
THE STATE'S VICARIOUS LIABILITY FOR THE ACTIONS OF THE CITY

In December 1998, seven welfare applicants brought a § 1983¹ class action suit against both the City and State of New York.² They alleged that New York City had illegally deterred its residents from seeking public benefits to which they were entitled, and that New York State had “failed to properly oversee and supervise the City’s administration of assistance programs.”³ A federal district court found in favor of the plaintiff class, issuing permanent injunctions against both the City and the State.⁴ In *Reynolds v. Giuliani*,⁵ the court of appeals reversed the district court’s finding of liability against the State.⁶ The court did not dispute that the City’s actions had been illegal and that the plaintiffs had been deprived of rights secured by federal law. Instead, the court held that an injunction could not be issued against the State because *Monell v. Department of Social Services*⁷ had precluded the imposition of respondeat superior liability under § 1983.⁸ New York State thus could not be held vicariously liable for the actions of New York City.

Reynolds’s invocation of the notion of respondeat superior represents just one approach that courts have utilized in addressing the question of when and how a state can be held vicariously liable for the actions of a city.⁹ As will surprise no one familiar with the indeterminacy of city status in American law,¹⁰ no single, coherent doctrine has emerged to help courts grapple with this issue. This lack of clarity undermines the potential utility of vicarious liability in facilitating the optimal delineation of roles between state and city. What is at stake, ultimately, may be the quality and effectiveness of local democracy itself.

¹ 42 U.S.C. § 1983 (2006).

² *Reynolds v. Giuliani*, 506 F.3d 183, 186 (2d Cir. 2007). The claims against the State were brought against certain state officials in their official capacity. *Id.*

³ *Id.*

⁴ See *Reynolds v. Giuliani*, No. 98 Civ. 8877 (WHP), 2005 U.S. Dist. LEXIS 32541, at *4–6 (S.D.N.Y. Dec. 14, 2005).

⁵ 506 F.3d 183.

⁶ *Id.* at 199.

⁷ 436 U.S. 658 (1978).

⁸ See *Reynolds*, 506 F.3d at 194. The court also concluded that the State’s failure to supervise did not amount to “deliberate indifference” and thus the State could not be directly liable. *Id.* at 195–96.

⁹ This Note uses the term “city” to refer broadly, and somewhat inaccurately, to all units of local government.

¹⁰ See generally Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV 83.

This Note seeks to fill this gap and provide a framework in which to analyze whether the actions of the city are legally attributable to the state in which it lies. In order to properly assess when and how vicarious liability should be imposed on the state, courts should consider three primary interests: fairness, allocative efficiency, and the value of local democracy. This Note argues that, taking account of these considerations, the best rule would hold the state vicariously liable only for those city actions that the state itself has mandated that the city perform. Included within this category of city actions that would give rise to state liability are those that the state has ordered the city to undertake and those carrying out affirmative responsibilities that lie with the state under federal or state law.

Part I provides background on the competing theories of the relationship between state and city. Part II surveys the current jurisprudence on vicarious state liability for city action. Part III sets out the argument for holding the state liable for city action only when the state has required the city to undertake that action. While fairness and efficiency might be promoted by imposing vicarious liability on the state for a broad range of city actions, consideration of the value of local democracy suggests that the scope of vicarious state liability should be far narrower. *Respondeat superior* doctrine, imported from the employment context, would not successfully limit the scope of state vicarious liability. Instead, the rule advocated here promotes fairness, efficiency, *and* local democracy by limiting state vicarious liability to those areas where fairness and efficiency concerns arise with particular force, freeing the state from liability in other situations so as to permit it to leave space for meaningful local democracy.

I. TWO THEORIES OF THE STATE-CITY RELATIONSHIP

Two conflicting lines of thought have dominated the debate over the proper place of the city in relation to the state in American law. Under the prevailing conception, the city is seen as a part of the state itself: a mere subdivision, not a separate, sovereign entity. The classic exponent of this view of the state-city relationship is John Dillon, a nineteenth-century lawyer. In his treatise on municipal government, Dillon presented his view regarding the status of the city that, once generally accepted, ensured the absorption of the city into the state. What is now termed “Dillon’s Rule” set forth that a city only possesses powers that are expressly granted to it by the state, incident to expressly granted powers, or essential to accomplishing declared objectives and purposes of the city.¹¹ These city powers are to be strictly con-

¹¹ 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237, at 449 (5th ed. 1911).

strued by the courts, with any ambiguity as to how much power the state has conferred resolved against the city.¹² A second aspect of Dillon's legal thought further narrowed the autonomy of the city. Dillon "found a city's retention of any private identity 'difficult exactly to comprehend,'" and sought to create "a fully public city government."¹³ With the city's private nature limited or eliminated, its remaining public identity consisted of those powers granted to it by the state, a conceptual restriction of its authority that rendered the city a creature of the state.¹⁴

Dillon's formulation of the state-city relationship soon took root in American legal thinking. In 1907, the Court in *Hunter v. City of Pittsburgh*¹⁵ rejected the city of Allegheny's attempt to prevent its annexation by Pittsburgh, declaring: "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them."¹⁶ Soon, Dillon and *Hunter's* conception of the city as a subdivision of the state was widely accepted;¹⁷ it remains the dominant formulation of the state-city relationship to this day.¹⁸

Lurking in the shadows, however, are other conceptions that envision a greater degree of city autonomy. Thomas Cooley represents the anti-Dillon. Also a nineteenth-century lawyer and municipal law treatise author,¹⁹ Cooley conceived of a broader role for the city. Concerned that state legislatures were captured by powerful private interests, he advocated a theory of inherent local sovereignty.²⁰ As a justice on the Michigan Supreme Court, he advanced this view while striking down a state attempt to seize control of a city commission, writing: "The state may mould local institutions according to its views of policy

¹² *Id.* § 239, at 452-53.

¹³ Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1111 (1980) (quoting JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 39, at 83 n.1 (Chicago, James Cockcroft & Co. 1872)).

¹⁴ *See id.*

¹⁵ 207 U.S. 161 (1907).

¹⁶ *Id.* at 178; *see also id.* ("The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.")

¹⁷ *See* WILLIAM BENNETT MUNRO, THE GOVERNMENT OF AMERICAN CITIES 53 (rev. ed. 1919).

¹⁸ *See, e.g.,* Reynolds v. Sims, 377 U.S. 533, 575 (1964) ("[S]ubdivisions of States — counties, cities, or whatever — never were and never have been considered as sovereign entities."); City of New York v. State, 655 N.E.2d 649, 651 (N.Y. 1995) ("[M]unicipal corporate bodies . . . are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers . . .").

