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Response

The Rule of Law Against Sovereign Immunity in a Democratic State

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> "I am afraid (and I have too great cause to fear) that our King is told he is no great king unless he be told so, but I believe his greatness lies in the observance of his laws. That king that is not limited rules slaves that cannot serve him." [1]
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> —Sir Dudley Digges.
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> "And the three most democratic features in Solon's constitution seem to be these: first and most important the prohibition of loans secured upon the person, secondly the liberty allowed to anybody who wished to exact redress on behalf of injured persons, and third, what is said to have been the chief basis of the powers of the multitude, the right of appeal to the jury-court—for the people, having the power of the vote, becomes sovereign in the government." [2]
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> —Aristotle.

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1. 2 COMMONS DEBATES 1628 71 (Robert C. Johnson & Maija Jansson Cole eds., 1977) (1628). The quote is from the Parliamentary debates surrounding the Five Knights case and relating to resistance to forced loans exacted by Charles I. *Id.*

2. Aristotle, *The Athenian Constitution* 9-1, trans. H. Rackham, *available at* http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0046%3Achapter%3D9%3Asection%3D1, *archived at* http://perma.cc/RX5Q-FE3K.

I. Introduction

Brettschneider and McNamee (BM) have explained to us—absolutely rightly, I think—that sovereign immunity doctrine, if it is to be justifiable, must proceed from a theory of the kind of sovereign that is supposed to be immune.[3] In a state built on democratic ideals, the kind of sovereign in question is the people, acting as a collective agent through their elected representatives (or sometimes directly); sovereign immunity, if it is acceptable at all, must be acceptable because it can support democratic popular sovereignty.

Such an approach is in marked contrast to popular theories of sovereign immunity that rely on notions such as the dignity of the state. That is as it should be. After all, states don't have dignity of their own, except insofar as they serve their people. Moral standing and worth is limited to humans, not the corporate entities they create. Maybe *kings* had dignity back in the imagined normative world of the Peace of Westphalia, but we don't go in for status hierarchies in which rulers are above the law by divine right or metaphysically dubious Hobbesian personifications anymore. (That stuff went out with the Stuarts.) Accordingly, if it is claimed that states and their treasuries have the kind of normative standing that entitles them to commit legal wrongs against individuals with impunity, that claim must proceed from an argument about the value represented by such states, sufficient to override the claims of individuals with their own normative standing.

BM offer such an argument. As I read it, they hold that democratic popular sovereignty requires a democratic state to have some breathing room: it must be allowed to make "mistakes" of policy and (even?) law without having its treasury subject to the thousands of tiny knives of aggrieved private litigants.[4] Accordingly, they divide the world of private litigation against the democratic state into two kinds of lawsuits: "purely private" claims[5]—mainly, it appears, claims in tort and contract—and "fundamental rights" claims[6]—based on the sorts of noneconomic constitutional rights that we usually think of under this category like due process, equal protection, and free speech.[7] The former are the breathing

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3. Corey Brettschneider & David McNamee, *Sovereign and State: A Democratic Theory of Sovereign Immunity*, 93 TEXAS L. REV. 1229, 1239–40 (2015).

4. *Id.* at 1251.

5. *See id.* at 1281.

6. *See id.* at 1290.

7. We might read BM's use of the term "fundamental rights" as appealing to the doctrinal concept from U.S. constitutional law or as describing a purely normative concept of political theory. BM appear at points to want to do both, however, I do not think they can get the doctrinal concept to do the work they need. The fundamental rights/nonfundamental rights dichotomy in constitutional law ordinarily functions as a way of policing general legislation (or, at least, non-individualized policy) under substantive due process doctrine: if an act of Congress or of a state infringes on a fundamental right, such as voting or free speech, it is subject to strict scrutiny. The proposition that economic rights are not fundamental, in that sense, amounts merely to the claim—

room: sovereign immunity ought to extend to them, for they are acts of the sovereign democratic *polis*, and if it is subject to suit for carrying them out, that may undermine its policy flexibility, and, with it, its capacity to pursue the general good. Sovereign immunity does not extend to the latter, however, for violations of fundamental rights are inconsistent with democratic sovereignty.

While I greatly admire the project of grounding the theory of sovereign immunity in the theory of democracy, I must confess to some reservations with respect to some of the conclusions BM draw. I agree that sovereign immunity ought to be justified only insofar as it advances democratic popular sovereignty, and I agree that such an approach rules out an immunity defense for democratic governments that violate fundamental rights. However, I cannot so easily accept that such a theory allows those governments to claim immunity for private injuries in tort and contract—particularly when those injuries are deliberately inflicted. Rather, based on BM's democratic approach to sovereign immunity, I must conclude that a state which too-freely disregards private rights cannot be consistent with the rule of law, and, for that reason, cannot be democratically legitimated; it follows, based on BM's core democratic insight, that sovereign immunity should not extend to the intentional violation by public officials of private rights.[8]

This essay begins by sketching out some ideas about the relationship between the rule of law and democracy. It then moves to describe the points where this view leads me to disagree with BM about the defensibility of sovereign immunity. I conclude with some thoughts on emergencies, existential threats, and state budgets.

