City v. City: The Case for Full Municipal Personhood under 1983

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NIMBYism breeds conflict. In 1999 New Rochelle, a city in West Chester, New York, sought to build an IKEA superstore. The proposed site shared a common border with the town of Mamaroneck. When negotiations between the municipalities broke down, Mamaroneck passed a local law requiring developers of significant real estate projects adjacent to, but not within its borders, to get a permit before starting construction. New Rochelle filed suit to enjoin the permitting process on numerous grounds; chief among these were claims that the local law violated New Rochelle’s Fourteenth Amendment rights to due process and equal protection. The city also sued for damages and attorneys fees under § 1983. Following Sixth Circuit precedent, the Southern District of New York held that the Fourteenth Amendment did not protect a city against the constitutional torts of a neighboring city or other intrastate political subdivision. The court also held that New Rochelle was not a “person” capable of bringing suit under § 1983.

Under current law, cities are virtually precluded from bringing suit under § 1983, despite the fact that the plain meaning of
the statute and substantial Supreme Court precedent practically compel the opposite result. Consequently, cities like New Rochelle must rely on the uncertainties of the political process to defend against the unconstitutional legislative encroachments of ambitious neighbors.

The inability of cities to bring suit under § 1983 is not due to a lack of effort. Political subdivisions have repeatedly attempted to use the statute to recover against one another, yet none have succeeded. The most cited reason for this nearly universal failure is the purported status of cities as "creatures" or instrumentalties of their creating states. This argument has satisfied judges and legal scholars since its most forceful exposition early last century, but it confuses the ability of cities to sue their creating states for Fourteenth Amendment violations with the separate and distinct question of whether cities can be plaintiffs under § 1983.

This Comment argues that municipalities should have a cause of action under § 1983. Such a cause of action will enable cities to better protect the interests of their citizens and will incentivize local legislators to consider the rights of neighboring jurisdictions before enacting laws which may hamper those rights. Granting cities full § 1983 personhood will also eliminate the substantial judicial confusion between municipal rights vis-à-vis their creating states under the Fourteenth Amendment and municipal rights under § 1983. This Comment will demonstrate that granting cities full § 1983 personhood will not impair the rights of the states to form, merge, dissolve, or otherwise control their political subdivisions. However, granting cities a § 1983 cause of action will give them a legal means of redress—against both intra- and interstate municipalities—where political processes are clearly inadequate.

10 See Parts II A and II B.

11 See City of Trenton v New Jersey, 262 US 182, 190 (1923):

A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The City is the creature of the state.

(internal citations omitted). See also Part II.

12 The arguments advanced in this Comment apply to all political subdivisions, but the cases discussed deal exclusively with suits by a political subdivisions against either their creating states or other intrastate subdivisions. See notes 150–51 and accompanying text.
Part I will introduce § 1983 and define the general scope of the statute. Part II will establish that, under current law, cities are liable for their constitutional torts under § 1983 but cannot bring suit under the statute. Part III will present four arguments for granting cities a cause of action under § 1983. Such an action (1) is consistent with the plain meaning of § 1983; (2) is prohibited through an incoherent application of the Court’s Fourteenth Amendment jurisprudence to the question of municipal status under the statute; (3) is in accord with the independence of cities established by the Supreme Court’s Eleventh Amendment jurisprudence; and (4) will promote the representation-reinforcing principles underlying the Court’s decision to subject cities to liability under § 1983. Finally, Part IV will address the counterargument that the proposed cause of action is inconsistent with New Federalism. Although federalism concerns may limit the scope of a § 1983 cause of action for cities, they are not a bar to full municipal personhood.

I. An Overview of § 1983

The Fourteenth Amendment prohibits the states from depriving any person of life, liberty, or property without due process of law. It also prohibits the denial of equal protection of the laws.\textsuperscript{14} Section 5 of the Amendment gives Congress the power to enforce its substantive provisions through appropriate legislation.\textsuperscript{15} Debate over the scope of congressional power under the Fourteenth Amendment has raged since its adoption,\textsuperscript{16} but there is no doubt that § 5 “is a positive grant of legislative power to Congress.”\textsuperscript{17} In the important case of Fitzpatrick v Bitzer, then-Justice Rehnquist noted that there was no doubt that the Amendment “sanc-

\textsuperscript{13} See Part IV B.
\textsuperscript{14} See US Const Amend XIV, § 1. The Amendment provides, in relevant part, that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

\textsuperscript{15} See id at § 5.
\textsuperscript{16} See, for example, United States v Morrison, 529 US 598, 619–23 (2000) (discussing controversial extensions of congressional power under the Fourteenth Amendment and noting that “several limitations inherent in § 5’s text and constitutional context have been recognized since the Fourteenth Amendment was adopted”).
\textsuperscript{17} City of Boerne v Flores, 521 US 507, 517 (1997) (internal quotation and citation omitted).
\textsuperscript{18} 427 US 445 (1976).
tioned intrusions by Congress . . . into judicial, executive and legis-
layative spheres of autonomy previously reserved to the states."19

Though extensive, Congress's powers under the Fourteenth
Amendment are not unlimited. Indeed, the Court has recently
reasserted its authority to police the boundaries of congressional
enforcement power under § 5.20 While this development may por-
tend an era of heightened scrutiny for new legislation enacted
pursuant to the Fourteenth Amendment,21 numerous statutes,
passed long before the Rehnquist Court, give effect to the
Amendment's substantive provisions. Perhaps best known of
these is Section 1 of the Civil Rights Act of 1871, known today as
§ 1983.22

A. The Language and Scope of § 1983

Section 1983 gives all persons under the jurisdiction of the
laws of the United States a cause of action against state and local
officials who deprive them of their constitutional rights "under
color of state law."23 The statute provides that:

Every person who, under color of any statute, ordinance,
regulation, custom or usage, of any State or Territory, sub-
jects or causes to be subjected, any citizen of the United
States or any other person within the jurisdiction thereof
to the deprivation of any rights, privileges or immunities
secured by the Constitution and laws, shall be liable to the
party injured in an action at law, suit in equity, or other
proper proceeding for redress.24

The key question for this analysis is the extent to which munici-
pal corporations should be considered "persons" under § 1983.
The term appears twice in the statutory text: first, in reference to
total § 1983 defendants—persons who act "under color of
state law"—and second, in defining potential § 1983 plaintiffs—
any "other person" who may be deprived of constitutional rights.

19 Id at 455.
20 See Boerne, 521 US at 536 (striking down the Religious Freedom Restoration Act
and holding that "the courts retain the power, as they have since Marbury v. Madison, to
determine if Congress has exceeded its authority under the Constitution").
21 See id.
23 Id.
24 Id (emphasis added).
It is clear that municipal corporations are persons liable for constitutional torts under § 1983.\(^{25}\) Equally well-settled is the right of private corporations to bring suit as § 1983 plaintiffs.\(^{26}\) However, nearly every circuit to address the issue has held that a city is not a person capable of bringing suit under § 1983.\(^{27}\) The only exception is the Sixth Circuit which, although it recognized that cities may be "persons" capable of bringing § 1983 suits,\(^{28}\) nonetheless held that the "Fourteenth Amendment . . . does not prescribe guidelines and impose restrictions upon one political subdivision vis-à-vis another political subdivision."\(^{29}\) Attempting to understand how courts can hold that a city is a "person" under the first clause of § 1983, but not under the succeeding clause, requires consideration of the evolution of municipal status under the statute.

B. Municipal Liability from *Monroe* through *Owen*

Though enacted in 1871, § 1983 went largely unnoticed until the Supreme Court's decision in *Monroe v Pape*.\(^{30}\) *Monroe* established the right of individuals to pursue a federal remedy against state government officials under § 1983, regardless of whether the laws of the state in question provided a means of redressing

\(^{25}\) See *Monell v Department of Social Services*, 436 US 658, 690 (1978) (holding that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory or injunctive relief"). See also *McMillian v Monroe County*, 520 US 781, 784 (1997) ("We held in *Monell . . . that a local government is liable under § 1983 for its policies that cause constitutional torts.").

\(^{26}\) See, for example, *Grossjean v American Press Co*, 297 US 233, 244 (1936) ("A corporation is a 'person' within the meaning of the equal protection and due process of law clauses."); *Fulton Market Cold Storage Co v PJ Cullerton*, 582 F2d 1071, 1079 (7th Cir 1978):

[T]he fact that the plaintiff in this suit is a corporation is of no legal significance. While a corporation is not a "citizen" within the meaning of the privileges and immunities clause, a corporation is a "person" within the meaning of the equal protection and due process of law clauses of the Fourteenth Amendment. Accordingly, Fulton, the corporate plaintiff, may maintain a § 1983 action to secure the protection and guarantees accorded to it under the Fourteenth Amendment.

\(^{27}\) The case law is introduced in Part II.

\(^{28}\) *South Macomb Disposal Authority v Township of Washington*, 790 F2d 500, 503 (6th Cir 1986) (noting that "it would be strained analysis to hold, as a matter of statutory construction, that a municipal corporation was a 'person' within one clause of section 1983, but not a 'person' within another clause of the same statute").

\(^{29}\) Id at 505.

constitutional harms suffered at the hands of state officers. The case ushered in a new era of civil rights litigation. In expanding the reach of the statute, however, the Court simultaneously held that cities and other local governments were not § 1983 persons. After an exhaustive review of the legislative history, the Court concluded that Congress could not have meant to include municipalities as persons under the statute.

Sixteen years later the Court reversed course, holding in Monell v Department of Social Services that the same legislative history "compelled" the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Justice Brennan further held that the absolute immunity accorded municipalities by Monroe was a "departure from prior practice" in that the precedents relied upon wrongly assumed that state-law immuni-

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31 See Monroe, 365 US at 183:

Although the legislation was enacted because of conditions that existed in the South at the time, it is cast in general language and is as applicable to Illinois as it is to the states whose names were mentioned over and over again in the debates. It is no answer that the State has a law which, if enforced, would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

32 See Developments, 90 Harv L Rev at 1169 (cited in note 30) ("Monroe v. Pape resurrected section 1983 from ninety years of obscurity.").

33 See id at 1194 ("Monroe ... had the effect of foreclosing, with few exceptions, an assertion of liability against entities resembling municipal corporations. Townships and counties, as well as cities have been held exempt from liability.").

34 Monroe, 365 US at 191-92 ("The response of the Congress to the proposal to make municipalities liable for certain actions being brought within the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."). The Monroe Court did not address whether a state is a § 1983 person. The Court deemed the issue settled under Monroe when it addressed the question fifteen years later. See Fitzgerald, 427 US at 452 (holding that because cities and other municipalities were not amenable to suit under § 1983, Congress could "not have intended to include States as parties defendant"). Although it did not directly address the issue, Monell v Department of Social Services, 436 US 658 (1978), reopened the question of state status under § 1983. It was not until 1989 that the Court definitively concluded that the states were not "persons" reachable under the statute. See Will v Michigan Department of State Police, 491 US 58, 64 (1989) ("[W]e reaffirm today what we concluded prior to Monell ... that a State is not a person within the meaning of § 1983."). Will is addressed in Part IV.


