

# Constitutional Conscience, Constitutional Capacity: The Role of Local Governments in Protecting Individual Rights

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## INTRODUCTION

On February 12, 2004, with California's 1977 ban on marriage for same-sex couples untouched on the books, the City of San Francisco issued a marriage license to Del Martin and Phyllis Lyon, longtime lesbian activists and partners of fifty-one years.<sup>1</sup> Within weeks, San Francisco had issued marriage licenses to 4000 more same-sex couples, and local officials in four other states had followed San Francisco's lead.<sup>2</sup>

Observers on both sides of the battle over marriage for same-sex couples condemned the actions of San Francisco and other local governments as extra-legal—the abandonment of the rule of law for the capricious rule of men and women.<sup>3</sup> State governments quickly took up this banner

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<sup>1</sup> See Rachel Gordon, *The Battle over Same-Sex Marriage, Uncharted Territory, Bush's Stance Led Newsom To Take Action*, S.F. CHRON., Feb. 15, 2004, at A1.

<sup>2</sup> See *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 465 (Cal. 2004); Suzanne Herel, *Court Halts Gay Vows, 29-Day Drama: S.F. Unleashed a "Gay-Marriage Tsunami"*, S.F. CHRON., Mar. 12, 2004, at A1; Evelyn Nieves, *Calif. Judge Won't Halt Gay Nuptials, New Mexico County Briefly Follows San Francisco's Lead*, WASH. POST, Feb. 21, 2004, at A1; Tatsha Robertson, *Civil Disobedience Adds to Battle over Same-Sex Marriage*, BOSTON GLOBE, Mar. 15, 2004, at A1. Local governments in New York, New Jersey, and New Mexico issued marriage licenses to at least some same-sex couples. In Oregon, Multnomah County attempted to marry approximately 3000 same-sex couples. *Li v. State*, 110 P.3d 91, 94 (Or. 2004).

<sup>3</sup> See *Lockyer*, 95 P.3d at 463; Hanna Rosin, *Barney Frank, Throwing Cold Water Instead of Rice*, WASH. POST, Mar. 23, 2004, at C1 (“[Congressman Barney] Frank supports gay marriages, just not the ones in San Francisco. Those were not legal marriages but acts of civil disobedience, he says, a mass ‘spectacle.’”); see also *Hebel v. West*, 2005 N.Y. Slip Op. 7887, WL 2778903, \*4 (App. Div. Oct. 27, 2005):

“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny”[ ]. Here, West robbed himself with judicial powers and declared the marriage laws of this State unconstitutional. Having concluded that the Legislature violated the constitution, he then wrapped himself with that body's power and drafted his own set of docu-

and moved to quell the perceived threat to the rule of law—and to their own power—by seeking an injunction against the mayor of San Francisco,<sup>4</sup> filing criminal charges against the mayor of New Paltz, New York,<sup>5</sup> and using the threat of litigation to intimidate the commissioners of Oregon’s Benton County.<sup>6</sup> Six months after San Francisco issued a marriage license to Martin and Lyon, the California Supreme Court decided *Lockyer v. City and County of San Francisco*, which declared invalid all of the licenses that the city had granted to same-sex couples.<sup>7</sup> While reserving judgment on the constitutionality of the state’s marriage laws, the court held that San Francisco was obligated to enforce the statutes as written unless and until a court held them to be unconstitutional.<sup>8</sup> If the city doubted the constitutionality of the state’s marriage laws, Chief Justice George wrote, it should have “denied a same-sex couple’s request for a marriage license and advised the couple to challenge the denial in superior court.”<sup>9</sup>

This Note rejects the notion that officials in San Francisco, New Paltz, and Benton County wholly abandoned the rule of law in 2004. It argues instead that their actions were a natural outgrowth of the role that local governments are expected to play in safeguarding individual constitutional rights. The regime of “constitutional tort” liability under 42 U.S.C. § 1983 treats local governments as integral to the protection of constitutional rights, exposing both individual officials and government entities to monetary damages for rights violations. While § 1983 serves the goal of victim compensation, it also acts as a disincentive for government actors to violate individual constitutional rights. In suits against officials in their individual capacities, the doctrine of qualified immunity attempts to balance these goals by demanding that defendants pay damages only if they should have known at the time that their behavior was unconstitutional.<sup>10</sup> The complex jurisprudence that has developed around this concept places high expectations on local government actors to be sophisticated, active, and independent interpreters of the Constitution.<sup>11</sup> Against this backdrop, the fear underlying *Lockyer*—that giving local governments the power to assert a difference of constitutional opinion with the state legislature would signal

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ments for licensing marriages.