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with which I concur—that *Lochner v. New York* was wrongly decided and ought to remain overruled. But in the sovereign immunity context, we are not discussing generally applicable laws, but, rather, individual wrongs such as the abrogation of contracts between specific people or the commission of torts against specific people. And when we move from general legislation to actions against specific people, we also move from substantive due process to procedural due process. *See generally Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (explaining boundaries of procedural due process). Procedural due process, of course, is concerned with the protection of life, liberty, and property interests, which at least arguably include those private economic harms represented by tort and contract. Because many of the ways in which states can injure private rights, such as by stealing or damaging their property or harming their persons, also amount to impairments of life, liberty, and property interests, I tend to agree with Chemerinsky's suggestion that sovereign immunity is in tension with the due process clause. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1215 (2001). Moreover, we do not ordinarily say that the protections of procedural due process are limited to the domain of constitutional fundamental rights, and procedural due process itself is surely a fundamental right if anything is, given that it captures the basic notion of a government under law. *See, e.g.*, *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (explaining that punishment only after a fair hearing is fundamental to the idea of liberty). For those reasons, there is a fundamental right, constitutionally speaking, to be free from the sorts of *individualized* private injuries from the state that are covered by tort and contract law—even though it is true that economic interests in general are not fundamental rights which must be protected from *general* legislation under a substantive due process theory.

8. To be clear, I suppose that the state is not required to have robust rules of tort and contract, but if it establishes these rights and applies them to its own actions, the rule of law requires it to be constrained to obey them.

II. The Rule of Law and Democracy

A. What is the Rule of Law?

The rule of law is a basic criterion for legitimate political states, which is often summarized by a catchphrase: the law, rather than men [or women], rules.[9] Understood in this way, it stands as a guard against the arbitrary use of the power of the state: it forbids those who control such power ("officials") from treating it as a personal resource to be used however they wish; instead, it commands that such power be used for ends that can be attributable to the political community as a whole, expressed through rules given in advance, and to which those over whom power is used may appeal to resist that power.

States are obliged to pursue the rule of law because it is a component of an important kind of equal status from which their citizens benefit in two respects. First, the arbitrary use of power, particularly state power, offers insult to those over whom the power is used; it suggests that the power users are hierarchical superiors who are entitled to general managerial control over the lives of others and that the interests and rights of those others need not be taken into account. Second, institutional arrangements which permit highly concentrated power—like that of the state—to be used arbitrarily place those who do not control such power in a fearful and subordinate relationship to those who do; it calls upon the former to bow and scrape to the latter. These two inegalitarian elements of rule-of-law failure, which I have called *hubris* and *terror* respectively, together create a state with a small class of superiors and a much larger class of inferiors; the former of whom are empowered to tyrannize the latter. "The rule of law" is a label for the kind of legal equality that rules out such illegitimate hierarchies, as well as the kind of state that achieves it.

B. Why is the Rule of Law Required for Democracy?

Democratic legitimacy presupposes the rule of law for at least three reasons, which we may label conceptual, pragmatic, and moral.[10] The conceptual reason is that the identity of a democratic sovereign and its acts

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9. I have attempted to give a comprehensive account of the rule of law in two articles: Paul Gowder, *The Rule of Law and Equality*, 32 LAW & PHIL. 565 (2013) [hereinafter Gowder, *The Rule of Law and Equality*]; Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021 (2014). The description of the rule of law given in the text is a synthesis and partial summary of my theory of the concept (mostly what I have called "the weak version"), as I currently understand it; because my understanding of the idea has developed over time, there are slight differences between the account in text and what I have said before. For the absolute fullest account of the rule of law, see PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD (forthcoming).

10. I am currently working on more fully developing the theory of the relationship between the rule of law and democracy. This section captures my best account of that relationship right now.

are impossible to ascertain without a system of at least foundational law that genuinely controls the acts of a democratic state. It is law that decrees whose votes count, what kinds of speech acts count as legislation, what the decision rules are for the branches of government, and the like. Thus, it is law that provides the basis for establishing the relationship between the cognitions that are in the minds of citizens and the acts and institutions of government; whatever the ideal of popular sovereignty at the root of democratic theory means, it means there must be *some* such relationship (the two cannot be wholly independent; the things that go on in peoples' heads cannot just be epiphenomenal). Assuming this is true, it follows that officials must reliably follow at least some of the laws (a basic criterion of the rule of law) in order for the system to be democratic.