36 Id at 690 (allowing female employees of the city of New York to bring a § 1983 suit against the city challenging a policy that required pregnant workers to take unpaid leaves of absence).

37 Id at 695.
ties overrode a § 1983 cause of action against cities. Monell exposed local governments to liability for monetary, declaratory and injunctive relief under federal law, but the case was silent on the question of a city's ability to bring suit as a § 1983 plaintiff.

Two years later, in Owen v City of Independence, Chief of Police George D. Owen used § 1983 to sue the city of Independence, Missouri, for unlawful discharge. The Eighth Circuit ruled in favor of the city on the grounds that its officials had acted in good faith. The Supreme Court, again through Justice Brennan, reversed. Beginning with the observation that the language of § 1983 establishes absolute liability, the Court reasoned that the qualified immunity bestowed by the Eighth Circuit was permissible only if it was well-established at the time § 1983 was enacted. Under this test, "neither history nor policy support[ed] a construction of § 1983 that would justify the qualified immunity accorded the city of Independence.

Thus, while Monell did not resolve the full scope of municipal liability under § 1983, Owen and other progeny leave no doubt that municipalities are "persons" under the statute. Nonethe-

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38 Id at 696 n 59 ("Each case cited by Monroe . . . is consistent with the position that local governments were not § 1983 'persons' reached its conclusion by assuming that state-law immunities overrode the § 1983 cause of action. This has never been the law.").
39 Monell, 436 US at 690.
40 The Court explicitly stated that it had "no occasion to address . . . what the full contours of municipal liability under § 1983 may be," but had "attempted to sketch only so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act" and the Court's prior cases. Id at 695. Further development of the § 1983 cause of action against municipalities was left to another day. See id.
42 Id at 625.
43 Id at 625–26.
44 Id at 625.
46 Owen, 445 US at 638.
47 Id.
48 Owen rejected qualified immunity for municipalities when their officials act in good faith, see 445 US at 650, but municipal liability is not absolute under Monell and its progeny. Rather, a city is liable "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Monell, 436 US at 694. Monell "unquestionably" involved official policy as "the moving force of the constitutional violation" at issue. Id. However, Monell explicitly rejected liability based on a theory of respondeat superior, holding that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." Id.
49 Subsequently, the Court unanimously reaffirmed and clarified Monell, holding that, where a "municipal policy or custom cause[s] the constitutional injury," a city enjoys no "immunity from suit—either absolute or qualified—under § 1983." Leatherman v Tarrant County Narcotics Intelligence and Coordination Unit, 507 US 163, 166 (1993). Thus, to assert a valid § 1983 claim against a city, a plaintiff must show that a municipal policy
less, lower federal courts have restricted municipal personhood to cases where cities are sued as § 1983 defendants, uniformly refusing to grant them a cause of action under the statute.

II. MUNICIPAL (HALF-)PERSONHOOD UNDER § 1983

If cities are persons under § 1983, then New Rochelle should be able to bring suit against Mamaroneck to recover damages for the latter's allegedly unconstitutional permitting processes. This is not the law. Virtually every court to address the issue has prevented cities and other political subdivisions from bringing suit against each other under § 1983. Courts have rejected inter-municipal claims on the theory that even if the language of § 1983 permits suits between political subdivisions, the Fourteenth Amendment simply does not operate in favor of one such city against another. Although courts use slightly different routes to arrive at this conclusion, the rule is grounded in the Supreme Court's decision in City of Trenton v New Jersey.

A. The Trenton Rule

In 1923, the City of Trenton attempted to sue the State of New Jersey to invalidate a state-imposed licensing fee on water taken from the Delaware River. The city claimed that the fee was a taking of property without just compensation or due process of law. The Court flatly rejected Trenton's claim. Describing the city as a "creature of the State" which exercised powers and

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49 See notes 2-8 and accompanying text.
50 The District Court of Puerto Rico is the lone exception. See Santiago Collazo v Franqui Acosta, 721 F Supp 385, 393 (D Puerto Rico 1989) (allowing the city of Vieques to bring a § 1983 claim against the Commonwealth of Puerto Rico on the grounds that the "municipality has rights secured by the Constitution and laws enforceable under § 1983") (internal quotations omitted).
51 262 US 182, 190 (1923).
52 See id at 184.
53 See id at 183.
privileges subject to the will of its creator,\(^{54}\) the Court held that the Contract Clause and the Fourteenth Amendment simply “do not apply as against the state in favor of its own municipalities” (the “Trenton rule”).\(^{55}\)

Justice Butler engaged in a lengthy examination of the Court’s city/state jurisprudence, basing his holding on the fact that cities, like other political subdivisions, are created by the state to act as agents in the exercise of a clearly defined set of state powers.\(^{56}\) Quoting the Court’s earlier decision in *Hunter v City of Pittsburgh*,\(^ {57}\) Justice Butler reasoned that because political subdivisions are, fundamentally, agents of their creators, the “number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.” \(^{58}\) *Trenton* and its progeny led to the eventual prohibition of constitutional preemption suits by political subdivisions against their creating

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54 See id at 187.
55 *Trenton*, 262 US at 192.
56 Id at 185–86.
57 207 US 161 (1907). *Hunter* involved a Fourteenth Amendment claim brought by the city of Allegheny against neighboring Pittsburgh. See id at 164–65, 167. In 1906, the Pennsylvania legislature passed a bill detailing procedures under which adjacent cities could merge. See id at 161. Pittsburgh sought to merge with Allegheny pursuant to the statute, and Allegheny sued to prevent enforcement of a decree ordering that the cities be joined. See id at 164. Allegheny claimed that the merger would violate both the Contract Clause and the due process and equal protection guarantees of the Fourteenth Amendment. See id at 167. The Court denied all requested relief, holding that “[m]unicipal 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.” Id at 178.

*Hunter* is recognized as a key precedent in the development of the *Trenton* rule, and may figure more prominently than *Trenton* in the development of municipal rights (or lack thereof) under the Fourteenth Amendment. See, for example, *Gomillion v Lightfoot*, 364 US 339, 342 (1960) (describing *Hunter* as the Court’s “leading case” on the political power of the States in relation to their political subdivisions); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 Mich L Rev 1201, 1208–11 (1999) (discussing problems with the *Trenton* rule). Hills does not use the same terminology as this Comment, but discusses the rule in terms of *Hunter* and the venerable *Trustees of Dartmouth College v Woodward*, 17 US (4 Wheat) 518 (1819). See Hills, 97 Mich L Rev at 1208 (tying *Hunter* and *Dartmouth College* to the “notion that local governments are creatures of the state, agencies that the state government is free to destroy or alter as it pleases”) (internal quotations omitted). For the purposes of this Comment, which is not primarily concerned with the historical development of the rule, *Trenton* is an adequate proxy for the prohibition of Fourteenth Amendment suits brought by a political subdivision against its creating state. For a comprehensive discussion of the city as a legal entity, consider Gerald E. Frug, *The City as a Legal Concept*, 93 Harv L Rev 1059 (1980). For a more detailed treatment of municipal status under *Trenton’s* antecedents, see id at 1099–1120 (focusing on *Trustees of Dartmouth College*).

58 *Trenton*, 262 US at 186, quoting *Hunter*, 207 US at 178–79. For a more extensive discussion of the possible rationales for the *Trenton* rule and its relation to municipal status under § 1983, see Part III C.
states. Over time, courts used the rule to deny cities a cause of action under § 1983.

See generally E.B. Schulz, The Effects of the Contract Clause and the Fourteenth Amendment Upon the Power of the States to Control Municipal Corporations, 36 Mich L Rev 385, 396–97 (1938) (concluding that Trenton and its progeny have removed "any lingering doubts, created by dicta in earlier cases, regarding the soundness of an assertion to the effect that the contract, due process and equal protection clauses of the national Constitution afford no protection whatever to municipal corporations, in their own right, as against the powers of the states to control them"). The Article provides an excellent historical overview of the various constitutional stratagems employed by cities against their creating states early last century.

The Trenton rule is no longer as robust as Schulz suggests. For the sake of simplicity and clarity, however, this Comment assumes that the Ninth Circuit's per se ban on constitutional suits by municipalities against their creating states is valid. See notes 117–19 and accompanying text. Nonetheless, a brief treatment of Trenton's current status highlights the complexity of the constitutional status of municipal corporations, a status that will undoubtedly be important to a city's future pursuit of constitutional redress under § 1983. Since its decision in Gomillion, 364 US 339, the Supreme Court has retreated from the seemingly absolutist position of Trenton and its antecedents. In Gomillion, where the Court permitted residents of Tuskegee to challenge a state-enacted redistricting plan as violative of the Fourteenth and Fifteenth Amendments, the city and the State of Alabama argued that the Trenton rule precluded any judicial interference in a state's dealings with its municipalities. See id at 340–44 (discussing Hunter, Trenton, and other cases). In the process of deciding for the disenfranchised residents of Tuskegee, Justice Frankfurter substantially recast the Trenton line of cases:

In dealing with claims under broad provisions of the Constitution . . . it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. Thus, a correct reading of the seemingly unconfined dicta of Hunter [v City of Pittsburgh] and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.

Id at 343–44. Frankfurter further called into question the supposedly limitless powers of the state in relation to its political subdivisions that followed from Trenton, noting that "the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." Id at 344–45.

Since Gomillion, political subdivisions have succeeded in asserting constitutional claims against their creators in a number of contexts. Perhaps the most important of the post-Gomillion cases is the Fifth Circuit's decision in Rogers v Brockett, 588 F2d 1057 (5th Cir 1979). The Rogers court allowed a Texas school district to challenge a state statute requiring participation in a federally subsidized breakfast program on the grounds that the requirement ran afoul of the Supremacy Clause. See 588 F2d at 1059–60. See generally Comment, Municipal Corporation Standing to Sue the State: Rogers v. Brockett, 93 Harv L Rev 586 (1980) (examining the Rogers decision and discussing its significance in relation to Hunter). Rogers contributed substantially to a thorough reassessment of the constitutional rights of political subdivisions, particularly where a municipality claims that a federal statute preempts state law. As a result, the contours of the constitutional rights of municipalities are in flux, and a thorough examination of the debate is beyond the scope of this Comment.
B. The Trenton Rule and the Denial of § 1983 Personhood

In *City of New Rochelle v Town of Mamaroneck*, the Southern District of New York held that a city was not a "person" capable of bringing suit under the statute. In dismissing New Rochelle's complaint, Judge McMahon conducted a close examination of municipal rights under § 1983, noting a split among the circuit courts on the question of whether a city can bring suit as a § 1983 plaintiff. Technically, the observation is correct. The Fifth, Seventh, and Eleventh Circuits have specifically held that a municipality is not a "person" capable of bringing suit under § 1983, despite its potential liability to suit under the statute. On the other hand, the Sixth Circuit appears to hold that municipalities are full-fledged § 1983 persons. An examination of this split reveals that it is more apparent than real.