<sup>4</sup> See *Lockyer*, 95 P.3d at 465; Original Petition for Writ of Mandate, Prohibition, Certiorari and/or Other Appropriate Relief; Request for Immediate Cease and Desist Order and/or Stay of Proceedings at 5–6, *Lockyer v. City and County of San Francisco*, 2004 WL 473257 (Cal. Mar. 11, 2004) (No. S122923); Robertson, *supra* note 2, at A1.

<sup>5</sup> See *New York v. West*, 780 N.Y.S.2d 723 (Just. Ct. 2004).

<sup>6</sup> See Mark Larabee & Jeff Mapes, *Benton Stops All Marriage Licensing*, OREGONIAN, Mar. 23, 2004, at A1.

<sup>7</sup> *Lockyer*, 95 P.3d at 464. The Oregon Supreme Court also found that the licenses handed out by Multnomah County were void when issued. *Li*, 110 P.3d at 102.

<sup>8</sup> *Lockyer*, 95 P.3d at 464.

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>11</sup> See discussion *infra* Part II.

the abandonment of rational constitutional discourse—begins to seem almost paranoid. In light of the trust placed in local governments in other contexts, we should give greater respect to the judgments of local governments directed by the state to enforce potentially unconstitutional statutes.

Even if one accepts the claim that local governments are capable of reaching valid constitutional conclusions, it may still be legitimate to attack San Francisco for attempting to implement a direct remedy for the constitutional defect it perceived rather than raising its concerns through the legal channel offered by the judicial system.<sup>12</sup> As discussed below, however, the doctrine of legal capacity, as it is classically formulated, would likely have barred San Francisco from challenging California's marriage laws in court.<sup>13</sup> Concerns about the legal capacity of municipal corporations may prevent local governments from challenging the constitutionality of state laws in courts.<sup>14</sup>

After surveying the evolution of legal capacity doctrine, this Note proposes that "classical" legal capacity doctrine has been rejected by many jurisdictions and should be narrowed uniformly.<sup>15</sup> Properly construed, legal capacity doctrine only precludes attempts by local governments to argue that the Constitution grants rights that local governments may assert on their own behalf but does not limit claims brought by local governments on behalf of their citizens. Reconceptualizing the doctrine in this way creates a natural avenue for cities to advocate for the individual rights of their citizens in the face of state law: by challenging that law in court. Cities are particularly justified in challenging state laws that enlist local governments to carry them out, as is the case with California's marriage laws.

Part I of this Note gives a brief background to the 2004 marriage controversy and outlines the arguments advanced by San Francisco to justify its actions. It then critiques *Lockyer* for its attempt to compartmentalize the functions of local governments so as to confine the scope of their dis-

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<sup>12</sup> The Oregon Supreme Court critiqued Multnomah County's actions along these lines:

County officials were entitled to have their doubts about the constitutionality of limiting marriage to opposite-sex couples. But, marriage and the laws governing it are matters of statewide, not local, concern. Thus, the *remedy* for such a perceived constitutional problem would be either to amend the statutes to meet constitutional requirements or to direct some other remedy *on a statewide basis*. Obviously, any such remedy must originate from a source with the authority to speak on that basis. The legislature has such authority and, in an appropriate adversary proceeding, the courts have it as well. But there is no source of law from which the county could claim such authority.

*Li v. State*, 110 P.3d 91, 101–02 (Or. 2004).

<sup>13</sup> See discussion *infra* Part III.A.

<sup>14</sup> See, e.g., *New York v. State*, 655 N.E.2d 649, 651 (N.Y. 1995); *Indian Oasis-Babaquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1242 (9th Cir. 1996).

<sup>15</sup> See discussion *infra* Part III.B.

cretion and responsibility.<sup>16</sup> Part II argues that the system of constitutional tort liability maintained under § 1983 mandates that local governments be proactive and independent guardians of individual constitutional rights. It is therefore irreconcilable with the *Lockyer* majority's reasoning: while *Lockyer* forbids local governments from disobeying state laws based on constitutional doubts, the regime of constitutional tort liability *requires* local governments to disobey such laws under some circumstances. Part III addresses the objection that San Francisco should simply have sued the State of California to express its constitutional concerns rather than "taking the law into its own hands." The doctrine of legal capacity, in its current form, likely would have prevented San Francisco from raising its constitutional doubts about the state's marriage ban in court. As this Part suggests, however, legal capacity jurisprudence has evolved in many jurisdictions to allow local governments to assert some constitutional claims against their states, and it could be expanded further to accommodate suits designed to protect individual rights. Part IV suggests that in order to protect individual constitutional rights and recognize the responsibility with which the law already entrusts local governments, local governments should have a legally sanctioned way to object when enforcing state statutes requires them to violate individual constitutional rights. Local governments might assert their doubts either by refusing to enforce the law—the route taken by San Francisco—or, alternatively, by bringing a lawsuit against the state. Attempting to provide an exhaustive and conclusive justification for one route over the other is the task of another article, and this Note will be content to suggest some of the advantages and disadvantages that would arise under each approach.