¹⁹ *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Boston, Little, Brown & Co. 1868).

²⁰ *See* Williams, *supra* note 10, at 138.

or expediency; but local government is [a] matter of absolute right; and the state cannot take it away.”²¹ The notion of an inviolable sphere of local government action protected from state interference persists. The most obvious manifestation is in the home rule movement, which attempts to grant the city such a sphere through state legislative action.²² Occasional glimpses of Cooley’s theory emerge in other areas as well: a series of more recent Supreme Court decisions depart somewhat from *Hunter* and “suggest that there is a distinction of constitutional significance between states and their local governments.”²³ There may yet be room in the law for some notion of city autonomy.²⁴

II. CURRENT LAW ON VICARIOUS STATE LIABILITY

Perhaps because both of these lines of thought seem to have influenced courts confronted with the question of whether the state can be liable for city action, the current jurisprudence on this subject is remarkably ill-defined. Not only has no coherent standard emerged to help guide courts in determining when and how the state should be held liable, but even those opinions that do assert a particular principle — that a state should not be able to insulate itself from liability through delegation, or that the city should bear all liability arising from its actions — do not delve deeply into why the principle advanced should apply more broadly. Moreover, the decision that arguably goes the furthest in attempting to establish a coherent doctrine, *Reynolds v. Giuliani*, imports respondeat superior from the not wholly analogous context of the master-servant relationship, and in the process appears to have set forth an entirely new conception of the relationship between state and city.

A. *Decisions Holding the State Vicariously Liable*

Many of those courts that have held the state vicariously liable for city action have seemed to rely on the idea that the state should not be able to insulate itself from liability arising from responsibilities delegated to the city. For example, both the Fourth and Ninth Circuits have employed this sort of reasoning in cases involving the federal

²¹ *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 108 (1871) (Cooley, J., concurring).

²² See generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003).

²³ David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 578 (1999); see, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (striking down a state initiative terminating local school desegregation plans, thereby allowing a “local school board [to] use the Fourteenth Amendment to defend its program of busing for integration from attack by the State,” *id.* at 459); *Milliken v. Bradley*, 418 U.S. 717, 741–47 (1974) (overturning a federal court’s desegregation decree because it ignored underlying school district boundaries).

²⁴ See Barron, *supra* note 23, at 560–95.

Food Stamp Act of 1964.²⁵ In *Robertson v. Jackson*,²⁶ the Fourth Circuit held the Commissioner of the Virginia Department of Social Services liable for local agencies' failure to process food stamp applications within the time periods dictated by federal law.²⁷ The court reasoned that, however much authority had been delegated to local agencies, the duty to ensure "compliance with federal requirements nevertheless remains at the state level," in large part because federal regulations obligate the state to monitor local compliance.²⁸ Similarly, in *Woods v. United States*²⁹ the Ninth Circuit held that the State of California could be found liable for violations of the federal Food Stamp Act even if the city of San Francisco had caused the violations: "the ultimate responsibility for operation of the plan remain[s] with the state."³⁰ Neither decision made completely clear why the location of "ultimate responsibility" at the state level rendered the state liable for city action. *Robertson* asserted that a state that delegates administrative duties "cannot thereby diminish the obligation to which the state, as a state, has committed itself, namely, compliance with federal requirements."³¹ The *Woods* court declared simply that the argument that the state could not be liable for the city's misuse of delegated responsibilities would, if "taken to its logical extreme," allow "all State responsibility . . . [to] be effectively abrogated."³²

This sort of logic has also been employed with respect to suits against states resulting from local governments' failure to comply with the National Voter Registration Act of 1993³³ (NVRA). The Eighth Circuit in *United States v. Missouri*³⁴ and the Sixth Circuit in *Harkless v. Brunner*³⁵ observed that the language in the federal Act itself made the state ultimately accountable for implementation of the Act.³⁶ Vicarious liability therefore attached — otherwise, "if every state passed legislation delegating NVRA responsibilities to local authorities, the fifty states would be completely insulated from any enforcement

²⁵ Pub. L. No. 95-113, 91 Stat. 913 (1977) (codified as amended at 7 U.S.C. §§ 2011-36 (2006 & Supp. III 2009)).

²⁶ 972 F.2d 529 (4th Cir. 1992).

²⁷ *Id.* at 533.

²⁸ *Id.* (citing 7 C.F.R. §§ 272.2(a)(2), 272.2(b), 275.5, 275.16, 275.18, 275.19(b) (2010)).

²⁹ 724 F.2d 1444 (9th Cir. 1984).

³⁰ *Id.* at 1447 (alteration in original) (quoting *California v. Block*, 663 F.2d 855, 858 (9th Cir. 1981)) (internal quotation marks omitted).

³¹ *Robertson*, 972 F.2d at 534.

³² *Woods*, 724 F.2d at 1448 (quoting decision below) (internal quotation mark omitted).

³³ 42 U.S.C. §§ 1973gg to 1973gg-10 (2006).

³⁴ 535 F.3d 844 (8th Cir. 2008).

³⁵ 545 F.3d 445 (6th Cir. 2008).

³⁶ See *id.* at 452-53; *Missouri*, 535 F.3d at 849-50; see also *United States v. New York*, 255 F. Supp. 2d 73, 79 (E.D.N.Y. 2003).

burdens.”³⁷ Allowing a state to “shed its . . . responsibilities” in this way “would be plainly unreasonable.”³⁸

B. Decisions Declining to Hold the State Vicariously Liable

Those courts that have explained their reasoning when choosing not to impose vicarious liability on the state seem to rely on the intuition that protecting the state from liability will promote local autonomy.³⁹ *Milliken v. Bradley*⁴⁰ is the most prominent example. In *Milliken*, the Supreme Court considered the validity of a cross-district school desegregation plan that a federal district court imposed upon Detroit — which had engaged in de jure segregation — and surrounding suburban school districts — which had not.⁴¹ The district court premised the propriety of its interdistrict remedy in part on the theory that acts of the Detroit Board of Education could be attributed to the State of Michigan itself, “thus creating a vicarious liability on the part of the State.”⁴² The Supreme Court accepted arguendo that the state could be held “derivatively responsible” for the actions of its local subdivision.⁴³ But the Court’s holding — that “[w]here the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district’s schools with those of the surrounding districts”⁴⁴ — amounted to a denunciation of the vicarious state liability theory espoused by the lower courts. If the state itself could be held vicariously liable, then presumably a court could impose the order statewide: a statewide wrong would call for a statewide remedy. But the Court reasoned that, because the only constitutional wrong had taken place at the local level,

³⁷ *Harkless*, 545 F.3d at 452; see also *Missouri*, 535 F.3d at 850 (“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.”).