1. Courts that explicitly deny municipalities a cause of action under § 1983.

When it dismissed New Rochelle's § 1983 claims, the Southern District of New York followed the Fifth, Seventh, and Eleventh Circuits, holding that municipalities could not bring suit as
§ 1983 plaintiffs. Courts reaching this conclusion rely principally on the Fifth Circuit’s decision in City of Safety Harbor v Birchfield that § 1983 was intended to “provide private parties a cause of action for abuses of official authority which resulted in the deprivation of constitutional rights, privileges, and immunities.” A critical fact, glossed over by the Southern District and other courts, is that Safety Harbor was decided two years before Monell, when Monroe was controlling on the issue of municipal personhood under § 1983.

In Safety Harbor, the city brought a § 1983 action against four state legislators who allegedly conspired to pass legislation “which operated to impair the obligations of an agreement between Safety Harbor and two other Florida cities.” The district court dismissed the suit primarily on the grounds that, in light of Monroe, Safety Harbor was not a proper plaintiff under § 1983. The Fifth Circuit began its analysis of the case with its conclusion that the district court’s holding was a proper extension of Monroe. The city responded that, despite Monroe, it would make “little sense to deny municipal corporations relief under the Civil Rights Act in cases where private individuals could recover.” To address this argument, the court turned to Trenton, under which “municipal corporations have repeatedly been denied the right to

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66 See id.
67 529 F2d 1251 (5th Cir 1976).
68 Id at 1255, quoting Moor v County of Alameda, 411 US 693, 699 (1973).
69 Monroe explicitly held that municipalities were not persons under § 1983. See 365 US at 191. See also Part I B. These courts do not ignore Monell, but hold that Safety Harbor’s interpretation of the congressional intent behind the passage of § 1983 “remains valid” in Monell’s wake. See New Rochelle, 111 F Supp 2d at 368 (collecting the opinions of these courts and characterizing them as standing for the continued validity of Safety Harbor). Other courts reject this reasoning. See Santiago Collazo v Franqui Acosta, 721 F Supp 385, 393 (D Puerto Rico 1989) (noting that in light of Monell it is “obvious that Safety Harbor is no longer correct”).
70 529 F2d at 1253.
71 See id.
72 Id (citations omitted).
73 Id. The counterargument is a useful reminder that private corporations are “persons” capable of bringing suit under § 1983. See note 26 and accompanying text. The Fifth Circuit’s cursory treatment of Safety Harbor’s counterargument obfuscates its later conclusion that the legislators sued by the city were protected from § 1983 liability by the common law doctrine of legislative immunity. See Safety Harbor, 529 F2d at 1256. It thus appears that a private individual would not have been able to recover under the circumstances of Safety Harbor. Note that the legislative enactments of municipal governments, unlike state legislators, are not immune to a § 1983 attack under Owen and its progeny. See, for example, Leatherman v Tarrant County Narcotics Intelligence and Coordination Unit, 507 US 163, 166 (1993) (holding that municipalities are liable under § 1983 for policies that cause constitutional torts), citing Owen, 445 US at 650.
challenge legislation . . . violative of the Federal Constitution." Writing for the Safety Harbor court, Judge Ainsworth concluded that the difference between public and private corporations developed in Trenton and its antecedents was particularly apt in this case, given the Monroe Court's "exhaustive review" of the legislative history of § 1983. It was the Monroe examination, rejected in Monell, that led to the Fifth Circuit's embrace of Congress's alleged intent to create a cause of action for "private persons"—but not for public corporations—when it enacted § 1983.

The New Rochelle court also relied on a post-Monell Fifth Circuit decision, Appling County v Municipal Electric Authority of Georgia, in rejecting the city's § 1983 claims. In 1980 the County of Appling brought a § 1983 suit against the Municipal Electric Authority of the state of Georgia ("MEAG") challenging the tax-exempt status of property held by the Authority. The property tax exemption was part of the state legislation creating MEAG. The Fifth Circuit dismissed the county's claims on the grounds that it had "no standing to invoke the federal [c]onstitutional guarantees of due process and equal protection [citations omitted]."

Ever since the Supreme Court's landmark decision in Dartmouth College v Woodward, it has been apparent that public entities which are political subdivisions of states do not possess constitutional rights, such as the right to be free from state impairment of contractual obligations, in the same sense as private corporations or individuals. (citations omitted). A full treatment of the rights of cities vis-à-vis their creating states is beyond the scope of this Comment. Ainsworth's characterization is nonetheless relevant because it highlights a persistent problem in the application of the Trenton rule to intermunicipal § 1983 suits: the tendency to frame the issue as a question of municipal rights in relation to the states rather than in relation to other political subdivisions. See Parts III B and III C.

See Safety Harbor, 529 F2d at 1255 (concluding that “[t]he fact that public entities are not right-holders in the same sense as private parties has particular relevance in determining whether a municipality is a ‘person’ entitled to bring suit” under § 1983 because the Supreme Court, after an “exhaustive review” of the legislative history of the 1871 Civil Rights Act in Monroe, concluded that the statute was intended to provide relief for private parties) (citations omitted).

The development of municipal liability under § 1983 is discussed in Part I B.
against an enactment of the state of Georgia." The county argued that Monell established its status as a "person" under § 1983. Turning to the Trenton rule the court disagreed, holding that "Monell did not call into question the principle that a city or county cannot challenge a state statute on Federal Constitutional grounds." The other cases cited in New Rochelle provide no additional substantive support for denying cities a cause of action under § 1983.

When it dismissed New Rochelle's § 1983 claim against Mamaroneck, the New Rochelle court expressly adopted the reasoning of the Fifth, Seventh, and Eleventh Circuits that Monell—which exposed cities to liability as persons under § 1983—did not hold that cities were "proper" § 1983 plaintiffs. The preceding analysis shows that these precedents are grounded in two rationales: (1) an interpretation of congressional intent explicitly rejected in Monell and (2) the Trenton rule.

2. The Sixth Circuit's technical embrace of full municipal personhood.

In reaching its holding, the New Rochelle court recognized and rejected the Sixth Circuit's ostensibly contrary holding in South Macomb Disposal Authority v Township of Washington. In 1986, the South Macomb Disposal Authority ("SMDA"), a mu-

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82 Appling County, 621 F2d at 1307.
83 Id at 1308.
84 Id. (citations omitted) (discussing Trenton and other cases).
85 For a list of the cases, see note 64 and accompanying text. The Eleventh Circuit simply followed Appling County, which is no surprise, given that the court was formerly part of the Fifth Circuit. See United States v State of Alabama, 791 F2d 1450, 1456 (11th Cir 1986). As for the Seventh Circuit, the New Rochelle court recognized its holding as dictum. See 111 F Supp 2d at 368, discussing Rockford Board of Education School District No 205 v Illinois State Board of Education, 150 F3d 686, 688 (7th Cir 1998). Judge Posner provides two citations to support the proposition that "a city or other municipality cannot bring suit under 42 U.S.C. § 1983." Rockford Board of Education School District No 205, 150 F3d at 688, citing City of Chicago v Lindley, 66 F3d 819, 823 n 6 (7th Cir 1995); City of East St Louis v Circuit Court, 986 F2d 1142, 1144 (7th Cir 1993). Interestingly, one precedent is itself dicta. See Lindley, 66 F3d at 823 n 6 ("We note that various decisions recognize that "municipalities cannot challenge state action on federal constitutional grounds because they are not "persons" within the meaning of the Due Process Clause," and therefore hold that the municipality "cannot bring a section 1983 claim" against the State") (internal citations omitted). The second case relies on the Seventh Circuit's decision in Village of Arlington Heights v Regional Transportation Authority, 653 F2d 1149, 1152–53 (7th Cir 1981), which is part of the case law used to support the outcome in South Macomb. For a discussion of this line of precedent, see Parts II B 2 and III B. Arlington Heights is discussed in notes 215–19.
86 See New Rochelle, 111 F Supp 2d at 368.
87 790 F2d 500, 503 (6th Cir 1986).
municipal corporation organized under the laws of Michigan, sued the Township of Washington ("Township") under § 1983. SMDA alleged that permitting requirements imposed by the Township exceeded the demands made on other parties seeking similar permits. The court recognized that "in light of Monell, it would be strained analysis to hold, as a matter of statutory construction, that a municipal corporation was a 'person' within one clause of § 1983, but not a 'person' within another clause of the same statute." This admission is the basis of the "split" described in New Rochelle, for although the Sixth Circuit does not say so explicitly, the implication is that municipalities are in fact full-fledged "persons" under § 1983. Substantively, however, the Sixth Circuit is in complete agreement with its sister circuits and the Southern District of New York.

Although the South Macomb court identified an interpretive dilemma inherent in § 1983, it did not hold in favor of SMDA. Rather, the court relied on the "body of law" that examines whether a municipal corporation "may assert constitutional claims against its creating state or a political subdivisions thereof." In other words, the court turned to Trenton. However, because the case involved a § 1983 suit between two political subdivisions of the state of Michigan, rather than a § 1983 challenge by a political subdivision against its creating state, the court apparently felt compelled to address the distinction. After setting out the Trenton rule, the South Macomb court held that "[f]or the same reasons, a political subdivision of a state cannot challenge the constitutionality of another political subdivision's ordinance on due process and equal protection grounds." The court did not reiterate those "reasons," nor did it explain its application of Trenton, a Fourteenth Amendment case, to a § 1983 suit between two political subdivisions.

88 Id at 501.
89 Id.
90 Id at 503. The court also discussed Safety Harbor, recognizing that the Fifth Circuit did not have the "benefit" of Monell. See id.
91 See New Rochelle, 111 F Supp 2d at 368 (claiming that the Sixth Circuit reached a conclusion opposed to the holdings of the Fifth, Seventh, and Eleventh Circuits when it recognized the interpretive problem inherent in limiting § 1983 municipal personhood to cases in which municipalities are defendants).
92 South Macomb, 790 F2d at 504.
93 See id, quoting Trenton, 262 US at 187 ("Being a subdivision of the state, the 'State may withhold, grant or withdraw powers and privileges [from a municipality] as it sees fit.'").
94 South Macomb, 790 F2d at 505.
The Sixth Circuit did not cut South Macomb from whole cloth. Judge Contie cited decisions of the Ninth, Fifth, and Seventh Circuits to support the court's position that political subdivisions could not assert Fourteenth Amendment claims against one another. As with the precedents relied upon by the New Rochelle court, the case law relied upon in South Macomb does not support a rule of law prohibiting § 1983 suits between political subdivisions. Nonetheless, Trenton and its progeny are the foundation upon which courts deny cities a § 1983 cause of action.