It must also be made clear at the outset that empowering local governments to take a more active role in advocating for individual constitutional rights will not necessarily advance the substantive policies of any one ideology or political movement. It would free San Francisco to advocate for marriage equality, but it could also legitimate the actions of local governments that refuse to enforce state laws protecting access to abortion clinics on free speech grounds, fight against school busing programs in the name of equal protection, or refuse to enforce background checks at gun shows held on county property, claiming Second Amendment concerns. Conceptions about the nature of individual rights vary widely, and some local governments would surely use the mechanisms advocated in this Note to challenge state statutes that others might view as *protecting* individual rights. In such situations, however, the state government would presumably defend the constitutionality of the statute. This would help to ensure that expanding the role of local governments in the protection of

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<sup>16</sup> While this Note is not a history or a case comment, the case of the San Francisco marriages and the court's attitude toward local governments serves to ground a relatively wide-ranging inquiry.

individual rights would not grant either “liberal” or “conservative” local governments unfettered power to implement their constitutional visions.

While there are many cases in which local government challenges might raise concerns, this Note focuses on debates that arose around the issue of marriage for same-sex couples because the actions taken by San Francisco and the responses to those actions reveal an oft-observed debate about the nature of local governments.

## I. POLARIZED VIEWS OF LOCAL GOVERNMENT IN THE DEBATE OVER MARRIAGE FOR SAME-SEX COUPLES

### A. *Civil Disobedience or Constitutional Conscience?: San Francisco’s Justifications*

Many observers viewed the San Francisco marriages as an act of classic civil disobedience, breaking the law in service of some legitimate purpose.<sup>17</sup> At least one of the mayors who followed Mayor Newsom’s lead embraced this characterization: “Laws are made to be broken at times to find out if they are really legit or not.”<sup>18</sup> Indeed, there is a long and venerable tradition in this country of testing the law by breaking it, and San Francisco’s actions could be understood and justified in reference to this proud lineage.<sup>19</sup> Civil disobedience, however, was not the primary justification given to the public by Mayor Newsom; it was not San Francisco’s argument in its *Lockyer* briefs; and it is not the focus of this Note. The mayor did not describe his actions as an extra-legal protest, designed to test the law or to honor more important moral or religious values.<sup>20</sup> Rather, he argued that disobeying California’s marriage laws was mandated by the higher *legal* authority of the state and federal constitutions.<sup>21</sup> This Section fleshes out this distinction by giving a brief summary of the events leading up to the marriage of Martin and Lyon.

On January 20, 2004, the newly elected San Francisco mayor, Gavin Newsom, attended the State of the Union Address as a personal guest of

<sup>17</sup> See Robertson, *supra* note 2, at A1.

<sup>18</sup> *Id.* (quoting Mayor Jim Bruno of Asbury Park, New Jersey).

<sup>19</sup> See, e.g., Editorial, *The Road to Gay Marriage*, N.Y. TIMES, Mar. 7, 2004, § 4, at 12 (“The rebellious mayors have so far acted honorably. Testing the law is a civil rights tradition: Jim Crow laws were undone by blacks who refused to obey them.”).

<sup>20</sup> *But see* Martin Luther King, Jr., Letter from a Birmingham Jail (Apr. 16, 1963), available at <http://coursesa.matrix.msu.edu/~hst306/documents/letter.html>: (“One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws . . . . How does one determine when a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of Harmony with the moral law.”).

<sup>21</sup> See Dean E. Murphy, *San Francisco Mayor Exults in Move on Gay Marriage*, N.Y. TIMES, Feb. 19, 2004, at A14 (quoting Mayor Newsom as saying, “I am just a guy who does stop signs and tries to revitalize parks. . . . I know my role. But I also know that I’ve got an obligation that I took seriously to defend the Constitution. There is simply no provision that allows me to discriminate.”).

House Minority Leader and longtime family friend, Nancy Pelosi.<sup>22</sup> Listening as President Bush outlined his vision of America and his second-term agenda, the Mayor heard little that reflected his concerns and values.<sup>23</sup> In particular, the President's endorsement of a "marriage amendment," which would enshrine in the Federal Constitution a definition of marriage as the union between one man and one woman, struck the Mayor as a proposal that would undermine the core constitutional values he had sworn to uphold when he took his oath of office.<sup>24</sup> Although equal marriage rights for same-sex couples had not been a plank in Newsom's campaign platform, he returned from Washington determined to end San Francisco's participation in what he now saw as unconstitutional discrimination.<sup>25</sup>