³⁸ *Harkless*, 545 F.3d at 453 (quoting *New York*, 255 F. Supp. 2d at 79). The conclusion that a state cannot insulate itself from liability by delegating a state responsibility has won favor in other contexts. See, e.g., *Henrietta D. v. Bloomberg*, 331 F.3d 261, 286 (2d Cir. 2003) (“New York State has promised that its programs will comply with the mandate of the Rehabilitation Act. Therefore, . . . New York State is also liable to guarantee that those it delegates to carry out its programs satisfy the terms of its promised performance, including compliance with the Rehabilitation Act.”) (citations omitted).

³⁹ For an example of a court declining to impose vicarious liability *without* providing its rationale, see *Henderson v. State*, 44 Ill. Ct. Cl. 180 (1991), which held that the state could “delegate its duty to maintain State roadways to units of local government, and, consequently, suffer no liability if a unit of local government is negligent in its maintenance.” *Id.* at 180–81.

⁴⁰ 418 U.S. 717 (1974).

⁴¹ *Id.* at 721, 738–40.

⁴² *Id.* at 727. The Sixth Circuit, in affirming the district court’s remedy, similarly reasoned that the violations committed by the Board of Education could be considered acts of the state itself. *Bradley v. Milliken*, 484 F.2d 215, 238 (6th Cir. 1973).

⁴³ *Milliken*, 418 U.S. at 748.

⁴⁴ *Id.* at 749.

and the state itself had not acted improperly, the remedy must be local.⁴⁵ Its implicit rejection of vicarious state liability was motivated, at least in part, by a conception of local autonomy that recalls that of *Cooley*.⁴⁶

A similar idea of local autonomy seemed to influence the court in *Buck v. State*.⁴⁷ In that case, a plaintiff who sustained burns at a local high school sued New York State.⁴⁸ In dismissing the complaint, the court highlighted the “distinction between work performed by the State through an agent and work performed by a corporation in the exercise of a governmental function delegated by the State.”⁴⁹ While in the former case, the state might be held vicariously liable, in the latter, liability could be imposed only on the unit of local government.⁵⁰ The court set forth the following proposition:

[W]hen the State delegates the governmental power for the performance of a state function, the agency exercises its independent authority as delegated, as does a city In such instances there is no authority for making claim against the State, but the agency exercising the delegated authority must respond for its own actionable conduct.⁵¹

Thus, unlike *Robertson* and similar cases that reflect an aversion to the state delegating responsibility and thereby insulating itself from liability, *Buck* asserts that the delegatee alone must answer for its conduct.

C. Reynolds and a New View of State and City

A final case in which vicarious liability was not imposed on the state, *Reynolds v. Giuliani*, deserves particular attention because it suggests both a new answer to the question of when the state can be vicariously liable for the actions of the city and a novel manner of viewing the relationship between state and city more generally. In

⁴⁵ See *id.* at 746.

⁴⁶ See *id.* at 741 (“No single tradition in public education is more deeply rooted than local control over the operation of schools”); see also Barron, *supra* note 23, at 577–78. The *Milliken* dissents, in contrast, embraced the theory of vicarious state liability as supporting the interdistrict remedy, relying on logic similar to that advocated in *Robertson*, *Woods*, and the NVRA cases. Justices White and Marshall, in particular, both emphasized that the state itself had an affirmative obligation to comply with the dictates of the Fourteenth Amendment, and that it could therefore be held vicariously liable for the actions of its municipalities. See *Milliken*, 418 U.S. at 770 (White, J., dissenting); *id.* at 797 (Marshall, J., dissenting). Both Justices also embraced the rationale that the state should not be able to insulate itself from liability by delegating its responsibilities to units of local government. See *id.* at 763 (White, J., dissenting); *id.* at 808 (Marshall, J., dissenting).

⁴⁷ 96 N.Y.S.2d 667 (Ct. Cl. 1950).

⁴⁸ *Id.* at 669.

⁴⁹ *Id.* at 672 (citation omitted).

⁵⁰ *Id.* at 672–73.

⁵¹ *Id.* (quoting *Pantess v. Saratoga Springs Auth.*, 8 N.Y.S.2d 103, 105 (App. Div. 1938)) (internal quotation marks omitted).

Reynolds, the Second Circuit held that New York State could not be vicariously liable for the actions of New York City. The plaintiffs' asserted theory that the State had a nondelegable duty to comply with the dictates of the Food Stamp and Medicaid Acts would impose "de facto respondeat superior liability" on the state defendants.⁵² This result, the court reasoned, would violate *Monell*, which had rejected § 1983 respondeat superior liability other than in certain limited circumstances not present in this case.⁵³ *Monell* had set forth that "a municipality cannot be held liable solely because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory."⁵⁴ The Supreme Court cases that followed *Monell* also dealt solely with the question of when and how a unit of local government should be liable for the actions of its employees.⁵⁵ 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.⁵⁶

Reynolds, in invoking the doctrine of respondeat superior in this manner, points the way to a new conception of the relationship between the state and the city. Respondeat superior covers a very specific type of principal-agent relationship: it governs the liability of an employer for the actions of his employees within the scope of their employment⁵⁷ (or, as it was traditionally put, the liability of the master for his servant).⁵⁸ The Second Circuit's invocation of *Monell*'s ban on § 1983 respondeat superior liability might therefore in part reflect an

⁵² *Reynolds v. Giuliani*, 506 F.3d 183, 194 (2d Cir. 2007) (emphasis omitted).

⁵³ *Id.* at 194, 196–98.

⁵⁴ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978) (emphasis altered). This limitation on vicarious liability for municipalities represented something of a compromise. On this point, *Monell* overturned *Monroe v. Pape*, 365 U.S. 167 (1961), which had declared that municipalities could not be subject to § 1983 liability. *Id.* at 191. Concerned, however, with opening the floodgates of litigation, the Court sought to ensure that a local government "could be held accountable . . . only for its own wrongs, not those practiced by others," and limited their vicarious liability. Mark R. Brown, *Accountability in Government and Section 1983*, 25 U. MICH. J.L. REFORM 53, 74 (1991) (emphasis omitted).