III. COURTS SHOULD ACCORD CITIES FULL PERSONHOOD UNDER § 1983

If cities are § 1983 persons, they should have a cause of action under the statute. Under current law, municipalities bear the burdens of § 1983 liability, yet, by operation of the Trenton rule, they cannot use the statute to redress the unconstitutional acts of parties—such as neighboring municipalities—who, unlike the state, neither created nor have the power to destroy them. The analysis that follows will show that granting cities a § 1983 cause of action (1) is consistent with the plain meaning of the statute; (2) is prohibited only through an incoherent application of the Trenton rule to municipal status under § 1983; (3) will enable courts to cast aside the Trenton rule in favor of a stable legal framework that analyzes municipal personhood under the Supreme Court’s Eleventh Amendment jurisprudence; and finally, (4) will promote the representation reinforcing principles underlying the Court’s decision to expose municipalities to § 1983 liability in Monell and its progeny.

A. Courts Should Adopt a Plain and Consistent Treatment of Cities under § 1983

It is well-established under the “plain meaning” rule that, where the meaning of statutory language is plain and unambiguous, a court need look no further than the statutory text to resolve a dispute. Thus, if the plain meaning of “person” as used in

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95 Id, citing Town of Ball v Rapides Parish Police Jury, 746 F2d 1049, 1051 n 1 (5th Cir 1984); Village of Arlington Heights v Regional Transportation Authority, 653 F2d 1149, 1153 (7th Cir 1981); City of South Lake Tahoe v California Tahoe Regional Planning Agency, 625 F2d 231, 233 (9th Cir 1980). These cases are addressed in Part III B 2.
96 See Part II B 1.
97 See, for example, Robinson v Shell Oil, 519 US 337, 340 (1997) (“Our first step in interpreting a statute is to determine whether the language at issue has a plain and un-
§ 1983 includes municipalities, then cities should have a cause of action under the statute. By its terms, the text of § 1983 applies to persons both as potential defendants and as plaintiffs capable of vindicating their constitutional rights. The Supreme Court has never ruled on the question of whether a city can bring suit as a § 1983 plaintiff. As a matter of interpretive mechanics, however, if a city is plainly a person under the first clause of the statute, then it must also be a person under the second clause. Several courts have recognized this interpretive dilemma, but only one has reached a decision consistent with the plain meaning rule.

The canon of consistent meaning buttresses this analysis. The canon is simply the “normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.” Courts often invoke the canon to bring coherence to different parts of a large statutory scheme, such as the Social Security Act. Certainly, the rule should apply with equal force to shorter statutes. Section 1983 is a single sentence that uses the term “person” twice in successive clauses. Although courts struggle to inject the common law of city/state relations into the interpretive analysis of municipal rights under § 1983, one cannot help but conclude that the ambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous...
canon requires that cities be permitted to bring suit under the statute. By adopting a plain, consistent interpretation, courts could eliminate substantial incoherence in this area of the law.

B. Municipal Half-Personhood is Not Supported by Trenton

Whether they specifically reject § 1983 personhood for cities or accept it and nonetheless deny municipal § 1983 claims, it is clear that courts rely, in substance, on Trenton to deny municipalities a § 1983 cause of action. Such reliance is untenable for three reasons: (1) the ability of cities to sue their states under the Fourteenth Amendment is irrelevant to the question of whether a city, as a § 1983 person, has a cause of action against other § 1983 persons; (2) even assuming that Trenton can inform the analysis of municipal personhood, the precedents relied upon to deny cities a § 1983 cause of action deal not with the relationships among political subdivisions, but exclusively with the relationship between cities and their creating states; and (3) as a result, the rationale of Trenton is completely eviscerated when the rule is applied to prohibit inter-municipal § 1983 suits.

1. The Fourteenth Amendment and § 1983.

As an initial matter, it should be apparent from the language and scope of § 1983 that Trenton, which established a rule of city/state relations under the Fourteenth Amendment, does not support denying cities a § 1983 cause of action. It is beyond question that Congress was acting within the scope of its powers under § 5 of the Fourteenth Amendment when it enacted § 1983.108

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104 See Part II B 1.
105 See Part II B 2.
106 See Part I A.
107 See Trenton, 262 US at 192 (holding that the restraints of the Fourteenth Amendment “do not apply as against the State in favor of its own municipalities”). See also Part II A.
108 See Monroe, 365 US at 171 (holding that § 1983 “was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment”). To assert a valid claim under § 1983, one need only allege “facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment.” Id. Because Monroe held that cities were not “persons” under the statute, claims of “constitutional deprivations” could not be asserted against them. See Part I B. However, after the birth of municipal personhood in Monell, the analysis in Part III A demonstrates that cities should have the same rights as every other § 1983 person.
Therefore, if municipalities are persons under the statute, they have a legitimate cause of action against any other § 1983 person. This is so because the enactment of § 1983 abrogated any immunity from suits brought by municipalities against § 1983 persons prior to the statute’s enactment, just as any immunity enjoyed by cities was “obviously abrogated by the passage” of the statute.109

By this simple logic, any substantive Fourteenth Amendment limitations on municipal power must fall outside the scope of § 1983, and are thus irrelevant to this analysis.

2. *Trenton* does not support the prohibition on a § 1983 cause of action for cities.

Although it ultimately denied SMDA’s claims against Washington Township,110 the Sixth Circuit recognized that *Monell* changed the status of municipalities under § 1983. Faced with the apparent anomaly of labeling municipalities “persons” vulnerable to, but not “persons” capable of bringing suit, the *South Macomb* court turned to *Trenton* and its focus on the relationship between states and the cities they create.111

Relying on *Trenton*, the *South Macomb* court held that the Fourteenth Amendment does not operate in favor of one political subdivision against another.112 However, the precedents used to reach this result involved direct challenges to states and state legislation, not municipal challenges to local laws such as those at issue in *New Rochelle*113 and *South Macomb* itself.114 Though

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An obvious question that arises is whether municipalities have Fourteenth Amendment rights. *Trenton* provides a clear answer to this question in the context of city/state relations: the protections of the Fourteenth Amendment do not operate in favor of a city as against its creating state. See Part II A. However, the *Trenton* rule does not address the constitutional rights of political subdivisions in relation to each other. In any case, it is clear that political subdivisions can assert constitutional claims in a number of contexts. See note 59 and accompanying text. This Comment argues that, unless a municipality attempts to use § 1983 against its creating state (or an arm of that state) it should be free to assert § 1983 claims against other § 1983 persons. See Parts III C and IV.

109 Owen, 445 US at 647.
110 For an extensive discussion of *South Macomb*, see Part II B 2.
111 See *South Macomb*, 790 F2d at 504, quoting *Trenton*, 262 US at 187 (“[T]he State may withhold, grant or withdraw powers and privileges [from a municipality] as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to sovereign will.”) (brackets in original). As with many judicial treatments of municipal rights, the court did not limit its discussion to *Trenton*. See *South Macomb*, 790 F2d at 504-05. See also note 57 and accompanying text.
112 790 F2d at 505.
113 See notes 2-8 and accompanying text.
114 See Part II B 2.
ostensibly supported by three precedents, the Sixth Circuit's denial to SMDA of a § 1983 cause of action is dependent on the Ninth Circuit's decision in *City of South Lake Tahoe v California Tahoe Regional Planning Agency*. In that case, the court denied the city of South Lake Tahoe standing to sue the California Tahoe Regional Planning Agency, establishing what is now recognized as the circuit's per se ban on constitutional suits between both a political subdivision and its creating state and such suits between political subdivisions.

*South Lake Tahoe* is notable for its reliance on the Supreme Court's decision in *City of New Orleans v New Orleans Water-Works Co.* This 1891 case appears to be the origin of the extension of *Trenton* to § 1983 suits between political subdivisions. Yet *New Orleans Water-Works* does not address the status of political subdivisions qua subdivisions, but only supports what *Trenton* definitively established thirty years later—the inability of politi-

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115 See *Town of Ball v Rapides Parish Police Jury*, 746 F2d 1049, 1051 n 1 (5th Cir 1984); *Village of Arlington Heights v Regional Transportation Authority*, 653 F2d 1149, 1153 (7th Cir 1981); *City of South Lake Tahoe v California Tahoe Regional Planning Agency*, 625 F2d 231, 233 (9th Cir 1980).

116 625 F2d 231 (9th Cir 1980). The Seventh Circuit case cited in *South Macomb* relies on *South Lake Tahoe*. See *Arlington Heights*, 653 F2d at 1152–53. In an example of extreme circularity, the third precedent relies on both *South Lake Tahoe* and *Arlington Heights*. See *Ball*, 746 F2d at 1052.

117 See 625 F2d at 233. In 1980, the City of South Lake Tahoe and its mayor sued the California Regional Planning Agency, alleging that land use regulations promulgated by the Agency took “property without just compensation and arbitrarily discriminate[ed] between similarly situated property owners in violation of the Fifth and Fourteenth Amendments of the Constitution." Id at 232. In a logical progression similar to the one undertaken in *South Macomb*, see Part II B, the court invoked *Trenton* for the proposition that political subdivisions cannot use the Fourteenth Amendment to challenge the validity of state statutes. See id at 233. In summary fashion, the court then declared the rule true “whether the defendant is the state itself or another of the state's political subdivisions.” Id.

118 See, for example, *Burbank-Glendale-Pasadena Airport Authority v City of Burbank*, 136 F3d 1360, 1362 (9th Cir 1998) (upholding the “per se rule,” established in *South Lake Tahoe*, barring a political subdivision of a state from challenging the constitutionality of a state statute.); *Palomar Pomerado Health System v Belshe*, 180 F3d 1104, 1107 (9th Cir 1999) (“Under established Ninth Circuit law political subdivisions of a state may not challenge the validity of a state statute in a federal court on federal constitutional grounds. This is true whether the defendant is the state itself or another of the state's political subdivisions.”) (internal quotations omitted). The acceptance of the Ninth Circuit's position (or lack thereof) is addressed briefly in note 59.

cal subdivisions to challenge enactments of their creating states on federal constitutional grounds.\footnote{Compare \textit{Trenton}, 262 US at 192 (holding that the Fourteenth Amendment "does not apply as against the State in favor of its own municipalities"), with \textit{New Orleans Water-Works}, 142 US at 89 ("[T]he city, being a municipal corporation and the creature of the state legislature does not stand in a position to claim the benefit of the constitutional provision in question, since its charter can be amended, changed, or even abolished at the will of the legislature."). This Comment discusses the rule in terms of \textit{Trenton}. See note 57 and accompanying text.}