Unfortunately for the mayor, California's marriage laws clearly excluded same-sex couples from marrying.<sup>26</sup> Moreover, they included no provision for local government officials to deviate from the state-mandated rules about how to perform marriages or who could marry.<sup>27</sup> In order to "prohibit persons of the same sex from entering lawful marriage,"<sup>28</sup> the California Legislature had amended the Civil Code in 1977 to make explicit that marriage in the state arose only out of a civil contract "between a man and a woman."<sup>29</sup> For twenty-seven years, no plaintiff had challenged this restriction in court, and no judge in the state had ruled on whether the amended statute complied with the requirements of either the state or federal constitutions.<sup>30</sup>

But while California's marriage statutes stood unchallenged, the status of gay and lesbian people had evolved dramatically under the state and federal constitutions in the years since 1977.<sup>31</sup> In 2003, the U.S. Supreme

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See Chris Taylor, *I Do . . . No, You Don't!: Why San Francisco's Brash Mayor is Taking on Schwarzenegger and Bush over Gay Marriage*, TIME, Mar. 1, 2004, at 40.

<sup>26</sup> See CAL. FAM. CODE § 300 (Deering 2005). Civil Code § 4100 was incorporated into the Family Code in 1993. *Id.*

<sup>27</sup> See *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 468–70 (Cal. 2004).

<sup>28</sup> *Id.* at 468 n.11 (quoting Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 at 1 (1977-1978 Reg. Sess.) (amended May 23, 1977)).

<sup>29</sup> CAL. CIV. CODE § 4100 (Deering 1992). In 2000, voters arguably reaffirmed this statement by enacting voter initiative Proposition 22, known as the "California Defense of Marriage Act" or "Knight Initiative." CAL. FAM. CODE § 308.5 (Deering 2005) ("Only marriage between a man and a woman is valid or recognized in California."). Others viewed Proposition 22 as attempting to establish the more limited rule that the state would not recognize same-sex marriages performed by other jurisdictions. Tentative Decision on Applications for Writ of Mandate and Motions for Summary Judgment, Judicial Council Coordination Proceeding No. 4365, at 11 (Cal. Super. Ct. Mar. 14, 2005), available at [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/452.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/452.pdf).

<sup>30</sup> See *Lockyer*, 95 P.3d at 488. The only court in California to address a ban on marriage for same-sex couples did so with respect to federal immigration policy and Colorado's marriage laws, not California's statute. See *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980).

<sup>31</sup> See, e.g., *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003). The *Flores* court held that selective non-enforcement of school anti-harassment

Court ruled that the U.S. Constitution prohibited states from criminalizing sodomy, reasoning in part that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”<sup>32</sup> While the Court’s majority assured readers that the decision expressed no opinion about the legality of banning same-sex couples from getting married,<sup>33</sup> Justice Scalia argued in dissent that such bans would be unsustainable in light of the majority’s holding and reasoning.<sup>34</sup> Five months later, the Massachusetts Supreme Judicial Court followed in the footsteps of the Vermont Supreme Court and an Alaska trial court in concluding that the state’s ban on same-sex marriages violated the state constitution.<sup>35</sup>

Based on legal developments in other states and on the developing interpretation of California’s equal protection clause as asserted by its courts, Mayor Newsom concluded that California’s ban on same-sex marriage no longer satisfied the requirements of the state constitution.<sup>36</sup> Concluding that the appropriate remedy to this constitutional infirmity was to marry couples without regard to sex or sexual orientation, the mayor instructed the county clerk to alter the forms and documents used in issuing marriage licenses in order to allow both same-sex and opposite-sex couples to marry.<sup>37</sup> To the north, the commissioners of tiny Benton County, Oregon, found similar constitutional problems with that state’s marriage laws but came up with a different solution. After being threatened with prosecution by the Oregon attorney general if they granted marriage licenses to same-sex couples, Benton County officials decided to remedy the equal protection violation by ceasing to issue licenses to *any* couples, opposite-sex or same-sex.<sup>38</sup>

In order to understand more clearly the claims being made by San Francisco and the other local governments that began marrying same-sex couples

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rules with regard to sexual orientation violated clearly established law: “As early as 1990, we established the underlying proposition that such conduct violates constitutional rights: state employees who treat individuals differently on the basis of their sexual orientation violate the constitutional guarantee of equal protection.” *Id.*

<sup>32</sup> *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

<sup>33</sup> *Id.* at 585.

<sup>34</sup> *Id.* at 590 (Scalia, J., dissenting).

<sup>35</sup> *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 Cl, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); *cf. Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). While *Baehr* did not squarely hold that Hawaii’s ban on same-sex marriage violated the state constitution, it did suggest that this might be the case, and proponents of marriage equality heralded it as a major advance. *See id.*

<sup>36</sup> *See Lockyer*, 95 P.3d at 465 n.4.

<sup>37</sup> *Id.* The City and County of San Francisco were consolidated in 1856, leaving a somewhat anomalous government structure. *See, e.g., Martin v. Bd. of Election Comm’rs*, 58 P. 932 (Cal. 1899).