⁵⁵ See, e.g., *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397 (1997); *City of Canton v. Harris*, 489 U.S. 378 (1989); *Polk Cnty. v. Dodson*, 454 U.S. 312 (1981).

⁵⁶ See *Reynolds*, 506 F.3d at 190–94. The court's reasoning seems to have rested on its understanding that *Monell*'s ban on respondeat superior flows from § 1983's causation requirement — vicarious liability would improperly fall on an actor that had not directly caused the relevant harm. See *id.* at 190.

⁵⁷ RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006). Respondeat superior is "limited to the employment relationship." *Id.* § 2.04 cmt. b; see also *Mackay v. Lowe*, 529 F. Supp. 504, 505 (E.D. Pa. 1982) ("The issue whether liability under section 1983 can be imposed through the doctrine of respondeat superior has a confused and often misunderstood history. An absolute precondition to the maintenance of any respondeat superior action is the existence of a master-servant relationship.").

⁵⁸ See RESTATEMENT (SECOND) OF AGENCY § 2 (1958).

understanding that the relationship between state and city parallels that between master and servant, with the city the servant of the state and subject to its control.⁵⁹

This master-servant conception of the relationship between the state and city would mark a departure from the views of both Dillon and Cooley. While a master-servant theory of state-city relations may suggest the subordination of city to state that follows from Dillon's Rule, it does not reflect the total absorption of the city into the state that Dillon advocated. An employer and his employee, whatever the power dynamic that exists between them, are separate entities. While *Reynolds's* master-servant idea may therefore be more easily reconciled with Cooley's views, in crucial respects it remains distinct. The master-servant conception invoked by *Reynolds* does not convey the same breadth of local autonomy as would be exercised in Cooley's city; instead, the employer-employee relationship is defined explicitly in terms of the employer's control over the employee.⁶⁰ *Reynolds* therefore suggests something of a middle ground between Dillon and Cooley: one that recognizes that the city is a separate entity that has some limited discretion to act independently of the state, but does not carve out a sphere of city autonomy into which the state may not intrude.

III. THE SEARCH FOR AN APPROPRIATE RULE

Clarifying the current doctrine on vicarious state liability requires first identifying what is at stake. Fairness, allocative efficiency, and the value of local democracy are all relevant to thinking about when the state should be liable for city action. Although the fairness and efficiency considerations may both suggest the need for a broad doctrine of vicarious liability, maintaining meaningful local democracy requires that liability be substantially narrower in scope. *Respondeat superior* doctrine, while perhaps intuitively appealing, does not fully take account of these factors when applied in the state-city context. Instead,

⁵⁹ Such an understanding is suggested, for example, by the court's observation that the situation before it was indistinguishable from "countless" other cases "in which an employer is charged with certain duties, delegates those duties to his subordinates and remains ultimately responsible to his superiors." *Reynolds*, 506 F.3d at 194.

⁶⁰ See RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) ("[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work . . ."); RESTATEMENT (SECOND) OF AGENCY § 2(1)-(2). One might argue that a master-servant conception implies that at times the servant may not be acting as the agent of the master: an employer is liable for the actions of his employees only when their actions are taken "within the scope of their employment." RESTATEMENT (THIRD) OF AGENCY § 2.04. But which conduct of the employee will be subject to the employer's control is normally determined through a bargaining process that does not exist between the state and city. See *infra* pp. 1052-53. Nothing is outside the scope of the city's employment to the state absent an independent idea of when and how the city should be insulated from state control.

a better rule is one that holds the state vicariously liable only for those city actions that the state has required the city to perform.

Some explanation of this inquiry's scope is warranted. What this Note seeks are transsubstantive principles that should inform institutional design choices about whether to impose vicarious liability on states. Not dealt with is the role played by sovereign immunity doctrine. The state and the city may each at times be insulated from liability.⁶¹ While these limitations on liability can be kept distinct from questions regarding the possible scope of vicarious state liability, it is worth noting that, particularly in those situations where the state enjoys sovereign immunity but the city does not,⁶² the concerns for fairness and allocative efficiency that motivate imposing vicarious state liability may be implicated by the application of sovereign immunity doctrine. Also beyond the scope of this Note are the potential remedial consequences that flow from a holding that the state or city is liable. Because the focus here is on the costs associated with a finding of liability — whether it is fair to locate these costs at a particular level of government, and the incentives that the impositions of these costs tend to create for government actors — the distinctions among remedial measures are elided. Even if a finding of liability against a government entity results in injunctive relief and not the awarding of damages, there are significant costs associated with responding to and defending against the suit and complying with the injunction. These costs may often be comparable to those associated with a suit for damages,⁶³ and in any case serve a similar role in leading government actors to be responsive to the potential threat of liability.

A. *The Purposes of Vicarious Liability*

Which standard of vicarious state liability is preferable depends on the purposes of imposing this sort of liability. Two justifications underlying respondeat superior's extension of vicarious liability for employers — fairness and allocative efficiency — are helpful when thinking about liability of the state for the actions of the city. A third consideration — the value of local democracy — arises solely with respect to the state-city relationship. Both of the justifications associated with respondeat superior in the master-servant context favor the broad extension of vicarious state liability; only a more limited imposition of

⁶¹ See, e.g., *Garner v. Covington Cnty.*, 624 So. 2d 1346, 1351 (Ala. 1993); *Denis Bail Bonds, Inc. v. State*, 622 A.2d 495, 497 (Vt. 1993). The extent of immunity may also depend on the nature of the relief sought. See *Edelman v. Jordan*, 415 U.S. 651 (1974).

⁶² See, e.g., *N. Ins. Co. of N.Y. v. Chatham Cnty.*, 547 U.S. 189 (2006).

⁶³ See, e.g., *Edelman*, 415 U.S. at 682 (Douglas, J., dissenting) (arguing that in a welfare case the distinction between prospective and retrospective relief "is not relevant or material," because in either case "the nature of the impact on the state treasury is precisely the same").

vicarious liability will, however, leave sufficient space for meaningful local democracy to thrive.

