwork for a standard that judges state supervision of municipal delegations in a way analogous to "supervisory liability" under 42 U.S.C. § 1983.[191] However, this doctrine remains underdeveloped. Courts should formalize a rule of state/municipal liability that uses a "deliberate indifference" standard to judge the liability of state defendants. Under this proposed "supervisory liability" standard, a state officer's action or inaction would be considered a violation of federal law for the purpose of granting injunctive relief under the *Ex parte Young* doctrine when the officer's supervision of delegated municipal power demonstrates a deliberate indifference to municipal violations of federal rights.[192] As an extension of *Ex parte*

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189. *Milliken*, 418 U.S. at 721, 745 ("[A]n interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. . . . Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.").

190. *See supra* notes 161–65 and accompanying text.

191. *See supra* Part III.B (framing existing delegation cases as "supervisory liability" cases).

192. When a federal right has been created but no statutory cause of action allows a plaintiff to vindicate that right, the doctrine of *Ex parte Young* allows plaintiffs to sue state officers to restrain official conduct that violates a federal law. *See* Ex parte Young, 209 U.S. 123, 160 (1908) ("The state has no power to impart to [a state official] any immunity from responsibility to the supreme authority of the United States."); *see also* Freer & Cooper, *supra* note 182, § 3524.3 (discussing the

Young, this standard would not operate when federal law has created a specific remedial scheme, or when state action can be challenged directly through either a voluntary waiver or federal abrogation of state sovereign immunity.[193]

There are four significant benefits to applying "deliberate indifference" as a tool to judge state delegations. First, creating a standard analogous to §1983's "supervisory liability" provides a coherent doctrine with which courts, plaintiffs, and potential state defendants are relatively familiar. Given a growing interest in litigation challenging state delegations of power, a clear and familiar standard would be valuable.[194] By linking state/municipal liability to the heavily litigated § 1983 framework, courts can predictably adjudicate new cases according to existing precedent, guide potential litigants and defendants in assessing the strength of their cases, and avert litigation (and, more importantly, the underlying rights violations) by prompting now-liable state actors to reconsider the structures of their municipal delegations.

Second, this standard only sanctions states when there is a systemic flaw in either the state's initial delegation of power or its

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doctrine of *Ex parte Young*, which "permits a private plaintiff to sue a state actor for prospective relief and, if successful, to stop a state from taking illegal action").

193. The right to injunctive relief under *Ex parte Young* requires: 1) that the state officer have a duty to take the challenged state action; 2) that the state officer's actions violate federal law; 3) that the challenged federal law is the "supreme law of the land," 4) that federal law not have already displaced *Ex parte Young* with an alternate "remedial scheme," 5) that the requested relief does not intrude on certain sovereign interests, and 6) that any grant of relief be prospective rather than retrospective. Freer & Cooper, *supra* note 182, § 3524.3; *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 927–32 (7th ed. 2015) (discussing the general significance and limitations of *Ex parte Young*).

194. It appears that the American Civil Liberties Union has adopted a state-by-state strategy of challenging inadequate municipal systems of public defense through suits alleging something like state deliberate indifference. *See*, *e.g.*, Tucker v. State, 394 P.3d 54, 59 (Idaho 2017) (claiming Idaho's public defense system violated the Sixth and Fourteenth Amendments); Phillips v. State, No. 15CECG02201, 2016 WL 1573199, at *1 (Cal. Super. Apr. 11, 2016) (alleging that Fresno's public defender's office suffers systemic and structural deficiencies); Press Release, American Civil Liberties Union, *ACLU Sues Nevada Over Deficient, Unconstitutional Public Defense System in 11 Rural Counties* (Nov. 2, 2017), https://www.aclu.org/news/aclu-sues-nevada-over-deficient-unconstitutional-public-defense-system-11-rural-counties (on file with author) [https://perma.cc/B7F4-DCBT] (accusing Nevada of failing to meet obligation of providing people with access to legal representation).

oversight of that delegation. It has been argued that increased state liability would have the effect of preventing violations of federal rights.[195] However, applying a clear and firm standard linked to a "fault-fixing" standard like "deliberate indifference" would allow private litigants to effectively pressure state political actors, even outside of the context of injunctive relief.[196] Deliberate indifference, as a middle ground "between strict liability at one extreme and malicious intent . . . at the other," has provided a standard courts feel comfortable applying to governmental actors while adhering to the language of "tort liability" that courts have applied to violations of federal rights.[197] Applying "deliberate indifference" would apply the language of "fault," and let courts restructure state delegations of power that are flawed but less than intentionally violative of federal rights. This standard would expand courts' capacity to hold state-level political actors accountable for "abdicating" their responsibilities to vindicate federal rights,[198] without requiring state-level solutions in the absence of concrete state-level problems.