<sup>38</sup> Larabee & Mapes, *supra* note 6, at A1.

in 2004, it is helpful to make note of some potential justifications that were *not* asserted. First, San Francisco did not challenge the supremacy of judicial interpretation of the Constitution, but rather made a weaker claim that in the absence of a specifically binding judicial opinion, local governments are competent to act on their independent judgment about the constitutionality of legislative commands.<sup>39</sup> Rather than challenging judicial power, the city aimed to obtain a judicial determination on the continuing viability of the state's marriage ban.<sup>40</sup> Second, San Francisco did not claim the power to disobey a statute based on a policy disagreement with the state legislature, but rather asserted that the Constitution prohibited the legislature's choice.<sup>41</sup> Finally, the city did not claim the power to extend more protection under the Equal Protection Clause at the local level than would be required at the state or federal level. Rather, it simply asserted the need to respect judicially enforceable individual rights.<sup>42</sup>

San Francisco's claims can be distinguished from those of the local governments in cases such as *Washington v. Seattle School District No. 1*<sup>43</sup> and *Romer v. Evans*,<sup>44</sup> which David Barron has conceptualized as preserving a space free from state interference for local governments to extend the principles of equal protection beyond what a court could order them to do.<sup>45</sup> Thus the Seattle School District could implement a desegregation plan to further Fourteenth Amendment values, but no other district would be required to follow suit. Local governments in Colorado could include sexual orientation in their nondiscrimination ordinances, or choose not to

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<sup>39</sup> See *Lockyer*, 95 P.3d at 510 (Werdegar, J., concurring and dissenting); cf. Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 394 (1997) ("Extra-judicial interpretations inform other branches, and especially the courts, of a particular branch's assessments and dispositions."). On this point, Newsom's actions stand in contrast to those of Alabama Supreme Court Justice Roy S. Moore, who was removed from office after defying a federal court order to remove a Ten Commandments display from his courthouse. See Ariel Hart, *Alabama Justice's Ouster Upheld in Ten Commandments Case*, N.Y. TIMES, May 1, 2004, at A9.

<sup>40</sup> Although the exasperated majority in *Lockyer* doubted the sincerity of this claim, without any explanation, there is no suggestion that the city ever indicated that it would refuse to honor a court judgment upholding the state's existing marriage law. See *Lockyer*, 95 P.3d at 484, 510 (Werdegar, J., concurring and dissenting) (recognizing that San Francisco ceased to issue marriage licenses to same-sex couples as soon as it was ordered to do so).

<sup>41</sup> The claim that San Francisco could disobey existing statutory law based on its conclusion that the law was unconstitutional loosely parallels a well-established debate about the power of the President to take similar action. See, e.g., Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990). The comparison is far from perfect, in large part because the U.S. Constitution specifically recognizes the President and endows him with certain powers, while it is silent on the existence or proper function of local governments. See generally U.S. CONST. art. II.

<sup>42</sup> Cf. David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 587-88 (1999) (arguing that the claimant in *Romer v. Evans*, 517 U.S. 620 (1996), "sought to free the local public sphere to check private discrimination, rather than to constrain public interference with private rights").

<sup>43</sup> 458 U.S. 457 (1982).

<sup>44</sup> 517 U.S. 620 (1996).

<sup>45</sup> See Barron, *supra* note 42, at 599-604.



do so, free to decide without interference from courts or the state government. San Francisco's argument, in contrast, was that the equal protection clause of the state (and later federal) constitution *required* equal marriage rights for same-sex couples. If this claim were vindicated in court, then *all* governments in the state would be compelled to follow San Francisco's lead in marrying same-sex as well as opposite-sex couples.

Of course, San Francisco was almost certainly motivated by more than constitutional concerns when it broke California's marriage laws. While the rest of this Note focuses on San Francisco's explicit rationale for its actions—the need to break California's marriage laws in order to obey the higher legal commands of the state and federal constitutions—this was clearly not the only purpose or effect of the city's actions. Four other consequences deserve mention. First, given that courts often look to what other government entities have done in reaching their conclusions, San Francisco and the cascade of other local governments who issued marriage licenses to same-sex couples sent a message to judges that marriage for same-sex couples was not an outlandish proposition.<sup>46</sup> Second, San Francisco spoke to a wider audience than just the courts. Its highly visible decision to issue marriage licenses to same-sex couples also served a public education function. By marrying same-sex couples in San Francisco's stately city hall, the city put thousands of same-sex couples of all ages, classes, races, and styles on display for the nation and the world, sending a more immediate and powerful message than a lawsuit ever could. As Mayor Newsom argued: "Put a human face on it. Let's not talk about it in theory. . . . Give me a story. Give me lives."<sup>47</sup> Third, marrying same-sex couples gave expression to the broader frustration felt by Mayor Newsom, and likely shared by many of his fellow San Franciscans, that the national agenda was out of step with local values. In Newsom's own words, Bush's State of the Union address left him "'scratching my head, saying this was not the world that I grew up aspiring to live in,'"<sup>48</sup> and issuing marriage licenses to same-sex couples was one way of communicating this to the national government.