In \textit{New Orleans Water-Works}, Orleans parish sued the city of New Orleans and a municipal waterworks on the grounds that both an 1884 enactment of the state legislature and a city ordinance violated the Contract Clause.\footnote{See \textit{New Orleans Water-Works}, 142 US at 84. In 1877, the Louisiana State Legislature exempted the New Orleans Water-Works from taxation in consideration for supplying all municipal water needs to the city of New Orleans free of charge. Id at 80. The state required the Water-Works to pay taxes when the legislature amended the Act in 1878, and in 1884 the state passed legislation requiring the city to pay for any water supplied to it. Id at 80–81. Pursuant to the 1884 enactment, the city passed an ordinance authorizing payment to NOWW. Id. The parish claimed that both the 1884 Act and the ordinance impaired the original contract between the latter two entities as embodied in the Act of 1877. See id at 84–90 (noting that the contract relied upon in the case was "that contained in section 11 of the act of 1877").} The Court analyzed the parish’s claims as a challenge to the state, holding that the city, as a creature of Louisiana, did not "stand in a position to claim the benefit of the [Contract Clause], since its charter [could] be amended, changed, or even abolished at the will of the legislature."\footnote{\textit{New Orleans Water-Works}, 142 US at 89.} As such, Justice Brown dismissed the case for want of jurisdiction.\footnote{Id at 93 ("As there is no federal question properly presented in this case, the motion to dismiss is granted.").}

It appears that the \textit{South Lake Tahoe} court seized upon \textit{New Orleans Water-Works} because the parish sued the city and the waterworks, both of which were political subdivisions of Louisiana. It is true that Orleans Parish challenged both a state statute and a local ordinance, but the ordinance merely operationalized a state law.\footnote{See \textit{New Orleans Water-Works}, 142 US at 88 (holding that the contract "was in reality between the state and the Water-Works Company").} It was the 1884 Act that required the city to pay for its water; the municipal ordinance did no more than set the terms of payment.\footnote{See id at 81 ("[A]cting under [the 1884 state] statute, the city council, in September, 1884, passed an ordinance . . . authorizing the mayor to enter into a contract with the [Water-Works].").} In denying the parish’s constitutional challenge to the city’s alleged impairment of the contract between itself and the waterworks, the Court explicitly held that the "contract was
in reality between the state and the water-works company."\textsuperscript{126} This fact triggered application of the \textit{Trenton} rule, destroying the parish's constitutional claim.\textsuperscript{127}

Read together, \textit{New Orleans Water-Works, South Lake Tahoe} and \textit{Trenton} purportedly establish three points. First, political subdivisions cannot bring Fourteenth Amendment challenges against their creating states.\textsuperscript{128} Second, courts extend the rule to deny municipalities a \$1983 cause of action.\textsuperscript{129} Third, the precedents used to support this extension involved disputes between political subdivisions and their creating states, not a challenge by one political subdivision to the acts or enactments of another.\textsuperscript{130} Therefore, the denial to cities of full \$1983 personhood is derived not from an examination of the historical or legal relationships among political subdivisions, but through rote application of \textit{Trenton} to inter-municipal disputes. Yet, the rationales underlying \textit{Trenton} have only an attenuated connection (if any) to suits between political subdivisions. Furthermore, the treatment of states under \$1983 insures that granting cities a cause of action under the statute preserves the \textit{Trenton} principal.

\textbf{C. The Rationale of \textit{Trenton} and the Viability of Full \$1983 Personhood}

The \textit{Trenton} rule is grounded in the fact that municipalities are created by the states to serve as agents in the performance of state functions.\textsuperscript{131} Commentators recognize that the rule is not the most coherent of doctrines and question the adequacy of a justification based exclusively on a city's status as the creation of its state.\textsuperscript{132} Recent scholarship suggests that it is more fruitful to frame the issue in terms of state autonomy and (where federal law is concerned) New Federalism.\textsuperscript{133} Relatedly, one could argue as a matter of policy that any independent power of a political subdivision to use the Constitution and federal laws to preempt its creator "undermine[s] the efficacy of . . . local self govern-

\textsuperscript{126} \textit{Id.}
\textsuperscript{127} Of course, \textit{Trenton} was not decided until three decades after \textit{New Orleans Water-Works}. The label is used for the reasons discussed in note 57 and accompanying text.
\textsuperscript{128} See, for example, \textit{Trenton}, 262 US at 192. See also Parts II A and II B.
\textsuperscript{129} This is the precise result of both \textit{South Lake Tahoe} and \textit{South Macomb}.
\textsuperscript{130} For a discussion of these cases, see Parts II B 1, II B 2, and III B.
\textsuperscript{131} See, for example, \textit{Trenton}, 262 US at 185–86.
\textsuperscript{132} See note 59 and accompanying text.
Regardless of which rationale(s) one finds intellectually satisfying, neither the "creature" theory nor federalism principles provide coherent support for the limitation of municipal personhood under § 1983.

The City of New Rochelle brought suit against Mamaroneck under § 1983 for the latter's allegedly unconstitutional enactment of a local permitting process. Ultimately, New Rochelle's § 1983 complaint was dismissed "[f]or the same reasons" that the city would be unable to challenge a statute enacted by the State of New York. The preceding analysis offers several potential articulations of those reasons: a city's status as a creature of its creator; federalism principles; or sound public policy. Yet, New Rochelle was neither a creature of Mamaroneck, nor did it seek to invalidate a state statute. Furthermore, if "local governance" means that states should be free to determine their own internal organization, it is difficult to see how allowing New Rochelle to proceed against Mamaroneck under § 1983 undermines the ability of the State of New York to eliminate, merge, or otherwise rearrange either entity. The only scenario that might implicate these concerns is one in which granting a city a § 1983 cause of action enabled it to sue the state itself. However, such an action is clearly prohibited by the Supreme Court's § 1983 jurisprudence.

Under the Eleventh Amendment, United States citizens cannot sue the states in federal court. The scope of the Amendment is an important consideration in defining the scope of § 1983. Not until seventeen years after Monell, in Will v Michigan Department of State Police, did the Supreme Court definitively hold that the states were not persons under § 1983. In Quern v

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135 See New Rochelle, 111 F Supp 2d at 357. See also notes 2–8 and accompanying text.
136 South Macomb, 790 F2d at 505. This quote applies equally to the New Rochelle court which, like the South Macomb court, used the Trenton rule to reach its holding. See New Rochelle, 111 F Supp at 368. See also Part II B.
137 See notes 2–8 and accompanying text.
138 See, for example, Hunter, 207 US 161, 179 (refusing to prevent the merger of Allegheny into Pittsburgh). See also note 57 and accompanying text.
139 The amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." US Const Amend XI.
142 Id at 63–64. There is extensive commentary on Will and the scope of § 1983. See, for example, William Burnham and Michael C. Fayz, The State as a "Non-Person" Under Section 1983: Some Comments on Will and Suggestions for the Future, 70 Or L Rev
Jordan, the Court concluded that the Eleventh Amendment precluded § 1983 suits against the states in federal court. Will, however, involved a § 1983 claim brought against the state of Michigan in its own courts, where the Eleventh Amendment does not apply.

Although not directly implicated in Will, the Eleventh Amendment provided the basis for the Court's finding that the states are not reachable under § 1983. Thus, under Will, the states are "non-persons," just as municipalities were "non-persons" prior to Monell. Although not decided on the same terms as Trenton, Will preserves the Trenton rule under § 1983, for § 1983 persons cannot sue the states under the statute. Therefore, allowing cities to bring suit as § 1983 persons does not open the states to suit by their political subdivisions. On the other hand, cities such as New Rochelle would be permitted to bring suit against Mamaroneck, subject to the limitations established in Monell and its progeny. Based on the facts of New Rochelle, Mamaroneck's action appears to fall squarely within the "policy" enactments at the heart of municipal liability under § 1983.

(1991) (challenging, among other things, the Court's failure to examine the legislative history of § 1983).

144 See id. See also Will, 440 US at 66 (holding that § 1983 does not override the states' Eleventh Amendment immunity). Id.
145 See Will, 491 US at 63–64 (noting that the Eleventh Amendment does not apply in state courts).
146 Justice White began Will with the observation that § 1983 "does not provide a [federal] forum for litigants who seek a remedy against a State" unless the state has waived immunity or Congress has overridden it through legislation enacted pursuant to § 5 of the Fourteenth Amendment. Id at 66. He further noted that, in deciding Quern, the Court held that Congress did not intend to "alter the federal-state balance" when it enacted § 1983. Id. It followed that Congress could not have meant to deny persons a federal forum against the states while at the same time allowing them to proceed in state courts. See id.

Sensitive to the fact that his reasoning looked suspiciously like an application of the Eleventh Amendment to state courts, Justice White pointed out that the Court's holding did not mean that the scope of the Eleventh Amendment and the scope of § 1983 were coterminous, but because the Eleventh Amendment was important to determining "congressional intent as to the scope of § 1983," the Court (somewhat circularly) refused to "disregard it." Id at 66–67. Commentators have expressed surprise at the Will Court's analysis. See, for example, Burnham and Fayz, 71 Or L Rev at 20–25 (cited in note 142) ("Even if we assume that Congress would have indulged in the radical confusion that the Eleventh Amendment applied in state court, there is nothing to indicate that Congress would have thought that the Eleventh Amendment applied to bar federal law claims, even in federal court.").

147 See Part I B.
148 See note 48 and accompanying text.
149 See, for example, Leatherman v Tarrant County Narcotics Intelligence and Coordination Unit, 507 US 163, 166 (1993), citing Owen, 445 US at 650 ("[A] municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom
The preceding analysis reveals that using *Trenton* to bar municipal suits under § 1983 has no sound basis in precedent or policy. In addition, although every case discussed thus far deals with suits between intrastate political subdivisions or between a subdivision and its creating state, the denial of full personhood to municipalities prevents them from bringing suit against out-of-state subdivisions that may commit constitutional torts. In the context of § 1983 suits between interstate political subdivisions, it should be clear that the *Trenton* rationale has no traction whatsoever. Whether a city chooses to bring suit against an intrastate neighbor or a municipality in a different state, granting cities full personhood under § 1983 will rectify substantial incoherence in both § 1983 and Fourteenth Amendment jurisprudence. Furthermore, the grant will recognize and clarify the distinction between city/state relations under the Fourteenth Amendment and the status of cities under § 1983. In so doing, courts will also promote the important policies that first led the Supreme Court to recognize municipalities as § 1983 persons.

D. Full Personhood Is Compelled by the Immunity Principles Established in *Monell* and Its Progeny

Thus far, this Comment has examined the question of municipal personhood in terms of cities as potential § 1983 plaintiffs. Granting cities a cause of action under § 1983 will also have salutary effects on municipalities such as Mamaroneck, who may face liability from a new source once cities are granted full personhood.