For a concrete example, in the United States, if the executive branch stops following the rules of bicameralism and presentment and instead just enforces as law whatever the president says is law, democracy has failed. The people have ceased to rule: the concrete instantiations of their rule, that is, the democratically enacted laws, no longer bind the powerful.

The pragmatic reason is that every democratic system is a massive alliance of the weak many against the powerful few. Democracy is just the system in which political authority does not depend on social, economic, or military power (we call those other systems "aristocracy," "oligarchy," and "dictatorship," respectively). In order for a democracy to sustain itself against the natural desire of the powerful few to rule on their own, the weak need to be able to combine and coordinate their individual power toward collective goals—bluntly put, they need to be able to credibly threaten to all get together to punish the powerful for getting out of line; in the first instance this is done in the ballot box, but, *in extremis*, it is done in the streets and on the field of battle. Law is a crucial mechanism for this kind of mass coordination, for it provides a publicly known set of standards which the powerful must follow.[11] It follows from this that the people must enforce their law against the powerful, including their public officials, or they risk the powerful breaking free from the constraints of that law and, thereby, the state ceasing to be a democracy.[12]

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11. *See generally* Paul Gowder, *What the Laws Demand of Socrates—and of Us*, 98 MONIST (forthcoming 2015); Gillian K. Hadfield & Barry R. Weingast, *What is Law? A Coordination Model of the Characteristics of Legal Order*, 4 J. LEGAL ANALYSIS 471 (2012); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

12. See, for example, Gowder, *supra* note 11, for the concrete case of Athens, where the stability of the democracy critically depended on maintaining the law. For further elaborations of the theory, see generally Paul Gowder, *Democracy, Solidarity, and the Rule of Law: Lessons from Athens*, 62 BUFF. L. REV. 1 (2014) [hereinafter Gowder, *Democracy, Solidarity, and the Rule of Law*]; Paul Gowder, *Trust and Commitment: How Athens Rebuilt the Rule of Law*, in THEORIZING TRANSITIONAL JUSTICE 225 (Claudio Corradetti et al. eds., 2015) [hereinafter Gowder, *Trust and Commitment*].

The moral reason is that the subordinate status associated with living in a state in which the rule of law is not respected is inconsistent with the equal status of a democratic citizen.[13] This is also true for pragmatic reasons—a citizen who lives in fear of arbitrary power is unlikely to vote freely, for example. But it is more important to understand it as responding to fundamentally normative reasons: democracy *just isn't* a social arrangement in which there are bosses and subordinates. Hubris is a fundamentally anti-democratic attitude, and one which supposes that the rights of others may be freely disregarded based on one's own judgment; a society in which officials are allowed to exhibit it can be said to be a failure from the standpoint of democracy.[14]

For these reasons, a democracy must comport with the rule of law. The problem with applying sovereign immunity to the intentional violation of private rights is that it would entail permitting a democratic state to violate the rule of law. In doing so, it would undermine the democratic character of such a state.

Note, incidentally, that the pragmatic and moral reasons do not depend on the democratic legitimation of the particular law(s) which the state violates in any particular instance. So long as the laws protect their interests, citizens of a democratic state have good reason to hold their officials to even undemocratically enacted laws; for the constraint of public officials is useful for preserving popular power on its own merits. Suppose we believe, for example, that judge-made law is undemocratic (such a thought would be a mistake, I think, but let us grant it). It does not follow that the government ought to be allowed to commit common law torts against ordinary citizens—doing so might still express hubris against those citizens, and the common law of tort might still provide democratic citizens with a basis to coordinate in order to assert their own power to control officials.[15]

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13. *See generally*, JEREMY WALDRON, DIGNITY, RANK AND RIGHTS (Meir Dan-Cohen ed., 2012) (giving an account of the way in which law universalizes access to the status reserved, in aristocratic societies, to the elite).

14. It's also a really bad sign. If officials start to exhibit *hubris*, ordinary citizens have good reason to worry that they don't care about citizens' legal rights, and thereby don't care either about citizens' equal status or about the standing of the commands the sovereign people have given them through the laws. See, for example, Gowder, *Democracy, Solidarity, and the Rule of Law*, *supra* note 12, at 11 for another example from Athens, in which the democrats understood private law-breaking by the powerful as a red flag indicating dispositions toward establishing oligarchy.

15. See Gowder, *Trust and Commitment*, *supra* note 12**,** at 232, for an example from Classical Athens in which the people used an amnesty, imposed on them by foreign sword, to provide the basis for a coordination equilibrium which allowed them to rebuild the rule of law and regain control of the powerful. On the importance of the common law of tort in controlling official power, see ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 195–99 (1885) (praising the English ability to bring private suit for trespass against public officials who violate private rights). I thank Corey Brettschneider for suggesting that I address this issue.