Finally, Mayor Newsom's prominence and stature have increased since the marriages in San Francisco. Although his decision vaulted him into the national spotlight, drawing much negative attention,<sup>49</sup> the popularity

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<sup>46</sup> Cf. Gant, *supra* note 39, at 394.

<sup>47</sup> Taylor, *supra* note 25, at 40; *see also* Editorial, *supra* note 19, § 4, at 12 ("The television images from San Francisco brought gay marriage into America's living rooms in a way no court decision could.").

<sup>48</sup> Murphy, *supra* note 21, at A14.

<sup>49</sup> *See* Rachel Gordon & Simone Sebastian, *Same-Sex Marriage Ban of "National Importance," Feisty Mayor: Newsom Calls Bush Reaction Shameful*, S.F. CHRON., Feb. 25, 2004, at A1 (reporting that Americans opposed marriage for same-sex couples by as much as 2-to-1 and that 4 in 10 favored a federal "marriage amendment"); Marc Sandalow & Rachel Gordon, *Newsom Now a National Figure, Same-Sex Marriage Decision Turns Him into Lightning Rod*, S.F. CHRON., Feb. 29, 2004, at A1 ("[W]hile San Franciscans appear to be

of the issue within San Francisco helped Newsom solidify his political position within the city after winning a hotly contested election.<sup>50</sup>

B. “Statutory Automaton”: Lockyer’s Attempt To Compartmentalize Local Government Functions

In *Lockyer v. City and County of San Francisco*, the California Supreme Court responded to the San Francisco marriages with a forceful assertion of judicial and legislative supremacy and an easy dismissal of local governments as neither competent nor authorized to interpret the Constitution in many circumstances. The court held that duly enacted statutes are presumed to be constitutional, and local governments must obey them unless a court with controlling jurisdiction has struck them down.<sup>51</sup> This hierarchical approach to constitutional interpretation conceptualizes local governments as fragmented creatures with functions that one can easily separate and categorize. The court’s overall scheme is temptingly simple—local governments can and must examine and obey the Constitution when exercising discretion in their actions, but they cannot act on independent constitutional judgment when the legislature has spoken clearly. This Note attacks the idea that such a facile division is possible. Even the *Lockyer* court recognized narrow exceptions to its general rule, instances in which local governments *can* refuse to enforce state statutes based on their alleged unconstitutionality. Although the court attempted to cabin these exceptions, pulling on the logical threads with which the exceptions were justified unravels the court’s attempt to create a tidy set of rules.

For a majority of the court in *Lockyer*, local governments can and should be understood to have a variety of neatly compartmentalized roles and powers. Broadly speaking, local executive officials have both *discre-*

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rallying behind their mayor, he has not fared so well in editorials and among some commentators across the country. Several have compared him to Alabama Chief Justice Roy Moore, who nailed the 10 commandments to his courthouse wall in defiance of a court order not to do so.”)

<sup>50</sup> In February 2004, 57% of San Francisco Bay Area residents favored marriage for same-sex couples, making it the only region in the state with majority approval of the policy. Rachel Gordon, *Acceptance of Gay Marriage Growing in State, Field Poll: Half of Voters Still Against It—but Even More Oppose Constitutional Ban*, S.F. CHRON., Feb. 26, 2004, at A1.

Newsom was elected with 53% of the vote, and his more liberal Green Party opponent, Matt Gonzalez, vowed to be a thorn in his side, telling supporters on election night, “[w]e didn’t win, but we didn’t lose, either.” John Wildermuth, *S.F. Leftists Warily Ask if Newsom is for Real, His Progressivism, Gonzalez’s Exit Leave Them Adrift*, S.F. CHRON., Apr. 5, 2004, at A1 (quoting Gonzales). One week after the city began issuing marriage licenses to same-sex couples, Newsom’s approval rating was surveyed at 69%, up 7% from the previous month. Rachel Gordon, *Newsom Sheds Wonk Image—Takes it to the Streets*, S.F. CHRON., Feb. 22, 2004, at A1; see also Phillip Matier & Andrew Ross, *Newsom Earns His Administration’s Honeymoon, Same-Sex Nuptials Rock the Boat a Bit but Solidify Support on the Home Front*, S.F. CHRON., Feb. 15, 2004, at A23 (quoting a Newsom adviser observing that “[i]f you can control the gay vote, the whole city tips in your favor”).

<sup>51</sup> *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 464 (Cal. 2004).