1. *Fairness.* — At one point, respondeat superior was seen as something of an anomaly, justified primarily because it was “firmly established.”⁶⁴ But two additional types of arguments have emerged in favor of imposing liability on the employer for the actions of his employee. The first set of justifications is grounded in notions of fairness. The employer, while not at fault in the traditional sense, has nevertheless contributed to the loss borne by others as the result of his employees’ actions: by the very act of engaging in an industry, the employer has created some risk of losses to third parties, losses that in fairness should fall on the employer and others who benefited from this activity.⁶⁵ Like the theory of strict liability in general, therefore, the doctrine of respondeat superior can be said to rest on the conception that “a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”⁶⁶

The fairness rationale arguably favors a broad imposition of vicarious state liability. The analogy from the master-servant context is somewhat strained because a public entity is not a profit-maximizing actor, and thus it is unclear from what activities it has benefited such that it should bear their costs. Because the costs associated with government liability will ultimately be passed on to taxpayers,⁶⁷ perhaps the best way to conceive of what would be fair when distributing liability between state and city is to ask: should solely city taxpayers bear the costs, or should all taxpayers statewide? One possible answer would be that if the city is undertaking an activity that is ultimately controlled by the state, then the state, and its taxpayers, should bear the costs of that activity. Under a strict application of Dillon’s Rule, the city can do nothing that is not authorized, and therefore indirectly controlled, by the state.⁶⁸ The home rule movement — which involves

⁶⁴ Jeremiah Smith, *Sequel to Workmen’s Compensation Acts*, 27 HARV. L. REV. 235, 256 (1914). To the extent that there could be a principled justification for the doctrine, it was that it served the goal of compensating injured parties. *Id.* at 256–57 (“[I]t is doubtful whether the arguments in its favor would have prevailed, if servants in general had the pecuniary ability of their employers.”); see also RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b. Because neither the state nor the city is likely to be judgment-proof and the relief sought against them will often be injunctive in nature, the compensation rationale is not particularly relevant in that context, even assuming that it is a valid justification with respect to traditional respondeat superior liability.

⁶⁵ See Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456 (1923).

⁶⁶ *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (Friendly, J.).

⁶⁷ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 408 (2000).

⁶⁸ See, e.g., *Olesen v. Town of Hurley*, 691 N.W.2d 324, 328–29 (S.D. 2004) (striking down a city’s attempt to serve food at the municipal bar because the city’s authority to serve alcohol did not extend to the power to run a full-service restaurant).

state legislation granting a city general authorization to do anything with local purposes and may provide that a city's control over local affairs cannot be trumped by the state — is the primary pushback against the expansion of Dillon's Rule. Yet many commentators have found that home rule has “not successfully created an area of local autonomy protected from state control.”⁶⁹ Given the limited sphere protected by home rule, together with the expansive application of Dillon's Rule, a broad swath of city activities could be construed as the state's business for which the state may in fairness be ultimately liable.

2. *Allocative Efficiency.* — A second, related set of justifications is grounded in efficiency and the deterrence of accidents. In theory, respondeat superior serves to internalize to the employer the costs associated with his business.⁷⁰ The employer is then in the best position to attempt to mitigate these costs, whether by changing the distribution of responsibilities between himself and his employees, selecting different employees,⁷¹ or changing the nature or level of the activity being engaged in for profit.⁷²

Considerations of allocative efficiency, more obviously than those of fairness, militate in favor of a broad extension of vicarious state liability. The analogy from the employment context is again somewhat strained, as a public entity is not necessarily a cost-minimizing actor.

⁶⁹ GERALD E. FRUG, CITY MAKING 51 (1999); see also, e.g., Michael E. Libonati, *Reconstructing Local Government*, 19 URB. LAW. 645, 646 (1987); Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 652 (1964). But see Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 15–16 (1990) (arguing that “most home rule governments possess broad regulatory and spending powers,” *id.* at 16). The problem is the difficulty of drawing the line between the state and the local — if it is to mean anything for the city to have exclusive control over local matters, there needs to be a way of categorizing what it means to be “local.” Nearly every action taken by a city will have some impact on those who live outside its borders, and when such actions are challenged, courts have been loath to uphold the exercise of city power at the expense of the state. See, e.g., *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000) (striking down municipal affordable housing ordinance as conflicting with state rent control prohibition); DAVID J. BARRON, GERALD E. FRUG & RICK T. SU, DISPELLING THE MYTH OF HOME RULE 9 (2004); FRUG, *supra*, at 51.

⁷⁰ See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 514 (1961) (“Not charging an enterprise with a cost which arises from it leads to an understatement of the true cost of producing its goods; the result is that people purchase more of those goods than they would want if their true cost were reflected in price.”).

⁷¹ RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2006) (“Respondeat superior creates an incentive for principals to choose employees and structure work within the organization so as to reduce the incidence of tortious conduct.”).

⁷² See *Konradi v. United States*, 919 F.2d 1207, 1210 (7th Cir. 1990) (Posner, J.) (“Often an employer can reduce the number of accidents caused by his employees . . . by altering the nature or extent of his operations: in a word by altering not his *care* but his *activity*.”). This centralization of costs may also provide greater opportunity for losses to be insured: an employer can take advantage of economies of scale when insuring against the losses arising from all employees' activities. See RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b; Calabresi, *supra* note 70, at 543.

Public officials may, individually and collectively, seek to achieve any number of goals, including reelection, prestige, and perquisites.⁷³ But minimizing liability costs is, at the very least, a meaningful consideration for public entities, particularly when, as may often be the case, the political goals pursued by public officials are correlated with minimizing losses, leading these officials to act as though they were cost-minimizers.⁷⁴ One would expect that a change in the extent to which a state is vicariously liable for the city would have an impact on the state's incentives and its exercise of authority. Allocative efficiency may therefore increase if all of the costs of the activities that the state has some ability to control are imposed on the state. The state, due to its position as a centralized decisionmaker, is better able to minimize these costs than is each city on its own. The imposition of vicarious liability on the state for the losses incurred from conducting these activities should reduce the overall extent of losses.

Indeed, there are good reasons to think that considerations of allocative efficiency are even more important with respect to the imposition of vicarious liability in the state-city context than they might be within the traditional employer-employee relationship. Vicarious liability can help to mitigate the perverse incentives that otherwise arise due to the absence of any market interaction between the state and city: insulating the state from vicarious liability could lead it to selectively delegate certain activities to the city without providing the corresponding means for the city to perform these functions at an optimal level. This consideration appears to have motivated the courts' imposition of liability on the state in the *Robertson, Woods*, and *NVRA* cases (and also to have motivated the *Milliken* dissenters): the central concern expressed in these opinions was that the state should not be able to insulate itself from liability.⁷⁵

A comparison with the delegation of tasks in the private sector is instructive in this regard. When the principal assigns a task to an independent contractor, as opposed to an employee, he is not generally liable for the conduct of the contractor.⁷⁶ That does not mean, however, that he does not internalize the potential costs of liability arising from this activity. The principal has bargained with the contractor,

⁷³ See Levinson, *supra* note 67, at 347 ("Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay.")