Third, as described above, this standard provides a significant amount of federal control over the vindication of federal rights.[199] Under this doctrine, the federal government can approach state delegation flexibly. With a standard of "deliberate indifference," federal lawmakers might feel confident in legislating bluntly and placing clearer burdens of enforcement directly on state officials without fear of centralizing liability.[200] Alternately, federal lawmakers would be free to displace this standard at any time with explicit remedial schemes that assign responsibility to whatever actor they feel would be most able to secure federal rights.[201] Either option allows the

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195. *See supra* Part II.B.1 (discussing "nonabdication doctrine").

196. *See* Gilles, *supra* note 127, at 858 (suggesting that applying fault-fixing standards induces government action to remedy problems).

197. Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 LEWIS & CLARK L. REV. 279, 307 (2010).

198. *See supra* Part II.B.1 (discussing the advantages of Weinstein-Tull's proposed "nonabdication doctrine").

199. *See supra* note 182.

200. *See supra* notes 115–24 and accompanying text (discussing the questionable benefits of centralizing institutional liability absent clear "fault-fixing"); *see also* Note, *The State's Vicarious Liability for the Actions of the City*, *supra* note 15, at 1049–52 (discussing the political and administrative costs of centralizing liability).

201. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 74 (1996) (giving deference to a congressionally created remedial scheme over a judicially created

federal government, when creating federal rights, to be confident that those rights will not be dismantled by flawed state/municipal delegations.[202]

Finally, as a normative matter, applying a clearly articulable standard of liability to state/municipal delegations would indicate that courts were beginning to take seriously the principle that a "duty to supervise [is] a necessary structural corollary of the delegation of governmental power."[203] Principles of hierarchical legal accountability underlie the Constitution, and "due process prohibitions on arbitrary uses of governmental power" might require states to be accountable for any delegation of government power. [204] Describing problems associated with privatization of government functions, Professor Gillian Metzger notes that "[a]dequately guarding against abuse of public power requires application of constitutional protections to every exercise of state authority, regardless of the formal public or private status of the actor involved."[205]

A "supervisory liability" standard could potentially hold states liable for municipal actions violative of federal rights even in the absence of a specific state mandate for that municipal action. For instance, this doctrine might allow challenges to state delegations of discretion to school boards that resulted in a pattern of those school boards unconstitutionally favoring religious programming. To the extent that state officials could exercise influence over these local discretionary decisions but choose not to, a court applying a "deliberate indifference" standard might require officials to exercise that influence. While § 1983's "supervisory liability" standard is a blunt tool

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remedy under *Ex parte Young*); *see also* Freer, *supra* note 182 (discussing the inapplicability of *Ex parte Young* in the context of a complex federal remedial scheme).

202. *See supra* note 83 and accompanying text (discussing the court's concern, in Harkless v. Brunner, 545 F.3d 445, 452 (6th Cir. 2008), that widespread state/municipal delegation could completely insulate states from the burden of enforcing voters' rights under the NVRA).

203. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1886 (2015).

204. *Id.* at 1904.

205. Gillian E. Metzger, *Privatization As Delegation*, 103 COLUM. L. REV. 1367, 1401 (2003). *See id.* at 1400–02 (describing the importance of vindicating principles of "constitutionally constrained" governance regardless of the party acting to achieve government's ends).

for asserting due process principles of supervisory accountability,[206] applying it to state/municipal delegations would be a significant acknowledgment of structural responsibilities for delegations of government power. Such acknowledgement would incentivize states to actively prevent at least those rights violations that were predictable from past municipal behavior.[207]

There are certainly some potential flaws with applying § 1983's "supervisory liability" standards to state/municipal delegations. Perhaps most troublesome from the perspective of potential plaintiffs is that the requirements of supervisory liability are quite difficult to meet in the context of individual lawsuits. [208] Weinstein-Tull points out that in incarceration cases, plaintiffs have

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206. 42 U.S.C. § 1983 (1996). Most significantly, § 1983's standard for supervisory liability is only triggered in the event of actual harm caused to a person's federal rights, and does not allow for relief from deliberately indifferent supervision absent harm. *Id.*