III. Sovereign Immunity and the Rule of Law: the Tension

The key problem is that "immunity" may shade too easily into "impunity"—the power to violate the acknowledged law without consequences. And impunity is just the kind of unconstrained official coercive power that the ideal of the rule of law urges us to prevent. Consider the contract abrogations that make up a sizable proportion of the sovereign immunity cases. Some individual or firm makes a contract with the state to provide some service to the public, but then the legislature decides it would rather not pay and so passes a bill renouncing the contract. The victimized party files suit, which is dismissed not on the grounds that the contract is invalid, but simply on the ground that it is within the discretion of the legislature, as the representative of the sovereign people, to decide not to pay it.[16] (That is, for practical purposes, what the notion of sovereign immunity amounts to: the discretionary power to act illegally.)

What are citizens to think about a legislature that has, and exercises, such a power? One thing they might reasonably think is that their legislature is not to be trusted—that its members might well hold the rights of their fellow citizens in sufficient disregard to use their power not for the public interest, but to help their friends and punish their enemies. This is, after all, the classic fear about power, especially the absolute kind: it corrupts.[17] The members of the legislature have used its official authority, backed up with all the force of the state, to cast aside a private right when that right seems inconvenient, and it has been sheltered from legal consequences; why should citizens be confident that they will be secure from its power in the future?

The intuitive response on behalf of Democracy, conventionally understood, to The Rule of Law, conventionally understood, in such situations is that we do not need so-tight legal constraints on our elected officials because the political process (especially when fundamental rights are legally protected) is there to protect us. This *political protection thesis* is the key hidden premise in arguments like BM's, which attribute even the illegal actions of public officials to something like a sovereign popular will:

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16. For the reader who may be worrying that the bill of attainder clause states a fundamental right in BM's sense, and that they therefore would agree with me that a state which does this kind of misbehavior against a named individual through the legislative process isn't entitled to sovereign immunity, I invite you to read, for "legislature," the identity of your least-preferred executive official. The same goes for similar arguments about the ex post facto clause. For those who think that abrogating a named contract either constitutes a taking or, alternatively, a deprivation of property without due process, and that those are definitely fundamental rights, I would be inclined to agree with you, but it appears that BM, based on their discussion of several contract abrogation cases, would disagree. Brettschneider & McNamee, *supra* note 3, at 1262–66. As I do not see the distinction between fundamental rights and those that are not fundamental to be the key issue in the question of sovereign immunity, that argument is beyond the scope of this essay. *See supra* note 8.

17. *See* Paul Gowder, *Institutional Corruption and the Rule of Law*, 9 LES ATELIERS DE L'ETHIQUE/THE ETHICS FORUM 84 (2014) (Can.) (explicating the concept of corruption and its relationship to the rule of law).

democratic officials might carry out isolated illegality, like the occasional abrogating of a contractual obligation in pursuit of the broader public interest, but they will not carry out systematic illegality, like an outright breaking free of the ties binding them to the *polis* and a stepping down on the path to impunity, and, thereby, oppression, because, after all, the bastards can always be voted out. Thus, we might think, a little bit of sovereign immunity does not pose too serious a threat to rule of law values.

The problem with that premise is that the people cannot control their bastards by voting alone. The key difficulty with representative democracies is that there is a principal–agent problem between the voters and the people for whom they vote: because it is costly to monitor and to coordinate to control elected officials, the electoral process alone cannot ensure that officials act in ways the people would endorse.[18]

Now consider how private litigation provides information to the public. Because the prospect of winning damages offers the victim of a government-contract abrogation an incentive to file a lawsuit, that prospect subsidizes the public revelation of otherwise potentially private information about the conditions under which officials are willing to break the law and recruits the judgment of a court to help tell the people whether their officials are in fact scofflaws.

Moreover, when a judge rules against an elected official, it can be a form of what we might call, with apologies to Jessica Bulman-Pozen and Heather Gerken, "uncooperative separation of powers."[19] Like uncooperative federalism, uncooperative separation of powers can take an issue that was previously off the political agenda and yank it onto the political agenda; in doing so, it can allow democracy to work, by forcing the *demos* to make an explicit and conscious decision after a public debate.[20] Faced with an unfavorable ruling, the official must either obey it, in which case the rule of law is restored, or must openly disobey it, in which case we are likely to get the sorts of things that tend to happen in brewing constitutional crises: widespread public attention and action by multiple branches of government. This, in turn, will allow the people to determine, again, that their officials are actually disobeying the law and, as important, the reasons their officials offer for doing so. Assuming that the people recognize all or some of the reasons given in the previous section for caring about the rule of law from a democratic standpoint, we can expect them to defend the rule of law unless

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18. *See generally* Geoffrey Brennan & Alan Hamlin, *On Political Representation*, 29 BRIT. J. OF POL. SCI. 109, 110 (1999) (summarizing literature on democracy as a principal–agent problem).

19. *Cf.* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1260 (2009) (adopting the moniker "uncooperative federalism" to argue that the concept should be more fully appreciated within the literature).