⁷⁴ See Wallace E. Oates & Diana L. Strassmann, *Effluent Fees and Market Structure*, 24 J. PUB. ECON. 29, 41-42 (1984); see also Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 799 (2007) (arguing that "[g]overnmental liability . . . creates a political incentive to invest in loss prevention in order to maximize political control over tax and spending policy").

⁷⁵ See *supra* sections II.A & II.B, pp. 1039-42.

⁷⁶ See *Hoover v. Sun Oil Co.*, 212 A.2d 214 (Del. 1965).

who has set a price on his services. Because the potential burden of liability from carrying on this activity is factored into this price, the principal is not completely insulated from the costs associated with the activity. Similarly, when the state contracts with a private entity to perform what has traditionally been a public task, it may also transfer its legal liabilities. In the context of private prisons, for example, it is generally argued that while the operation of the prison by a private party constitutes state action for the purposes of the Federal Constitution — thereby allowing individuals to enforce their federal rights against private prison operators under § 1983 — the state might be insulated from vicarious liability for the actions of these private entities.⁷⁷ Delegating this responsibility does not mean that the state has freed itself of the costs of these activities, however, as the potential burden of liability is imposed indirectly through the price mechanism.

No such bargaining process occurs between the city and state: the state can choose when and how to delegate responsibility to the city. The state can set its own price for its sale of liability because it determines how much funding to grant the city in order to carry out an activity. Even if one were to assume that the state were attempting to minimize total public costs (and not just the costs directly incurred by the state and not its cities), the lack of any market between city and state to determine the correct price to put on the shift in responsibility will often lead to under-appropriation. If one has a less optimistic view of public entities, one might also think the state could try to exploit this power dynamic. Given the choice between delegating a responsibility to a private party (at a price determined by the market) and to a municipality (at a price largely determined by the state), the state might be expected to favor the latter. This lower, state-determined price may leave the city without adequate funding to properly perform the designated function. The broad extension of vicarious liability to the state can therefore help ensure that the state has the appropriate incentives to minimize the losses associated with public undertakings.

3. *Local Democracy.* — The theory underlying traditional respondeat superior doctrine can only take us so far in thinking about how to structure vicarious liability between states and cities because of an additional consideration relevant to the city-state relationship but not to the private context: the desire for meaningful local democracy. The debate between the acolytes of Dillon and Cooley surrounds the desir-

⁷⁷ See Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 138–39 (2001); cf. Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569 (2001) (discussing how the delegation to private entities of the administration of the Temporary Assistance to Needy Families (TANF) program insulates the state from liability).

ability of some form of decentralization. There are many reasons to prefer centralized decisionmaking in some circumstances.⁷⁸ But one would not want to centralize control over all public activities, as doing so would imperil many of the “attractive values associated with protecting localized decisionmaking.”⁷⁹ Professor David Barron lists some of these attractive values: “promoting responsive and participatory government by bringing the government closer to the people; fostering diversity and experimentation by increasing the fora for expressing policy choices and creating a competition for a mobile citizenry; and providing a check against tyranny by diffusing power that would otherwise be concentrated.”⁸⁰ Perhaps most fundamentally, if all decisions are centralized at the state level, many citizens will not have the opportunity to engage in the public sphere, to participate actively in determining how they want their community to be governed. Such a cost is hard to measure but very real. As Alexis de Tocqueville observed nearly two centuries ago, “if an American were condemned to confine his activity to his own affairs, he would be robbed of one half of his existence.”⁸¹

Preserving meaningful local democracy requires a substantially narrower scope of vicarious state liability than would be suggested after taking account of only the fairness and allocative efficiency considerations. In theory, extending state vicarious liability might not necessarily lead to an undesirable degree of centralization and a loss of local public life. Just as the state may take into account whether an activity is most efficiently administered at the local or state level, it could conceivably consider the effect on local autonomy as a separate quantity to be weighed when determining when and how the administration should be delegated to the city. Even if losses might be more effectively managed at the state level, the state could choose to delegate a task to the city because the value of the increase in local public life would offset the expected losses.

But there are good reasons to think that the state may substantially undervalue local public life. The utilitarian calculus suggested above

⁷⁸ Some of those reasons include promoting allocative efficiency, *see supra* pp.1048–50, mitigating the threat of the tyranny of the majority, *see* THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1999), avoiding the problems associated with NIMBYism, *see* Barak D. Richman & Christopher Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, 23 YALE J. ON REG. 29, 32–33 (2006), and ensuring the efficient integration of local economies, *see* Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 749 (1973).

⁷⁹ David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 377–78 (2001).

⁸⁰ *Id.* at 378.

⁸¹ ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 142 (Thomas Bender ed., Henry Reeve et al. trans., Modern Library 1981) (1835).

will require state officials to limit their own power, a requirement that will often conflict with interests such as attaining prestige and perquisites that may be motivating public officials. The value of local public life will seldom be a sufficiently visible interest for an official to consider its protection necessary for reelection. Moreover, even if these state officials are not acting in their own self-interest, they may tend to genuinely put a greater value on centralization than others would or than is objectively reasonable (to the extent that there is an objectively reasonable degree of centralization). Simply as a matter of self-selection, those who seek and attain statewide office will often tend to be those who intuitively favor the exercise of power at the state rather than local level. That states often place little value on local autonomy is evidenced by their acquiescence in the erosion of home rule authority.⁸²

If state officials tend to undervalue local decisionmaking, the broad imposition of vicarious liability will lead to a substantial decrease in the discretion and power of local governments, below what might otherwise be socially desirable. The state will have far greater motivation to control city action if it is subject to liability arising from that action. It can be expected to act on this motivation by exercising its powers to limit the range of local discretion. The city's own response to increased vicarious state liability may further contribute to this effect. Imposing vicarious liability on the state does not mean that the city cannot also be liable, but in many cases the added presence of the state as a legally responsible party may reduce the remedial burden falling upon the city. The city will have diminished incentives to exercise due care in carrying out whatever activities it performs if some of the burden of its negligence falls on the state: it will be less likely to fully internalize the costs of its actions.