207. For instance, controversy erupted in St. Louis, Missouri in the summer of 2017 because municipal prisoners were held in cramped cells without air conditioning during a record-breaking heat wave. The threat posed by unregulated temperatures was well-known because a heat wave in St. Louis killed seventeen people in 2011. *17th St. Louis Area Heat Death Comes as Temperatures Set to Moderate*, ST. LOUIS POST-DISPATCH (Aug. 3, 2011), http://www.stltoday.com/news/local/crime-and-courts/th-st-louis-area-heat-death-comes-as-temperatures-set/article_7dbf2f8a-bdf0-11e0-93af-0019bb30f31a.html [https://perma.cc/L455-MAL3]. Furthermore, several other states had set statewide policies regarding temperature control, and a number of Missouri cities had recently been subject to conditions of confinement suits that, among other things, alleged freezing cells. Matt Pearce, *Missouri Cities, Including Ferguson, Sued Over 'Grotesque' Jail Conditions*, L.A. TIMES (Feb. 9, 2015), http://www.latimes.com/nation/la-na-ferguson-lawsuit-20150209-story.html [https://perma.cc/3NEK-FEQ2]. However, while the Missouri Department of Corrections oversees a system of reporting about the health and wellbeing of prisoners, it had set no policies for temperature control in prisons at the time of the 2017 heat wave. Durrie Bouscaren, *What's the Workhouse? Here's What You Need to Know About St. Louis' Medium Security Institution*, ST. LOUIS PUBLIC RADIO (July 26, 2017), http://news.stlpublicradio.org/post/what-s-workhouse-here-s-what-you-need-know-about-st-louis-medium-security-institution#stream/0 [https://perma.cc/4BQW-ZNJV]. Formal court acknowledgement of structural responsibilities for delegations of government power would have placed at least *some* burden on state officials to avoid future inhumane conditions by setting temperature control standards.

208. In Reynolds v. Giuliani, 506 F.3d 183, 192–93 (2d Cir. 2007), the Second Circuit—applying § 1983's "supervisory liability" standards—pointed out that when a state has taken some action in response to municipal violations of law, "plaintiffs face[] a heavy burden of proof in showing that the state's response was so patently inadequate to the task as to amount to deliberate indifference."

resisted the notion that § 1983 standards are applicable.[209] The resistance of individual plaintiffs to this standard is understandable, as it generally requires the plaintiff to prove that the "supervising" defendant either had knowledge of a pattern of rights violations or ignored obvious risks that could lead to rights violations[210]—a heavy burden of proof for an individual, resource-limited plaintiff to bear.

These arguments may be overstated, however, because individual plaintiffs without documentation of a notorious and widespread pattern of rights violations have little to gain from adding state officials to their suits. In a suit against a state official acting in their official capacity, prospective injunctive relief is almost always the only available remedy,[211] while complete injunctive and monetary relief can be obtained directly from the municipal officials or municipal entity responsible for the underlying rights violation. In the state/municipal delegation context, prospective injunctive relief is most valuable when used to address a widespread pattern of violations of federal law that is causally connected to the state's delegation—exactly the circumstances where a "deliberate indifference" standard would apply.[212] This standard also gives advocates and activists a distinct advantage when faced with widespread municipal violations of federal rights. As the ACLU argued in *Tucker v. State*, non-governmental organizations would have the ability to *create* liability on the part of

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209. Weinstein-Tull, *supra* note 15, at 866–67 (citing Brief in Opp'n at 19–20, Brown v. Armstrong, No. 13-1056, 2014 WL 1783194 (2014)).

210. *See* BODENSTEINER & BERGER LEVINSON, *supra* note 172, and accompanying text (summarizing post-*Iqbal* standards for supervisory liability in most circuits).

211. *See* Ann K. Wooster, Annotation, *Immunity of State from Civil Suits Under Eleventh Amendment–Supreme Court Cases*, 187 A.L.R. Fed. 175 Art. 13[b] (2017) (discussing Justice Brennan's concurring opinion regarding state sovereign immunity in America). THE FEDERALIST NO. 81, at 2 (Alexander Hamilton) (The Avalon Project, Yale Law School) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . .").

212. *See generally* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 534 (1961) (discussing the pure efficiency value of injunctive relief in cases where harm is widely spread and the costs of suing are high).

the state by documenting the causal connection between the state's oversight and patterns of municipal misconduct.[213]

A potentially larger problem is that this standard does not, by itself, suggest a course of action when no identifiable state official has a duty related to the federal rights that municipalities are violating.[214] In *Tucker v. State*, the Idaho Supreme Court dismissed claims against Idaho's governor because his general duty to "see that the laws are faithfully executed" did not sufficiently link his inaction to the alleged municipal deprivations of rights.[215] Theoretically, a state might structure itself so that no identifiable official has any power to affect municipal violations of a federal right. It is unclear to what extent Congress can empower state actors in the face of contradictory state law, or to what extent states can disempower its own officials to prevent the vindication of federal rights.[216] From a practical perspective, however, this Note is skeptical that state lawmakers would be willing to drastically limit their own power in order to avoid the specter of injunctive relief, as a decision by state actors to radically disempower themselves in favor of municipalities "will often conflict with interests such as attaining prestige and perquisites that may be motivating public officials."[217] Additionally, if we accept Metzger's proposal that broad principles of accountability for delegated authority are embedded in the structure of the Constitution, that accountability would require at least a "minimal level of hierarchical oversight" over delegated discretion.[218] The Ninth Circuit's decision in *Armstrong v. Brown* demonstrates the extent to which courts are willing to attach liability to a residual responsibility of oversight. In *Armstrong*, even though state law explicitly disclaimed responsibility for the prisoners whose rights were being violated, the court held California officials

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213. *See supra* notes 1–11 and accompanying text (noting outside studies of Idaho's public defense system leading to the conclusion that it was constitutionally inadequate).