*tionary functions*, “decisions within their authorized sphere of action—such as . . . [the] exercise of prosecutorial discretion,” and *ministerial duties*, acts mandated by statute.<sup>52</sup> Ministerial duties arise when “a public officer is required to perform in a prescribed manner in obedience to the mandate [of] legal authority and without regard to his own judgment or opinion concerning such act’s propriety or impropriety, when a given state of facts exists.”<sup>53</sup> While local executive officials may “take into account constitutional considerations” in performing discretionary functions, they generally may not do so when charged with a ministerial duty.<sup>54</sup> Within this rigid structure, the court suggests that a provision whereby local governments may decline to execute their ministerial duties based on their constitutional judgment would precipitate the breakdown of the rule of law in favor of rule by men and women.<sup>55</sup>

The *Lockyer* court argued that local government officials lack both the capacity and the authority to exercise any independent judgment about the constitutionality of a statute assigning them a ministerial duty. From this perspective, the courts and the legal profession enjoy a privileged position with respect to constitutional interpretation.<sup>56</sup> While local officials are free to reach their own conclusions about what the Constitution means and how it should be interpreted and applied, this interpretive power is no different than that enjoyed by every individual—a personal view that cannot interfere with the exercise of ministerial duties imposed by statute.<sup>57</sup>

Emphasizing the detail with which the state legislature had prescribed the issuing of marriage licenses, providing for such things as the form to be used and the procedural requirements for solemnization,<sup>58</sup> the *Lockyer* court had no difficulty concluding that the role played by local governments in the marriage regime was “*ministerial* rather than discretionary.”<sup>59</sup> With regard to marriage, Mayor Newsom was charged simply with administering state policy—a “state officer[ ] performing state functions”<sup>60</sup> with “no discretion to withhold a marriage license or refuse to record a marriage certificate.”<sup>61</sup>

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<sup>52</sup> *Id.* at 463.

<sup>53</sup> *Id.* at 473 (quoting *Kavanaugh v. West Sonoma County Union High Sch. Dist.*, 62 P.3d 54, 58 (Cal. 2003)). This language and rationale is reminiscent of the long established “contingency” rationale for justifying what might otherwise be viewed as an unconstitutional delegation of legislative power to other governmental actors. *See, e.g.*, *Brig Aurora v. United States*, 11 U.S. 382 (1813); *Field v. Clark*, 143 U.S. 649 (1892).

<sup>54</sup> *Lockyer*, 95 P.3d at 463.

<sup>55</sup> *Id.*

<sup>56</sup> *See id.* at 490.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 468–70.

<sup>59</sup> *Id.* at 472.

<sup>60</sup> *Id.* at 471 (emphasis omitted) (quoting *Sacramento v. Simmons*, 225 P. 36, 39 (Cal. Ct. App. 1924)).

<sup>61</sup> *Id.* at 472.

Although it imposed a seemingly categorical rule against the exercise of independent constitutional judgment by local officials charged with ministerial duties, the *Lockyer* court recognized a number of exceptions. The court could not avoid a long line of cases in which public officials were permitted to refuse to perform a ministerial duty when they had doubts about the underlying validity of a bond, contract, or public expenditure (the “bond cases”).<sup>62</sup> The majority reasoned that disobedience in those cases had been permissible because: (i) the public entity had a personal stake or interest in the constitutional issue; (ii) disobedience was the most practicable or reasonable route to a judicial determination of the validity of the statute; and (iii) often the public official faced potential personal liability if, after being executed, the instrument was found to be unconstitutional.<sup>63</sup> At times, the court pressed the second point even further, suggesting that, for disobedience of ministerial duties to be just, it must be *necessary* to obtaining a judicial resolution of the constitutional issue.<sup>64</sup> In addition, the court noted that local officials might have the legal authority to interpret an ambiguous statute or to make determinations regarding which statute takes precedence in a situation in which two or more competing statutory provisions apply.<sup>65</sup>

Writing separately, Justice Moreno advanced a somewhat more coherent and liberal interpretation of prior cases. Under his reading, rather than establishing a bright-line rule, these cases gave judges discretion over whether or not to entertain constitutional questions when “asked to grant a writ of mandate to enforce a statute over which hangs a substantial cloud of unconstitutionality.”<sup>66</sup> Justice Moreno identified three categories of cases in which courts could exercise their discretion because disobedience would be reasonable: (i) when “the statute in question violates a ‘clearly established . . . constitutional right’”;<sup>67</sup> (ii) “when there is a substantial question as to its constitutionality *and* the statute governs matters integral to a locality’s limited power of self-governance”;<sup>68</sup> and (iii) when

[T]he question of a statute’s constitutionality is substantial, and irreparable harm may result to individuals to which the local government agency has some protective obligation—be they employees, or students of a public college, or patrons of a public li-

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<sup>62</sup> *See id.* at 482.

<sup>63</sup> *See id.* at 485.