20. *See id*. at 1287; Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1894–97 (2014) (explaining "the discursive benefits of structure").

and until they share the judgment of their officials that there are overriding reasons warranting its violation.

Permitting officials to claim sovereign immunity on behalf of the people against private wrongs sacrifices this important tool that the people may use to control their officials. Accordingly, we have *democratic* reason to hesitate before applying sovereign immunity even to purely private wrongs.

IV. Intentional Wrongs vs. Genuine Mistakes

In the first instance, the worries in the previous section only concern intentional private wrongs—the abrogation of contracts, undermining of property rights, and commissions of intentional torts. Those kinds of violation represent the deliberate abuse of state power, which, unchecked, can undermine the rule of law.

There is less reason to worry about the application of sovereign immunity to either negligent torts or to reasonable mistakes of law by public officials.[21] Less reason, however, is not the same as no reason.

With respect to negligent torts, rule of law worries arise from the fact that negligent misconduct, too, may represent a breaking free of official power from public control. The extent to which this worry ought to give us pause depends on the extent to which the negligent conduct actually represents a use of official coercive power. Thus, compare two hypothetical police officers. The first officer negligently strikes a pedestrian with a squad car. The second officer negligently injures a citizen in the course of an arrest, by, for example, meaning to grab and use a Taser but carelessly grabbing and firing a gun instead.

There seems to be substantial rule of law reason to treat these two police officers, and the immunity claims the state might want to raise based on their behavior, differently. The first officer is engaging in conduct that an ordinary citizen might also engage in, and which the public has reason to restrain to exactly the same extent that it has with respect to ordinary citizens. There are no distinctively *rule of law* reasons, rooted in the control of state power, to control police driving. Accordingly, I am inclined to agree with BM that it is permissible for a democratic state to apply sovereign immunity to ordinary acts of negligence.

By contrast, the second officer is directly applying official coercive force against ordinary people—the core conduct that the rule of law aims at controlling. The public has strong reason to exercise particularly careful controls over that conduct. Citizens may not be able to feel secure against

21. There may be democratic reasons to reject the application of sovereign immunity to these categories that do not originate in the rule of law. We might think, for example, that negligence liability would provide useful incentives to government actors to carefully carry out the tasks the people have assigned to them, such as the operation of public goods. However, the scope of this essay is limited to rule of law reasons to worry about sovereign immunity.

their state or have faith in the strength of the law to control the use of state power against them where officials are allowed to use that power negligently. Accordingly, a democracy that provides inadequate incentives for officials to take due care in their use of the state's monopoly of coercive force may be indistinguishable, from citizens' perspectives, from one that allows officials to intentionally misuse that monopoly. Since citizens must actually believe that the law can control their officials in order to successfully use legal tools to do so,[22] there is substantial rule of law reason to deny a democratic state the power of sovereign immunity in cases of negligent use of the tools of state coercion.[23]

Now let us consider genuine mistakes of law. Of course, such mistakes ought to be reasonable—we ought not, for example, to give officials an incentive to remain ignorant of the law so that they may break it with impunity. But even the domain of reasonable mistakes of law is somewhat fraught. As a practical matter, it may be impossible to tell the difference in many cases between mistake of law and intentional defiance. For example, when the official actor in question is a multi-member body like a legislature or city planning commission, problems which are familiar from the struggle with the legal fiction of legislative intent recur: whose words or thoughts constitute the relevant beliefs which may be attributed to the body?[24] Moreover, when the question is not what is intended, but what is believed about the law, it becomes fairly difficult to parse out intentional disobedience from good-faith disagreement. Suppose, for example, an executive official orders an act which he or she knows the courts to have declared illegal but subscribes to a theory of legal authority according to which his or her own interpretation of the law counts as authoritative for her own conduct.[25] From the standpoint of a court which disagrees, is such an official knowingly violating the law or merely making a mistake about it?

That being said, there are some unambiguously reasonable mistakes of law. Consider a local official who genuinely but mistakenly believes, based on a careful review of the legally relevant material, that the government has an easement over some piece of private property (and that the courts would agree), and who, accordingly, illegally enters that property. And suppose there is strong evidence for that good-faith mistake, such as memoranda memorializing the official's reasoning. It is hard to see how the rule of law

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22. *See* Gowder, *supra* note 11, at 14.

23. This reason is particularly strong in a political environment like the one we face, in which racially charged incidents of police violence are frequently explained away as mistakes.

24. *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) (describing various critiques of the notion and use of legislative intent).

25. In constitutional law, this view is known as "departmentalism." *See generally* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1031 (2004) (defining departmentalism). There is, in principle, no reason why elected officials cannot take similar positions with respect to nonconstitutional sources of law.

would be undermined by applying sovereign immunity to shield the government from trespass liability in such a case. Here, too, we may safely stand with BM in using sovereign immunity to shield the public purse.