Thus, limiting the state's liability for the actions of its cities can help to enhance city independence. If the state can be sued when a municipal water pipe explodes and causes flooding, and cities are less motivated to properly maintain their pipes, there will be a greater potential, perhaps not always realized, for the city water system to soon become a state one. If meaningful local democracy means giving cities control over such mundane tasks — and possibly much more — then the scope of vicarious state liability must be sufficiently restricted to provide localities with space to operate. Certainly, the increase in city discretion that would result from placing limitations on vicarious state liability may come at a cost. Allocative efficiency may be decreased if the state is no longer a centralized decisionmaker fully internalizing losses from public activities. But there are always countervailing costs

⁸² See FRUG, *supra* note 69, at 51.

to be weighed in determining the proper degree of centralization: some costs are accepted as “a price we willingly pay in order to achieve the benefits of local democracy.”⁸³

B. Respondeat Superior as a Middle Ground?

As the preceding section indicates, neither of the two possible blanket rules — that the state is always liable for city action (which could be seen to flow from Dillon’s conception of the city as a subdivision of the state), or that it never is (which could be said to be informed by Cooley’s conception of the autonomous city) — provide good solutions to the question of when vicarious state liability should be imposed. The former solution would threaten to undermine meaningful local democracy, while the latter would lead to serious risks of unfairness and allocative inefficiency. The doctrine of respondeat superior, invoked by the Second Circuit in *Reynolds*, appears at first glance to be a tempting alternative. Given that the master-servant conception lies somewhere between the extremes of Dillon’s and Cooley’s conceptions of the city, might the respondeat superior doctrine, if imported from the employment context and applied directly to the city and state, chart a reasonable middle path between the all-or-nothing blanket rules? Unfortunately, there is no logical way to delimit the scope of the city’s “employment” by the state. The result is that a mechanical application would seem to render the state liable for every city action, and the doctrine would therefore devolve into one of the blanket rules already rejected.

Respondeat superior can only provide a coherent means to determine when the state should be vicariously liable if one can define the “scope of employment” between the city and the state.⁸⁴ Such a definition is elusive. With an employer and his employee, each has exercised some choice to enter into their relationship as principal and agent. Each party’s ability to enter the relationship provides the means for bargaining over its scope, and their ability to dissolve the agreement ensures that the maintenance of this boundary is ongoing.⁸⁵ With the state and the city, however, both parties do not have a choice about whether to enter into the principal-agent relationship. The city is linked inexorably by law, history, and geography to the state. Tied as it is to a specific physical space within the boundaries of its state, it

⁸³ Schwartz, *supra* note 78, at 747.

⁸⁴ RESTATEMENT (THIRD) OF AGENCY § 7.07(1) (2006) (“An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.”).

⁸⁵ Certainly, the range of choice and the bargaining power available to each party may be constrained in any number of ways, both obvious and subtle. See generally Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991).

cannot unilaterally decide to secede.⁸⁶ It cannot enter or withdraw from its relationship with the state. The state, however, does have some choice. It is the sole party with the power to create or end the relationship: the state may redraw the boundaries of its local governments at will.⁸⁷ Effectively, the state may “hire” or “fire” a city, but the city has no ability to determine when or how it enters into this relationship.⁸⁸

The lack of mutual consent to enter and sever the relationship creates substantial difficulties when attempting to define the scope of the city’s “employment” to the state: the state and city have had no opportunity to delineate when the city is acting as a servant of the state. The clearest way to avoid these difficulties and apply respondeat superior doctrine to the state-city relationship is to define the scope of employment by including within it all those actions of the city that the state has the power to control. The crucial element in distinguishing the master-servant relationship from other agency relationships, and providing the justification for respondeat superior doctrine in the first place, is the degree of control that the master exerts over the servant.⁸⁹ In the state-city context, then, the test would be whether the state does, in fact, have this power to control the details of city decisionmaking. But given the current status of cities in American law, nearly every city action could in theory be controlled by the state.⁹⁰ The scope of the city’s employment, and therefore of the state’s vicarious liability, would be effectively boundless. The problems under respondeat superior are thus the same problems associated with an across-the-board rule holding the state vicariously liable for all city action: while perhaps defensible in terms of fairness and efficiency, it would leave little room for meaningful local democracy.

C. *Vicarious Liability for City Actions Mandated by the State*

How, then, should a court approach the question of whether a state can be held vicariously liable for city action? Crafting an appropriate

⁸⁶ See U.S. CONST. art. IV, § 3, cl. 1.

⁸⁷ See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907). Some states can also in certain circumstances place a city in receivership, effectively taking over the administration of local government. See, e.g., *Powers v. Sec’y of Admin.*, 587 N.E.2d 744 (Mass. 1992) (upholding the constitutionality of the state Receivership Act).

⁸⁸ This lack of bilateral choice is problematic for the master-servant conception of the state and city. One might quite reasonably argue that because all agency relationships require the consent of both parties, see *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981), no such relationship could possibly characterize the interaction between state and city.

⁸⁹ See RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (“An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control.”); *id.* § 7.07(3)(a).

⁹⁰ See *supra* pp. 1046–47.

standard requires taking into account fairness, allocative efficiency, and the value of local democracy. It is hardly surprising that the respondeat superior rule fails to draw a line that properly reflects these considerations, given that it was developed in a context in which the market interaction between principal and agent provides for a more efficient allocation of responsibilities, and in which the third of these factors has no relevance. An acceptable balance can, however, be achieved with the rule that the state be vicariously liable only for city actions that the state has mandated that the city perform. This rule promotes fairness, efficiency, *and* local democracy because it limits the vicarious liability of the state to those situations in which the first two considerations are particularly prominent, while otherwise freeing the state from liability in a way that permits it to give local democracy space to breathe.

Some clarification of the scope of this proposed rule is necessary. Only to the extent that a city has meaningful discretion about whether and how to undertake an activity should the state be insulated from vicarious liability. If a state were to affirmatively order a city to do something — to build a road, for example — certainly this would be categorized as an action the state mandates the city perform. Also included in this category are actions taken pursuant to affirmative responsibilities that, according to state or federal law, lie with the state, but that the state has delegated to its cities. Because compliance with the law requires that these activities be performed, and the state has foisted this responsibility on its cities, the cities have no discretion — the state's delegation in effect dictates that the city undertake the activity. Thus, to take the facts of *Reynolds*: federal law requires states (having accepted federal funding) to administer their food stamp program in a particular manner.⁹¹ Because the state had accepted this responsibility, then delegated the administration of its program to its local governments, New York City was in essence required by the state to administer a food stamp program in accordance with federal law.