Municipal liability under § 1983 is part and parcel of the "expansive sweep of the statutory language," which does not expressly include any common-law immunities. Nonetheless, the Court has read certain immunities into § 1983 on the grounds that Congress, had it intended to abolish them through § 1983, would have done so expressly. In those cases, as in any where

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150 This is a peculiar feature of the case law in this area. Interstate, inter-municipal § 1983 claims, though certainly conceivable, are not addressed in any of the cases discussed in this Comment.
151 The point is almost self-evident. The *Trenton* rule prevents cities from asserting constitutional claims against their creating states. In the case of a § 1983 claim brought by one city against another that happens to be across a state line, the rule is not implicated.
152 See *Owen*, 443 US at 635-63.
153 Id at 637, quoting *Pierson v Ray*, 386 US 547, 555 (1967). *Pierson* reestablished the absolute immunity of judges from § 1983 liability. 386 US at 553-54. Other examples
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the Court immunizes an entity from the reach of § 1983, the immunization is “predicated upon a considered inquiry into the immunity historically accorded” the entity or official at common law “and the interests behind it.”154

With respect to cities, the Court determined that there was no history of immunity for municipal corporations, and neither “history nor policy” supported granting them even qualified § 1983 immunity.155 “By 1871,” Justice Brennan noted, “municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis.”156 It is clear that private corporations are “persons” capable of bringing suit under § 1983,157 a fact that supports a construction of the statute enabling municipal corporations to do likewise. However, the Court did acknowledge two doctrines that had afforded cities limited protection from liability. One distinguished between a city’s governmental and proprietary functions, and the second immunized municipalities for ‘discretionary’ or ‘legislative’ activities, but not for those ‘ministerial’ in nature.”158 With regard to the governmental/proprietary dichotomy, cities were traditionally immune from suits arising out of “governmental” functions, but were liable for their private or proprietary acts to the same extent as any private corporation.159

include absolute prosecutorial immunity and qualified immunity for prison officials. See Owen, 445 US at 637–38 (collecting cases).

154 Owen, 443 US at 638.
155 Id. at 639, citing Monell, 436 US at 687–88 (emphasis added).
156 Id at 639, citing Monell, 436 US at 687–88 (emphasis added).
157 See note 26 and accompanying text.
158 Owen, 445 US at 644.
159 Id. The governmental/proprietary distinction is rooted in the common law concept of sovereign immunity. See Eugene McQuillin, 18 Law of Municipal Corporations § 53.02.10 (Callaghan 3d ed 1987). Generally, when a city functions in a governmental capacity, it is simply an extension of its creator and is, like the state itself, immune from suit. See id at § 53.29. On the other hand, when a city acts in a proprietary capacity, it faces the same liability as any private corporation. See id. For example, a city is usually immune from liability for a tort committed by a firefighter if the tort occurs in the course of fighting a fire. See W. Page Keeton, Prosser and Keeton on Torts § 131 at 1053 (West 5th ed 1984). However, if the city operates an electric company, and charges fees, the activity “looks” proprietary and a tort committed in the operation of the utility will give rise to municipal liability. Id at 1052–53.

Interestingly, both the South Macomb and New Rochelle courts claim that the question of a municipality’s ability to bring a Fourteenth Amendment claim against its creating state when the municipality acts in a proprietary capacity remains unresolved. See South Macomb, 790 F2d at 504; New Rochelle, 111 F Supp 2d at 365. Given the fact that states are not reachable as persons under § 1983, Will, 491 US at 63–64, such a claim is clearly untenable under the statute. The governmental/proprietary distinction remains relevant. See, for example, Postscript: Tracing the Governmental Proprietary Test, 53 U Cin L Rev 561, 584 (1984) (“As long as the notion persists that governments cannot govern
Dealing first with the governmental/proprietary issue, the \textit{Owen} Court noted that the distinction was an outgrowth of sovereign immunity and conducted a rather lengthy examination of the doctrine.\footnote{See \textit{Owen}, 445 US at 644–48.} Ultimately, Justice Brennan concluded that a municipality's governmental immunity was clearly eliminated by Congress's enactment of § 1983.\footnote{Id at 647.} In other words, by including municipalities in the universe of § 1983 persons, Congress "abolished whatever vestige of the State's sovereign immunity the municipality possessed."\footnote{Id at 648–49.}

Turning next to the discretionary/ministerial distinction, the Court established that this source of municipal immunity grew not out of sovereign immunity, but from a need to preserve the separation of powers.\footnote{Id at 648.} The doctrine developed to limit judicial encroachment on the reasonableness of a city's policy judgments.\footnote{See \textit{Owen}, 445 US at 648.} Despite the fact that a municipality has wide latitude in exercising its judgment as to fiscal and other policies, the Court rejected the discretionary/ministerial distinction as grounds for municipal § 1983 immunity. Because a municipality has "no discretion to violate the Federal Constitution," Justice Brennan held that "when a court passes judgment on a municipality's conduct in a § 1983 action, it does not seek to . . . interfere with the local government's resolution of competing policy considerations . . . but looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes."\footnote{Id at 649.}

\textit{Owen} thus provides two persuasive policy rationales for granting cities full personhood under § 1983. Allowing municipalities to bring suit as § 1983 plaintiffs is consistent with both the parallel treatment of private and municipal corporations under the statute\footnote{Id at 638–39. See also note 26 and accompanying text.} and the \textit{Owen} Court's conclusion that Congress eliminated any "vestige" of municipal immunity when it included municipal corporations within the ambit of § 1983.\footnote{\textit{Owen}, 445 US at 647–50.}

\begin{thebibliography}{9}
\bibitem{}Id at 647.
\bibitem{}Id at 648–49.
\bibitem{}Id at 648.
\bibitem{}Id at 638–39. See also note 26 and accompanying text.
\end{thebibliography}
E. Representation Reinforcement

Granting cities a cause of action under § 1983 will enable them to better defend the interests of their citizens and will increase the accountability of local legislatures. The notion of legislative accountability is at the heart of the Court's decision to impose § 1983 liability on municipalities under Monell and its progeny. In Owen, Justice Brennan noted that § 1983 was intended not only as a means of compensation for persons deprived of their constitutional rights, but also as a "deterrent against future constitutional deprivations." The Court reasoned that municipal liability would create an incentive for legislators and other officials who might harbor doubts about the constitutionality of a proposed course of action to "err on the side of protecting . . . constitutional rights." Although the Court does not use the language of externalities analysis, its holding appears to be motivated by a desire to force local legislatures to internalize the costs of enactments that might have a negative impact on individual citizens or, in this context, neighboring towns. This motivation is also apparent in Justice Brennan's conclusion that the threat of damages might encourage policymakers to "institute internal rules and programs designed to minimize unintentional infringements on constitutional rights."

Owen involved the allegedly unconstitutional dismissal of a police officer, but the arguments supporting municipal liability in that context apply with equal force to permit suit by a city seeking to protect its development rights against the legislative encroachment of an unhappy neighbor. This is precisely what New Rochelle sought to do in its suit against Mamaroneck. Some commentators suggest that intrastate political processes adequately protect cities like New Rochelle, but New Rochelle involved an intensely local dispute. Without representation in the Mamaroneck city council, it is difficult to envision how New Ro-

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168 Monell, 436 US at 690 (holding that local governing bodies can be sued directly under § 1983).
169 See Owen, 445 US at 651.
170 Id at 651–52.
171 Id at 652.
172 See notes 2–8 and accompanying text.
173 See, for example, Willscher, 67 U Chi L Rev at 258–60 (cited in note 133) ("Cities are fully represented, and their grievances are resolvable by, the state legislature."). Will-scher discusses the point in terms of a municipality's right to challenge state statutes. See id at 243–44. While this scenario is beyond the scope of this Comment, it is relevant to the inter-municipal context.
chelle could obtain meaningful redress for Mamaroneck’s intrusive permit requirements through the political process—absent a policy of legislative retaliation. If New Rochelle had § 1983 at its disposal, this dispute appears to be one in which the threat of damages would induce a town like Mamaroneck to think twice before it legislates.\textsuperscript{175}

IV. LINGERING FEDERALISM CONCERNS

Despite the clear distinction between municipal suits against the state and municipal personhood under § 1983, the prospect of enabling cities to use the statute against other state-created entities may nonetheless raise federalism concerns. Section 1983 is, after all, a statute designed to vindicate federal rights.\textsuperscript{176} The Supreme Court has recently revitalized federalism—and invalidated substantial pieces of federal legislation—in a series of highly publicized cases.\textsuperscript{177} Although decided long before this resurgence, cases such as Trenton and New Orleans Water-Works, which prohibit cities from using the Constitution against their creating states, are consistent with the Rehnquist Court’s renewed sensitivity to state sovereignty.\textsuperscript{178} To address this concern, courts should limit § 1983 actions by political subdivisions to those cases in which the subdivision acts “independently.” To this end, the Supreme Court’s Eleventh Amendment jurisprudence can be helpful in determining when a political subdivision should have a § 1983 cause of action, and when it should.

\textsuperscript{175} For example, Mamaroneck may lobby the New York state legislature to pass a law requiring permits of the sort it sought to impose throughout the state. The costs involved in passing such legislation would likely be much higher than the costs of passing a local law, but it is clear that a state statute would be immune to a § 1983 attack. See Part IV A.

\textsuperscript{176} Section § 1983 was enacted to enforce the provisions of the Fourteenth Amendment itself. See Monroe, 365 US at 171. See also Part I.

\textsuperscript{177} See, for example, Printz v United States, 521 US 898, 933 (1997) (striking down a provision of the Brady Handgun Violence Prevention Act on the grounds that the provision improperly required states to administer a federal regulatory program); Lopez v United States, 514 US 549, 642–43 (1995) (invalidating the Gun-Free School Zones Act of 1990 because of the lack of a “concrete tie” between firearm possession and interstate commerce).

\textsuperscript{178} The cases are discussed in Parts II A and III B. See also note 120 and accompanying text. For a survey of the Rehnquist Court’s substantial work in this area, see Robert H. Freilich, Adrienne H. Wyker and Leslie Eriksen Harris, Federalism at the Millenium: A Review of U.S. Supreme Court Cases Affecting State and Local Government, 31 Urban Law 683, 722–40 (1999).
A. The Status of Political Subdivisions under the Eleventh Amendment

The Supreme Court has held that the Eleventh Amendment is an important consideration in determining the scope of § 1983. By its terms, the Amendment prohibits suits "against one of the United States." However, it is well-settled that the proscription includes not only actions in which a state is a named party, but also "certain actions against state agents and state instrumentalities." In contrast, the Amendment generally does not extend to cities and other municipalities. Generally, where a court determines that the state, rather than one of its officers or political subdivisions, is "the real, substantial party in interest," Eleventh Amendment immunity extends to the individual or political subdivision. Because political subdivisions may be identified with the state when they conduct certain activities, granting a cause of action to every political subdivision because they are labeled as such could result in substantial interference with the sovereignty of the states.

To determine whether and when a particular political subdivision, such as a school board, is entitled to share in the Eleventh Amendment immunity of its creating state, a court must determine whether the entity is "an arm of the state," in which case it

179 See Will, 491 US at 66–67 ("[I]n deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it."). Will is introduced in Part III C.