V. What is the Threat?

With respect to intentional wrongs and the like, it seems like we have a tradeoff from the standpoint of democracy. On the side of rejecting sovereign immunity, we have the worry that unaccountable political officials pose a threat to the rule of law and a healthy recognition of the way in which the people may use vigorous private enforcement of their laws to keep their officials in line. But on the side of accepting it, we have the concerns that BM have raised about the way that potential liability may impair policy flexibility or bankrupt democratic polities. A resolution of the question will require balancing these democratic concerns against one another. In aid of that, this section suggests that the latter worry is not so serious as might be feared.

To start, I divide it into two worries, which I will consider in turn. First, officials might be deterred from pursuing the public good to the best of their ability because of the fear that the state would be held civilly liable (*the deterrence worry*). Second, the state might actually be disabled from carrying out policy, including policy initiatives unrelated to civil liability, because the lawsuits that have been filed against them are so expensive that their budgets become overtaxed (*the budget-busting worry*).

It is hard to see how the deterrence worry represents a problem from the standpoint of popular sovereignty. If we imagine general rules of tort and contract as democratically legitimate (or even just democratically useful for the reasons given in the previous sections), then we are asked to balance the gains, from the standpoint of popular sovereignty, from effectuating the democratic judgments (or merely empowering the people to control their officials) encapsulated in the rules of contract and tort against the gains from effectuating the one-off judgment of the people's officials that those rules need to be set aside in a particular case.

In the abstract, that judgment may seem difficult to make. A plausible case could be made for the democratic superiority of either position. However, one compelling additional fact seems to stack the scales in favor of effectuating the general rules of contract and tort: the people, through their democratic legislators, may exempt themselves from those rules, through prospective legislation, even in a world without sovereign immunity.[26]

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26. Of course, this is complicated in a federal system such as ours by the fact that the federal government may create private rights against states, which could not be amended directly by states. A doctrine of sovereign immunity would, and does (as BM discuss), protect the states to some extent against that. Brettschneider & McNamee, *supra* note 3, at 1254. However, in view of the fact that federal legislation itself is a sovereign democratic act, it's hard to see how *democratic sovereignty* requires state budgets be protected from it.

This is a point that deserves the strongest emphasis. The rules of contract and tort are common law and statutory rules completely in the control of democratically elected legislatures whether or not there is a doctrine of sovereign immunity. Should those legislatures wish, they may amend those laws to prospectively exempt themselves from liability at will. The state of Texas may pass a law, for example, providing that "all contracts henceforth made between the State and any private party shall not be enforceable." Sovereign immunity, as applied to tort, contract, and property law, is *merely a default rule*. It provides that the state shall not be sued unless it says otherwise. The abolition of sovereign immunity would simply shift the default in the other direction. In consequence, all the state actually loses in the move from a sovereign immunity to a no sovereign immunity regime would be the ability to reach back and immunize itself *retrospectively* from causes of action that arose before the enactment of the statute, retrospectively seize property rights acquired before that enactment, abrogate contracts entered into before enactment, and the like. And since legal prospectivity is a core requirement of the rule of law,[27] this does not seem like too heavy a burden to ask the state to take up.

Of course, such legislative action might be expected to have political consequences. If the state passes a law saying that no contracts it enters into in the future mean anything, the people will worry, first, about the extent to which their own contracts with the state are at risk and second, about the economic consequences of a world in which the state is not required to keep its contracts (such as the fact that nobody will be willing to enter into contracts with the state, except perhaps with an extraordinary risk premium).[28] They (via advocacy organizations, lobbyists, and the like) may demand that the idea be dropped altogether, or may demand that strong (and perhaps judicially enforceable) checks and balances be enacted on the kinds of contracts that the state abrogates—perhaps, for example, requiring an explicit finding of public emergency or the participation of multiple branches of government. They may choose to immunize only genuine mistakes rather than outright illegality by providing for something like the qualified immunity doctrine of 42 U.S.C. §1983.[29] At any rate, by abolishing *constitutional* sovereign immunity and, in doing so, forcing the legislature to make this decision, and to do so in the open, before it gets to take advantage of a default-rule immunity doctrine to shelter the abuse of private rights, we make it possible to get a legislatively enacted sovereign immunity doctrine which not only preserves some degree of breathing room for officials to carry

27. *See* Gowder, *The Rule of Law and Equality*, *supra* note 9, at 566.

28. On the latter, see generally Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. OF ECON. HIST. 803 (1989) (explaining the role of legal constraints on governments in economic development).

29. 42 U.S.C. § 1983 (2006).

out illegal policy options but which also itself reflects the direct operation of a democratic process.