A rule that imposes vicarious liability on the state for those actions it has mandated that the city perform is fair in that it ensures that the state remains liable for those costs that are most clearly “characteristic of its activities.”⁹² If the state dictates that the city do something, the city, in complying, is essentially acting as an arm of the state and performing state business. For the state (and its taxpayers) to escape liability from harms arising due to actions mandated by the state would be similar to allowing an employer to escape liability for harm-causing actions that his employee undertook at his direction. Certainly, one

⁹¹ See *Reynolds v. Giuliani*, 506 F.3d 183, 187–88 (2d Cir. 2007).

⁹² *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968).

might argue that fairness dictates that the state should be liable for even more city action. If the value of local democracy is to be protected, however, some limits on vicarious state liability are necessary, and the proposed rule ensures that the state remains liable for those activities that would be the most unfair for it to escape.

The rule promotes allocative efficiency by mitigating the perverse incentives that arise due to the lack of market interaction between state and city, preventing the state from foisting responsibilities upon the cities without bearing their full costs. Because the state would remain vicariously liable for all local actions taken pursuant to mandatory delegations, it would have incentives to ensure that cities have adequate means at their disposal to perform these functions. City actions that would not give rise to vicarious liability under this rule are those for which perverse incentives leading to inefficiency are less of a threat. If a city retains some degree of discretion about whether to undertake an activity, then it can decline to do so if it has insufficient means to conduct the activity without causing a substantial risk of harm that outweighs the benefits. A state delegating power to the city, but leaving it a choice about whether or not to exercise this power, therefore has greater incentives to provide the means for the city to perform this function at an optimal level.

By leaving a broad swath of city activity that will not give rise to vicarious state liability, the rule also helps to preserve local democracy. Vicarious liability only attaches in those cases where local democracy has already essentially been quashed because the state has left the city with no choice about whether and how to act. In those cases where the city does have discretion, the state will not be liable. This restriction on liability decreases the extent to which the state will be motivated to limit the range of local discretion.

This proposed rule may be acceptable both to those who promote Dillon's conception of the city as a mere subdivision of the state and to those who share Cooley's vision of inherent local sovereignty. While one who does not highly value local democracy would likely push for a broader scope of state vicarious liability, the rule does not threaten the status quo established by Dillon's Rule. The state would remain free to exercise control over the city, both by utilizing the city to implement state programs and policies and by controlling whether the city has discretion to exercise power in other arenas. The state, ultimately, will get to decide to what extent it will take on liability. And while the threat of vicarious liability may lead the state to reconsider delegating certain tasks to cities, acolytes of Cooley should nevertheless favor the imposition of liability in cases where the state has mandated that the city take action: otherwise, the decentralization that occurs may actually come at the expense of the city, which will possess only limited autonomy if its delegated powers come in the form of underfunded mandates. Members of both sides of the debate remain free to battle

over whether and how the state should delegate power and discretion to the cities.

Courts, in making their determinations regarding vicarious state liability, may have already intuited some version of this rule and the considerations of fairness, allocative efficiency, and local democracy underlying it. The outcomes of *Woods*, *Robertson*, the NVRA cases, and *Buck* are all consistent with the application of the rule: only where state or federal law placed the responsibility for action on the state did the courts in these cases hold that the state could be held liable for city action. In those cases where liability was imposed, the courts often hinted at the allocative efficiency and fairness concerns that motivate imposing vicarious liability by remarking on the perverse results that could follow if the state could effectively abrogate its responsibilities under the law through delegation.⁹³ In *Buck*, where liability was not imposed, a concern with protecting local democracy appears to have motivated the court.⁹⁴

Of the cases surveyed, only *Reynolds* and *Milliken* appear to be inconsistent with the application of this rule. *Reynolds*'s focus on *Monell* led it to dismiss too quickly the fact that federal law placed an affirmative duty on the state; the court thus ignored the fairness and allocative efficiency concerns raised in *Woods* and *Robertson*.⁹⁵ *Milliken* presents a closer question, as cities generally retain significant discretion over the administration of their schools. But responsibility for specific aspects of the administration of the school may nevertheless continue to effectively rest with the state. Whether *Milliken* is inconsistent with this Note's proposed rule depends on whether one accepts the dissents' contention that the Fourteenth Amendment places an affirmative responsibility on the state to desegregate.⁹⁶ If this interpretation is correct, the Court allowed the state to transfer this affirmative responsibility to the city — certainly not a benefit to the exercise of meaningful local democracy, whatever concern for local sovereignty the Court might have raised — while improperly ignoring the fairness and efficiency concerns raised by the dissents.⁹⁷

⁹³ See, e.g., *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008); *Robertson v. Jackson*, 972 F.2d 529, 534 (4th Cir. 1992) (arguing that delegation to local agencies does not “diminish the obligation to which the state, as a state, has committed itself, namely, compliance with federal requirements”).

⁹⁴ See *supra* p. 1042.

⁹⁵ See *Reynolds*, 506 F.3d at 194.

⁹⁶ See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 770 (1974) (White, J., dissenting). That such a duty should lie at the state level would make sense because, due to residential segregation between cities, often only the state would have the capacity to fulfill this mandate. See *id.* at 787 (Marshall, J., dissenting).

⁹⁷ Compare, e.g., *id.* at 808 (Marshall, J., dissenting), with *id.* at 741–42 (majority opinion).

CONCLUSION

As this Note has argued, the rule courts should announce is that the state's vicarious liability will be strictly limited to city action taken pursuant to affirmative obligations either imposed by the state on the city, or imposed by state or federal law on the state. To say that the courts have more often than not reached the correct result, and in doing so have sometimes hinted at a valid underlying approach, does not mean that they have done enough. Transparency and doctrinal clarity are extremely important in this area. Those seeking to preserve a balance between state and city, and to provide space for local action, should be careful to help ensure that the limits of vicarious liability are clear. As the experience with home rule has shown, uncertainty as to where the line between state and city is drawn can lead to the consolidation of power at the state level.⁹⁸ If any meaningful decentralization is to occur, a state must be certain if and when it will be liable for city action, so as not to have the incentive to mitigate its uncertainty by exerting greater control over city activities. Courts should make an effort to elucidate the rule they are applying, and to make clear the underlying considerations that have informed the application of this rule, in order to provide the necessary guidance to states and cities. Preserving the clarity of this rule as applied to infinitely variable factual scenarios is, of course, easier said than done. To the extent possible, however, courts should strive for such clarity in order to help preserve "the benefits of local democracy."⁹⁹

⁹⁸ See BARRON, FRUG & SU, *supra* note 69, at 9.

⁹⁹ Schwartz, *supra* note 78, at 747.