180 US Const Amend XI.


182 Mt. Healthy City School District Board of Education v Doyle, 429 US 274, 280 (1977). The Court's 1890 decision in Lincoln County v Luning established the rule. 133 US 529, 530 (1890):

[While a county is territorially part of the state, yet politically it is also a corporation created by, and with such powers as are given to it by the state. In this respect, it is a part of the state only in the remote sense in which any city, town, or other municipal corporation may be said to be a part of the state.

The wisdom of Lincoln County is a subject of continuing debate, particularly in light of the revitalization of federalism by the Rehnquist Court. See generally Melvyn R. Durchslag, Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?, 43 DePaul L Rev 577 (1994) (exploring the consequences of municipal liability but concluding that it may be preferable to an otherwise absolute immunity). This issue is explored briefly in Part IV D.

183 Regents of the University of California, 519 US at 429 (citing cases). See also note 186 and accompanying text.

184 See Will, 491 US at 70 ("[O]ur holding here does not cast any doubt on Monell, and applies only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes.").
is immune, "or is instead to be treated as a municipal corporation or other political subdivision, to which the Eleventh Amendment does not extend." The "arm of the state" doctrine, sometimes referred to as the Mt. Healthy test, is widely used by lower federal courts when faced with the question of a particular entity's Eleventh Amendment immunity from suit.

Courts have developed numerous variations of the Mt. Healthy inquiry; consequently, the number of factors considered in determining whether a particular entity is "independent" differs across circuits. Regardless of the specific number of factors

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185 Id.
186 Of course, Mt. Healthy is not the only source for the inquiry. See, for example, Edelman v Jordan, 415 US 651, 663 (1974), quoting Ford Motor Co v Department of Treasury, 323 US 459, 464 (1945) (holding it "well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment" and reiterating that "[w]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants"). See also note 187 and accompanying text.
187 This Comment argues that municipalities should be able to bring a § 1983 action after a structured inquiry identical to the inquiry made under the Court's "arm of the state doctrine." It is beyond doubt that the Mt. Healthy inquiry is well-accepted. See, for example, Lester H v Gilhool, 916 F2d 865, 870 (3d Cir 1990), citing Mt. Healthy, 429 US at 280 ("To determine whether the School District is insulated by Eleventh Amendment immunity, we must decide whether a Pennsylvania school district is an alter ego of the state of Pennsylvania. This depends on the powers granted the school district by the state."); Gary A v New Trier High School District No 203, 796 F2d 940, 945 n 8 (7th Cir 1986) quoting Mt. Healthy, 429 US at 280 ("The Mt. Healthy test for whether an entity is an arm of the state is fact specific. Courts are instructed to look at the 'nature of the entity created by state law.'")); Hadley v North Arkansas Community Technical College, 76 F3d 1437, 1438 (8th Cir 1996), quoting Mt. Healthy, 429 US at 280 (noting that Eleventh Amendment immunity does not extend to independent political subdivisions created by the State, such as counties and cities, and holding that the question to be decided is whether the entity in question "is to be treated as an arm of the state . . . or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend"); Sturdevant v Paulsen, 218 F3d 1160, 1164 (10th Cir 2000), quoting Mt. Healthy, 429 US at 280 (noting that the "inquiry under the arm of the state is . . . whether [the entity in question] is 'more like a county or city than . . . like an arm of the state'); Ambus v Granite Board of Education, 975 F2d 1555, 1560 (10th Cir 1992) (same).
188 Compare Belanger v Madera Unified School District, 963 F2d 248, 250–51 (9th Cir 1992) (finding the following factors relevant to determining whether a governmental agency is an arm of the state: "[1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central government functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only in the name of the state and [5] the corporate status of the entity"), with Sturdevant, 218 F3d at 1164 (noting that in applying the Mt. Healthy test, the court must examine two things: [1] "the degree of autonomy given to the agency, as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state," and [2] "the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing").
considered, it is clear that a political subdivision does not share in the state's Eleventh Amendment immunity if there are "persuasive indicia" that the subdivision occupies an "independent status" relative to its creating state.\footnote{See, for example, Moor v County of Alameda, 411 US 693, 719–20 (1973) (holding that California counties did not share in the Eleventh Amendment immunity).} Courts must glean such indicia from a careful examination of the state laws governing the entity in question.\footnote{Regents of the University of California, 519 US at 430 n 5 ("Ultimately . . . whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the United States' within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of the state law that define the agency's character.").} These factors may include the power to sue and be sued; the power to buy, hold and sell land; or the power to levy taxes.\footnote{See Notes 2–8 and accompanying text.} Ultimately, courts must judge the independence of any particular entity on a case-by-case basis. The \textit{Mt. Healthy} test, however, which by its terms requires a court to determine whether a particular entity more closely approximates a county or city than an arm of the state,\footnote{See, for example, Moor, 411 US at 719–20. See generally note 187 and accompanying text.} suggests that most cities possess an independence rendering them unable to share in the Eleventh Amendment immunity enjoyed by their creating states.

B. Using \textit{Mt. Healthy} to Cabin § 1983 Actions Initiated by Political Subdivisions

This Comment began with the story of New Rochelle's efforts to build a retail outlet within its borders.\footnote{Sturdevant v Paulsen, 218 F3d 1160, 1164 (10th Cir 2000), quoting Mt. Healthy, 429 US at 280.} To see how the arm of the state doctrine would enable cities like New Rochelle to fend off the encroachments of ambitious neighbors and still preserve the sovereignty of the states, it is useful to return to the facts of that case. Under current law, New Rochelle cannot sue Mamaroneck "for the same reasons" that it cannot sue the State of New York.\footnote{See Notes 2–8 and accompanying text.} Yet, if Mamaroneck neither created New Rochelle nor partakes of New York's sovereign immunity under the Eleventh Amendment, it is not clear what those reasons are.\footnote{For a discussion of the inapplicability of the Trenton rule to inter-municipal suits of the New Rochelle–Mamaroneck type, see Parts III B and III C.}
By analogizing an inter-municipal § 1983 suit to an action by a city against its creating state, the rule obliterates the well-established distinction between cities and states. In the first place, the states do not need Trenton to protect them from the § 1983 assaults of insubordinate political subdivisions. Trenton established that a city cannot claim the protections of the Fourteenth Amendment against its creating state; Will established that the states are not persons under § 1983. Enabling New Rochelle to bring a § 1983 action against Mamaroneck to invalidate a local law does not threaten, or even implicate, either rule. To see that this is true, consider a scenario under which a private developer, rather than the city of New Rochelle, sued to enjoin enforcement of the permitting process established by Mamaroneck. Under Owen and its progeny, it is clear that such a suit—which directly challenges a discretionary, legislative function—is permissible under § 1983. Consequently, a court could not interpret the claim as a challenge to the State of New York, nor as a challenge to a statute passed by the New York state legislature. These facts do not change when the city of New Rochelle steps into the private developer's shoes. It is nonsensical to nonetheless bar New Rochelle's § 1983 action on the grounds that a city cannot claim the protections of the Fourteenth Amendment against its creating state.

This hypothetical brings the chief incoherence of municipal status under § 1983 into stark relief. Under current law, municipalities do not have the power to sue each other because they do not have the power to sue their creating states. Yet the immunity of the states from suits by their political subdivisions or private parties is well-established wholly apart from the question of the powers of a state's political subdivisions. Indeed, Will makes it clear that the states are not reachable under § 1983, and reaffirms the liability of municipalities under the statute. The non-

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196 See Part IV A.
197 262 US at 192.
198 491 US at 64.
199 New Rochelle involved, among other things, § 1983 claims by the City of New Rochelle against the neighboring Town of Mamaroneck. See 111 F Supp 2d at 357–58 (listing the claims).
200 See note 48 and accompanying text.
201 Otherwise, the claim would run afoul of Will, under which the state is not a § 1983 person liable for constitutional torts. See 491 US at 64.
202 Will, 491 US at 64.
203 Id at 70 (holding that Monell is not undercut by the status of the states as non-persons under § 1983).
personhood of the states under § 1983 depends explicitly on the Eleventh Amendment.\textsuperscript{204} Thus, the denial to cities of a cause of action under § 1983, though phrased in terms of limitations on municipal power, is in fact an extension of Eleventh Amendment immunity from the states to their political subdivisions. When analyzed from the perspective of a city as a potential § 1983 defendant, rather than as a § 1983 plaintiff, the immunity cannot be reconciled with the "warp and woof" of § 1983 jurisprudence\textsuperscript{205} or well-settled principles of Eleventh Amendment immunity.

Further buttressing this argument is the fact that the precedents relied upon to prohibit § 1983 suits by municipalities preceed decades of significant developments in both the enforcement of the Fourteenth Amendment through § 1983\textsuperscript{206} and the treatment of political subdivisions under the Eleventh Amendment. For example, both New Orleans Water-Works and Trenton speak of political subdivisions as agents or instrumentalities of their creating states.\textsuperscript{207} It is that status which disables political subdivisions from suing their creating states under the Contract Clause and the Fourteenth Amendment.\textsuperscript{208} But under the Mt. Healthy test, it is clear that instrumentality status does not guarantee immunity from suit. Rather, determining whether an instrumentality shares in its creator's Eleventh Amendment immunity requires an extensive inquiry into the nature of the entity

\textsuperscript{204} See id:

[P]rior to Monell, the court had reasoned that if municipalities were not persons then surely States also were not. And Monell overruled Monroe, undercutting that logic. But it does not follow that if municipalities are persons then so are States. States are protected by the Eleventh Amendment while municipalities are not, and we consequently limited are holding in Monell to local government units which are not considered part of the State for Eleventh Amendment purposes. Conversely, our holding here does not cast any doubt on Monell, and applies only to States or governmental entities that are considered arms of the State for Eleventh Amendment purposes.

\textsuperscript{205} Monell, 436 US at 696.

\textsuperscript{206} See note 59 and accompanying text.

\textsuperscript{207} See Trenton, 262 US at 190 ("The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations.") (citation omitted); New Orleans Water-Works, 142 US at 91 (referring to municipalities as "mere agent[s] of the state"); Regents of the University of California v Doe, 519 US 425, 429 (1997) (noting that the Eleventh Amendment applies not only to the States, but in "certain actions against state agents and state instrumentalities").

\textsuperscript{208} These cases are discussed in Parts II A and III B.
under the law of its creating state.\textsuperscript{209} If, on the basis of such an inquiry, a court determines that the state, rather than the subdivision, is the real party in interest, then the entity is immune as if it were the state itself.\textsuperscript{210}

Courts should undertake an identical inquiry to determine whether and when a municipality or other political subdivision can pursue a § 1983 claim against another political subdivision. If a court determines that both the entity bringing suit and the entity being sued are "independent" under \textit{Mt. Healthy}, then the state is not the "real, substantial party in interest,"\textsuperscript{211} and the suit should go forward. Using \textit{Mt. Healthy} to limit the range of § 1983 suits between political subdivisions will thus enable cities to enjoy the benefits of § 1983 personhood and nonetheless preserve the sovereignty of the states.