In view of the capacity of the people, through their elected representatives, to thereby carve out exceptions to generally applicable laws for their official acts, we must conclude that the loss to sovereign policy flexibility from the fear of liability if sovereign immunity no longer stands as the default rule is relatively modest. And given that the cost of that marginal additional sovereign policy flexibility is itself democratically troubling (particularly because it stands to reason that most of the individuals subject to private torts by the government are likely to be those who can not effectively avail themselves of the political process, such as the unpopular or "discrete and insular minorities"[30]) we must conclude that the risk of deterring some portion of the full range of policy options is not all that worrisome from the democratic standpoint.

As for the *budget-busting worry*, I doubt it has significance in today's fiscal environment. BM's examples tend to hail from periods of existential crises, such as immediately following the Revolutionary and Civil Wars, and for good reason. Despite the widespread partial waivers of sovereign immunity by the federal government and by states (as BM have noted),[31] and despite the fact that subgovernmental units of states—such as regional planning agencies created by states[32] and municipalities organized under state authority[33]—have no immunity at all, the sky has not fallen: the people nonetheless continue to successfully exercise their sovereign authority through all levels of government.[34] And even though more robust liability—

30. This is referring to *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), of course.

31. Brettschneider & McNamee, *supra* note 3, at 1284.

32. Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 402 (1979).

33. N. Ins. Co. v. Chatham Cnty., 547 U.S. 189, 197 (2006). Congress may even abrogate immunity granted by states to their political subdivisions in situations where it may not abrogate the immunity of the states themselves. Jinks v. Richland Cnty., 538 U.S. 456, 466–67 (2003).

34. The Treasury department estimates the legal exposure of the federal government in pending litigation into three categories: "probable," "reasonably possible," and "remote," the last of which is not reported. As of September 30, 2013, the estimated "probable" exposure was $7.2 billion; it was $9.9 billion on September 30, 2012. DEPARTMENT OF THE TREASURY, A CITIZEN'S GUIDE TO THE 2013 FINANCIAL REPORT OF THE U.S. GOVERNMENT 112 (2013), *available at* http://www.fiscal.treasury.gov/fsreports/rpt/finrep/fr/14frusg/FR_02252015_Final.pdf, *archived at* http://perma.cc/D95C-AHKN. The comparable figures for "reasonably possible" were $9.2–$15.1 billion (2013) and $12.8–$15.2 billion (2012). *Id.* Assuming a pending case against the federal government takes more than a year to resolve, these slice-of-time estimates ought to be a decent guess at how much damage is done to the federal budget by litigation in a year; taking the high figures and supposing $22.7 billion per year of federal liability, this represents less than one percent of federal revenue, which was above $2.8 trillion at the time. *Id.* at iii. Other reports suggest the number is even lower. For example, the *National Law Journal* reports that only $1.7 billion was spent from the Treasury's Judgment Fund in 2013. Jenna Greene, *U.S. Cuts Legal Tab in Half: Lawsuits Payouts Last Year Came to $1.7B*, NAT'L L.J., Mar. 10, 2014, http://www.nationallawjournal.com/id=1202646148756/US-Cuts-Legal-Tab-in-Half?mcode=0&curindex=0&curpage=ALL&slreturn=20150228170251, *archived at* http://perma.cc/4PBN-XUU2.

such as unconstrained punitive judgments—might pose a greater threat to such budgets, the states have the authority to limit punitive judgments generally against both public and private defendants.

In the contemporary world, states have an awful lot of money. Even Mississippi had a 2014 total budget of close to twenty billion dollars.[35] On the other end of the scale, the California governor's 2015 budget for "total state expenditures by agency" sums to almost 165 billion dollars.[36] It would take a lot of lawsuits to show a blip in these kinds of numbers, representing so many torts and breaches of contract that it seems to me we ought to worry about the democratic legitimacy of such a state on those grounds alone.[37] Any state that is committing billions of dollars worth of private wrongs in a year is, I would surmise, probably oppressing some electoral minorities or otherwise seriously disregarding the interests of some of its people in a way that is in tension with the notion of a democracy that treats its citizens as political equals.

The elephant in this particular room is public pensions. Many cities and states are facing staggering unfunded pension obligations; on some estimates those obligations when totaled reach into the trillions of dollars, although the figures are quite disputed.[38] This may be the place where governments might reasonably say that they need to have sovereign immunity in order to abrogate these contracts without facing total budgetary collapse. But the thing about public pension obligations is that they are not only an *impediment* to democratic sovereignty but also a *product* of it: the elected representatives of the people created the pensions in the course of negotiating with public employee unions in ordinary democratic politics; the people received the benefits of the labor of those public employees. Abrogating those pensions to protect the budget, and thus the policy options, of officials elected by the people today would also undercut the decisions made by

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35. JOINT LEGISLATIVE BUDGET COMMITTEE, STATE OF MISSISSIPPI BUDGET: FISCAL YEAR 2014 22 (2013), *available at* http://www.dfa.state.ms.us/Offices/OBFM/Forms/FY2014%20Appropriations.pdf, *archived at* http://perma.cc/GE6V-RCMT (giving total appropriations and reappropriations of $19.2 billion).