214. *See supra* note 182 (discussing limits on the application of *Ex parte Young*).

215. *See* Tucker v. State, 394 P.3d 54, 64–65 (Idaho 2017) (quoting Idaho Const. art. IV, § 5).

216. *See* Weinstein-Tull, *supra* note 15, at 900 (describing the academic debate around whether federal laws binding states necessarily give state officials the authority to comply with those laws).

217. Note, *supra* note 15, at 1050–51 (discussing incentives for state officials to prioritize centralized decision-making over local authority).

218. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1901 (2015).

liable because the prisoners' detention "serve[d] essentially state purposes."[219] If courts, as in *Armstrong*, are willing to recognize state supervisory responsibility even when the state limits its own authority in an area of delegated power,[220] obvious attempts to avoid liability by delegating "the dirty work" to municipalities are unlikely to be successful if that delegation is intended to accomplish some state purpose.

Finally, standards designed to determine individual liability might simply be inadequate for the task of restructuring administrative delegations of power. Metzger suggests that *Bivens*, a judicially created remedy equivalent to a federal § 1983 action, has been "a poor vehicle for asserting the duty to supervise."[221] According to Metzger, the doctrine's focus on individual liability and monetary damages makes it an ineffective tool for remedying institutional structural deficiencies.[222] This critique has been repeated in the context of §1983, with critics arguing that it is not logical to apply ideas of moral culpability to determine whether to sanction an institution.[223]

To some extent, this critique is muted in the context of a suit against a state official under *Ex Parte Young* doctrine, which has developed specifically to provide prospective injunctive relief to prevent violations of federal rights. However, there is a great deal of merit to these ideas, and a better standard might remove any remnants of individual liability from the doctrine. Such a standard could require states to restructure delegations of federal duties when the structures of those delegations are *known to contribute to* municipal violations of federal rights. Still, the difference between a "deliberate indifference" standard and a "known to contribute to" standard might simply be one of degree, and *Milliken v. Bradley* indicates that there is a limit to the Supreme Court's willingness to

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219. Armstrong v. Brown, 732 F.3d 955, 961–62 (2013). *See supra* text accompanying notes 177–82 (discussing California's unsuccessful attempt to completely abdicate responsibility for the care and custody of some state parolees).

220. *Armstrong*, 732 F.3d at 960.

221. Metzger, *supra* note 218, at 1917.

222. *Id.*

223. Bandes, *Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct*, *supra* note 152, at 1208–11 (discussing problems with the application of moral standards to institutional decisions); *see also* Bandes, *The Negative Constitution: A Critique*, *supra* note 154, at 2291–93 (critiquing the application of rigid culpability standards to the protection of rights in the institutional context).

tolerate judicial restructuring of state delegations of power based solely on the misconduct of a municipality.[224] While an ideal standard might focus on institutional competence rather than individual *mens rea* as the metric for determining the scope of judicial remedies, the "deliberate indifference" standard presents an immediately workable approach that matches existing precedent, respects the limits that the Supreme Court has placed on municipal independence, and draws from a heavily litigated doctrine that is familiar to plaintiffs, defendants, and courts.

CONCLUSION

Across almost every area that could implicate federal rights, states have delegated powers affecting those rights to municipal governments. Courts have repeatedly noted systemic flaws in states' supervision of delegated authority that have led to the deprivation of federal rights. Courts often attempt to remedy these deprivations by ordering states to restructure their supervision of delegated powers. This Note urges courts to formalize that practice and adopt a standard for judging state supervision of municipal delegations analogous to "supervisory liability" under 42 U.S.C. § 1983.

Creating a standard analogous to § 1983's "supervisory liability" provides a coherent, immediately usable doctrine that allows plaintiffs and courts to efficiently remedy municipal violations of federal rights. By applying the "supervisory liability" standard, courts can sanction states when there is a flaw in either the state's initial delegation or its oversight of that delegation, while preserving municipal liability for harms to the federal rights of individuals. Limiting the application of this standard to only when explicit remedies have not displaced it also provides for federal control over the vindication of federal rights.

Finally, articulating a standard that can hold states liable for their delegations of discretion to municipalities takes seriously the principle underlying due process: namely, that government action at every level should be constrained by a consideration of individual rights.

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224. *See supra* notes 45–46 and accompanying text (discussing the impact and consequences of the holding in *Milliken v. Bradley*).