C. A Brief Survey: \textit{Mt. Healthy} Applied

If courts employed a \textit{Mt. Healthy} analysis to determine the viability of inter-municipal § 1983 suits rather than granting municipal defendants per se immunity, how would outcomes change? A brief survey of several cases examined in this Comment suggests that the proposed rule threatens neither the sovereignty of the states nor the integrity of the precedents underpinning the prohibition of inter-municipal suits under § 1983.

Allowing municipalities to sue one another will not enable them to sue their creating states. Under the proposed rule, \textit{Trenton} and \textit{New Orleans Water-Works} would remain undisturbed. Furthermore, by using \textit{Mt. Healthy} to determine the viability of a § 1983 suit brought by a municipality against another political subdivision, any case in which a court determines that a city is challenging the state itself will be resolved in favor of the state.\textsuperscript{212} This is merely an application of \textit{Will} to § 1983 suits that municipalities may commence under the rule proposed in this Comment.\textsuperscript{213} \textit{Trenton} involved a Fourteenth Amendment challenge to

\begin{itemize}
\item \textsuperscript{209} See \textit{Regents of the University of California}, 519 US at 429–30 (internal quotations and citations omitted).
\item \textsuperscript{210} See id at 429.
\item \textsuperscript{211} Id.
\item \textsuperscript{212} \textit{Mt. Healthy}, 429 US at 280–81 (denying a school board Eleventh Amendment immunity). See also Parts IV A and IV C.
\item \textsuperscript{213} See \textit{Will}, 491 US at 70 (holding that state immunity from § 1983 "applies only to States or governmental entities that are considered 'arms of the state' for Eleventh Amendment purposes" and referring to \textit{Mt. Healthy} for purposes of making the determination).
\end{itemize}
the State of New Jersey itself, which was a named defendant in the suit.\textsuperscript{214} The proposed rule permits § 1983 suits between "independent" political subdivisions, not constitutional suits by a subdivision against the state itself. Similarly, \textit{New Orleans Water-Works} involved a constitutional challenge to a state statute which allegedly violated the Contract Clause.\textsuperscript{215} Under the proposed rule, such a suit would be resolved in favor of the state, just as it was in 1891.\textsuperscript{216}

D. The Limits of Municipal Personhood and Federalism

Cities should have a cause of action under § 1983 only when the target of the suit is not an arm of the state for Eleventh Amendment purposes and the other limitations of the statute are met.\textsuperscript{217} One could argue that any § 1983 challenge to a municipal-

\textsuperscript{214} See 282 US at 183–84.
\textsuperscript{215} 142 US at 80–83. For a more recent example, consider the Seventh Circuit's decision in \textit{Village of Arlington Heights v Regional Transportation Authority}, 653 F2d 1149 (7th Cir 1981). \textit{Arlington Heights} was one of the cases relied on by the \textit{South Macomb} court, see 790 F2d at 505. See also Part II B 2. In 1979, the Arlington Heights village challenged a state statute and RTA ordinance levying unequal tax assessments. \textit{Arlington Heights}, 632 F2d at 1150. The Seventh Circuit held that Arlington Heights could not bring suit because, under the \textit{Trenton} rule, it could not use the Fourteenth Amendment to challenge the validity of a state statute. Id at 1151-52. The village argued that this rule did not apply because it was challenging an ordinance of the RTA—a political subdivision of Illinois—and not a state statute. Id at 1152-53. The court rejected the argument on three grounds: (1) the complaint stated that they sought to invalidate a state statute; (2) the RTA could exercise only powers granted to it by the state, thus a challenge to the ordinance was a challenge to the state itself; and (3) the \textit{Trenton} rule. See id at 1153.

It is clear from the facts of the case that the village's challenge was in fact directed against a state statute and not the RTA ordinance. Id at 1150. The ordinance did not define the taxes to be assessed and was merely a "vote" to impose taxes specifically authorized by the Illinois state legislature. Id. Applying a variant of the \textit{Mt. Healthy} test to the facts of the \textit{Arlington Heights} would likely produce the same outcome the court reached in applying the \textit{Trenton} rule. For example, under the variation established by the Tenth Circuit, the court would examine both the degree of autonomy of the RTA under state law and the extent of control exercised by the state; as well as the extent of financing the RTA received independent of the state treasury and its ability to provide for its own financing. See \textit{Sturdevant v Paulsen}, 218 F3d 1160, 1164 (10th Cir 2000). The \textit{Arlington Heights} opinion does not discuss the financing of the RTA, but with respect to the tax at issue, it is clear that the agency had virtually no discretion outside of when the tax would be imposed. \textit{Arlington Heights}, 653 F2d at 1150. Illinois state law established its terms, not an RTA ordinance; the RTA merely voted on when to impose the tax. See id.

Although a court would have to examine this issue in greater depth, it appears that, with respect to the tax, the RTA is an arm of the state under \textit{Mt. Healthy}. Thus, the result of \textit{Arlington Heights} remains the same, but it is a result grounded in analysis rather than rote application of the \textit{Trenton} rule. On the other hand, in cases like \textit{South Macomb} and \textit{New Rochelle}, municipalities should have a valid § 1983 cause of action.

\textsuperscript{216} \textit{Arlington Heights}, 653 F2d at 1150.
\textsuperscript{217} See note 48 and accompanying text.
ity is, in effect, a challenge to the state, since cities derive all of their powers from the states that create them. This argument is untenable for two reasons. First, it would eliminate any distinction between municipal action and state action—overturning Monell and rendering the arm of the state doctrine moot. Second, political subdivisions cannot claim immunity simply because they may exercise a "slice of state power." Rather, courts must determine whether a political subdivision is entitled to immunity from § 1983 after a detailed examination of the entity and the action in question.

This is not to suggest that federalism concerns evaporate simply because cities are not arms of the state entitled to share in the latter's Eleventh Amendment immunity. The Tenth Amendment is also employed in the Supreme Court's efforts to safeguard the states from federal encroachments. Nonetheless, whether invoked on Tenth or Eleventh Amendment grounds, the Supreme Court has held that federalism principles are "no impediment to municipal liability" under § 1983. Any remaining inconsistency between the status of political subdivisions and New Federalism would require a reassessment of Monell, for it is clear that private individuals and corporations can challenge municipal policies under § 1983. While one could argue that

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218 A portion of the Seventh Circuit's Arlington Heights opinion could be read to stand for this proposition. The second ground for rejecting the village's case was that a constitutional challenge to an RTA ordinance enacted pursuant to a state statute was tantamount to such a challenge against the state statute. Arlington Heights, 653 F2d at 1153. See also note 215 and accompanying text. Read broadly, one could use this holding as a defense to any municipal action against another political subdivision because any official action taken by a city (such as passing legislation) can be traced back to a state statute.

219 See, for example, Lake County Estates v Tahoe Regional Planning Agency, 440 US 391, 401 (1979) (denying Eleventh Amendment immunity to a bistate authority created by Nevada and California on the grounds that the authority was not immune merely because it exercised a "slice of state power"). To support the proposition, Justice Stevens cites Mt. Healthy, 429 US 274; Moor v County of Alameda, 411 US 693, 717–21; and Lincoln County v Luning, 133 US 529, 530. See Lake County Estates, 440 US at 401 n 19. See also Cash v Granville County Board of Education, 242 F3d 219, 222 (4th Cir 2001) (noting that Eleventh Amendment does not extend to "counties and similar municipal corporations... even if the counties and municipalities exercise a 'slice of state power'" (internal citations omitted).

220 For a discussion of the mechanics of this determination, see Part IV B.


222 See Monell, 436 US at 691 n 54 (addressing federalism concerns and concluding that neither the Tenth nor Eleventh Amendments prohibit municipal liability). In the course of this discussion, Justice Brennan explicitly declared National League of Cities "irrelevant to [the Court's] consideration of the case." Id.

223 Monell established the general liability of municipal corporations. See 436 US at 690. For the status of private corporations, see note 24 and accompanying text.
Monell itself is inconsistent with federalism principals, it is the law.

The only issue addressed here is whether, consistent with current law and policy, municipalities should enjoy the same right to bring suit as § 1983 plaintiffs that private citizens and corporations already enjoy. One need not move beyond the Court's § 1983 and Eleventh Amendment jurisprudence to determine that the denial of a § 1983 cause of action to independent political subdivisions cannot be reconciled with either body of law. Under § 1983, cities can claim virtually no immunity for constitutional torts; under the Eleventh Amendment, cities are not arms of the state. Thus, the federalism principles militating against municipal preemption suits are simply not implicated when a city brings suit against another independent political subdivision.

A final illustration will clarify the point. In New Rochelle, the municipal act at issue was a local law passed by the Town of Mamaroneck. The town passed the law pursuant to a state statute granting it the power to convene a local legislature and pass laws. Yet the local law itself was not a law of the state of New York, nor was New Rochelle's challenge an attempt to invalidate Mamaroneck's general power to pass and enforce laws. Under the expansion of municipal personhood advanced in this Comment, New Rochelle would not be able to challenge a state statute mandating a permitting process identical to the one created by Mamaroneck's local law. Such a suit—which would constitute a direct challenge to a state statute—is simply untenable under the Supreme Court's decision in Will. The power of a state to pass laws affecting its political subdivisions would remain unchanged by granting municipalities full personhood under § 1983.

CONCLUSION

More than twenty years ago, the Supreme Court determined that cities are persons under § 1983, yet that personhood remains incomplete. By operation of the Trenton rule—an anachronism of the Court's early twentieth century jurisprudence—cities are uni-

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224 See, for example, Durchslag, 43 DePaul L Rev at 618–23 (cited in note 182) (reviewing the inconsistent treatment of municipalities under the Court's federalism jurisprudence but concluding that treating local political subdivisions as part of the state under the Eleventh Amendment "would overrule Monell and thus immunize all political subdivisions from damage claims in federal court for violations of federally protected liberties").

225 The specific laws are not necessary for the purposes of the illustration.

226 491 US at 64 (holding that a state is not a person reachable under § 1983).
formly denied the right to bring suit under § 1983. This Comment has demonstrated the incoherence of that denial.

Rather than relying on Trenton, courts should begin with the presumption that § 1983 confers a valid cause of action on municipalities. Such a cause of action will enable cities to better protect the interests of their citizens and will force local legislatures to act with particular awareness of potential consequences to neighboring jurisdictions.

Granting cities full personhood under § 1983 may raise fears that opportunistic subdivisions would use the statute to encroach on the powers of their creating states. However, courts have well-established tools at their disposal to prevent § 1983 plaintiffs from using the statute against the states. So long as those tools are used, any federalism concerns inherent in the proposed cause of action are no greater than the federalism implications of a § 1983 action brought by any non-municipal § 1983 person.

Full § 1983 personhood is consistent with the Supreme Court's recognition that the statute is designed to provide persons the means to obtain broad remedial relief from constitutional torts. Courts should no longer deny cities that relief.