36. GOVERNOR'S BUDGET SUMMARY 15 fig.SUM-06 (2015), *available at* http://www.ebudget.ca.gov/2015-16/pdf/BudgetSummary/SummaryCharts.pdf, *archived at* http://perma.cc/N4Q7-PPSW.

37. According to a 2005 report of the Bureau of Justice Statistics, the median award in all state court tort cases was $24,000 in jury trials and $21,000 in bench trials. THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, TORT BENCH AND JURY TRIALS IN STATE COURTS, 2005, 5 (2009), *available at* http://www.bjs.gov/content/pub/pdf/tbjtsc05.pdf, *archived at* http://perma.cc/MT75-GNLL. In the 75 largest counties, plaintiffs won punitive damages less than five percent of the time. *Id.* at 12 tbl.12. The median damage award against a government defendant was $61,000 for individual plaintiffs, and $70,000 for business plaintiffs. *Id.* at 18 app. tbl.2. (Hospital defendants—which may include government hospitals—have rather higher median awards, but, as I suggested above, I see no rule of law objection to immunizing the state against ordinary negligent torts, which would include medical malpractice claims against government hospitals.)

38. *See generally* Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 10–16 (2013) (giving estimates and noting controversy).

officials elected by the people at the time those policies were enacted. Which is a more serious blow to democratic sovereignty? There is no obvious way to say.

Moreover, solving the public pensions crisis with abrogation would itself be a major democratic failure. It would amount to imposing the entire burden of a political choice made in the name of the community as a whole on a small proportion of the population—retired public employees. Rather than raise taxes or reduce services on everyone in the state, it would just impoverish a handful of people who made the mistake of trusting the promises made by their government employers, many of whom are not participants in the Social Security system, and who made their economic choices over decades in expectation of the retirement incomes promised to them by law.[39] This seems to me like exactly the "majority tyranny" which is inconsistent with the ideal of a democracy that treats its citizens as equals.

There may be a case for a budget-busting defense of sovereign immunity at the historical moments BM mention, after the nation has just finished fighting devastating wars on its own territory. However, as I have discussed elsewhere, when the *demos* is under serious existential threat, courts are practically unlikely to be willing or able to use legal niceties to prevent the government from doing something about it.[40] It does not seem too wrong to say that in such cases, the courts should rule against illegal official action(s), but the officials in question should ignore the ruling(s), in view of the overriding reasons to stray from the rule of law.

In fact, a doctrine of sovereign immunity may actually be worse for democratic self-determination in times of existential threat. As North and Weingast make clear, states that are known to be unable to keep their commitments may find it quite difficult to get things done that require those commitments be kept.[41] In times of existential threat, this can be fatal to the *demos*. In particular, among the cases BM survey, *Hans v. Louisiana*[42] is a total disaster. If a state is to be entitled by law to repudiate its own bonds right after a war, then how are we to expect it to be able to sell those bonds *ex ante* in order to finance the war or its post-war reconstruction?[43] The sale

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39. *See* Beermann, *supra* note 38, at 73–74 (explaining likely consequences to workers of abolishing municipal pensions in bankruptcy).

40. Paul Gowder, *The Countermajoritarian Complaint*, 23 TRANSNAT'L L. & CONTEMP. PROB. 7, 15–16 (2014).

41. North & Weingast, *supra* note 28. Incidentally, their analysis also suggests that the overall budgetary consequences of liability may also be overstated: a state that is reasonably constrained by law to keep its contracts and the like may be able to sell bonds cheaper; one that is constrained by law to respect private property rights and the like may promote greater economic growth; all these things are likely to swell, rather than shrink, public coffers.

42. 134 U.S. 1 (1890).

43. The same goes for the facts presented in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which, as BM point out, was a suit over a contract to supply war supplies. Brettschneider & McNamee, *supra* note 3, at 1242. How is a democratic state supposed to get war material, if the people who would sell it cannot trust that the contracts will be enforced?

of war bonds and reconstruction bonds are classic examples of the general principle established by Jon Elster: the ability to precommit to a course of action is itself a form of freedom.[44] The people have more, not less, sovereign freedom of action when they can make contracts which will be enforced on them later; in some of these cases that freedom includes the freedom to carry out the transactions necessary to the military victory on which their democratic character itself depends.

VI. Conclusion

I have defended a fairly narrow objection to BM's thesis: constitutional sovereign immunity ought not to extend to the intentional violation by public officials of even purely private legal rights. Yet despite that objection, their fundamental point remains. My objection is wholly in terms of democratic sovereignty, squarely within the territory that BM marked out. Their key, game-changing insight remains: whatever our future debate about sovereign immunity looks like, it must be carried out in terms of democratic theory. BM are to be thanked for advancing the debate such a great distance.

44. JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 2 (2000).