<sup>64</sup> *See id.* at 486.

<sup>65</sup> *See id.* at 473 n.16.

<sup>66</sup> *Id.* at 500 (Moreno, J., concurring).

<sup>67</sup> *Id.* at 501 (alteration in original) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>68</sup> *Id.*

brary, or patients in a public hospital, or in some cases simply residents of the city.<sup>69</sup>

Still, Justice Moreno concluded that San Francisco had acted impermissibly because it went “well beyond making a preliminary determination of the statute’s unconstitutionality or performing an act that would bring the constitutional issue to the courts.”<sup>70</sup>

The court’s attempt to distinguish inconvenient precedents was unsuccessful. Even the more narrow exceptions recognized by the majority undermine its claims that local governments lack the capacity and authority to form valid constitutional conclusions about statutes imposing ministerial duties. If local officials lack the legal expertise and general competence to reach constitutional conclusions worthy of judicial attention, then they should not be allowed to disobey statutory laws in the “bond cases” any more than they should in other areas. The extent to which local governments and individual local officials might have a particularized interest in the outcome of a bond issuance should make a court *less* likely to trust the sincerity and validity of their constitutional doubts, rather than spurring them to give local governments freer rein to disobey a statute. Finally, the argument that we cannot trust local governments to engage in the complex task of determining whether a statute passes constitutional muster squarely conflicts with the court’s own proposal for testing the constitutionality of state statutes: suits by private citizens against local governments.<sup>71</sup> Presumably, local governments are trusted to mount a competent defense to such suits, an endeavor that seems no less challenging than forming an initial judgment about the constitutionality of the statute.<sup>72</sup> The actions that the court found permissible cannot be distinguished in a principled way from the actions at issue in the case it was deciding.

Having articulated a seemingly tidy test, the court had little trouble dismissing San Francisco’s actions as being outside the scope of established exceptions. The City of San Francisco had no direct interest in the alleged equal protection violations it asserted, nor was disobedience necessary in order to get the constitutional issue before a court. Rather than disobedience, the proper route for an official to challenge the constitutionality of a statute in this case must be to rely on the private right-holder to challenge it.<sup>73</sup> Additionally, individual officials faced no potential liability because no reasonable officer would be compelled to conclude that California’s marriage laws violated the Constitution.<sup>74</sup> In making this last argument, the court confused potential liability with a judgment about how

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<sup>69</sup> *Id.* at 502.

<sup>70</sup> *Id.*

<sup>71</sup> *See id.* at 485.

<sup>72</sup> *See* discussion *infra* Part IV.A.

<sup>73</sup> *See Lockyer*, 95 P.3d at 485.

<sup>74</sup> *Id.* at 484.

the court would rule on the merits of such a claim. As discussed below, the question of the scope of individual liability is less clear than the *Lockyer* court suggested.<sup>75</sup>

The court also noted that Mayor Newsom and other San Francisco officials had no reason to fear that they might have to pay damages personally for enforcing the state's marriage ban because, under California law, the city must indemnify individual officers against any personal damages that courts might award.<sup>76</sup> This point undermines the court's attempt to explain the "bond cases" as a logical exception to the general rule against direct non-enforcement of statutes. California's provision for indemnification of government officials contains nothing to suggest that it would apply if city officials were held liable for enforcing unconstitutional marriage laws but not for enforcing unconstitutional bond issuance statutes. If taken seriously, the court's suggestion that indemnity should erase concerns of individual damages liability from the minds of local officials would render moot one of the two exceptions to the rule against direct disobedience.

*C. Giving Local Governments More Respect: Justice Werdegar Critiques the Lockyer Majority's Rigid Hierarchy*

In her concurring and dissenting opinion in *Lockyer*, Justice Werdegar took her colleagues to task for overstating the danger posed by San Francisco's actions, calling it "extravagant" to characterize them as "a threat to the rule of law."<sup>77</sup> She pointed out that city officials "never so much as hinted that they would not respect the authority of the courts to decide the matter," and that they did, in fact, stop issuing marriage licenses immediately when ordered to do so by the California Supreme Court.<sup>78</sup> In light of the reasonable expectation that San Francisco would obey a court order, there was no real danger to the rule of law:

To recognize that an executive officer has the practical freedom to act based on an interpretation of the Constitution that may ultimately prove to be wrong does not mean the rule of law has collapsed. So long as the courts remain open to hear legal challenges to executive conduct, so long as the courts have power to enjoin such conduct pending final determination of its legality, and so long as the other branches acknowledge the courts' role

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<sup>75</sup> See discussion *infra* Part II.A.

<sup>76</sup> *Lockyer*, 95 P.3d at 484 (citing CAL. GOV'T CODE § 825 (Deering 2005)); see also *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting) (acknowledging that many states have indemnification statutes to protect officers from personal judgments under 42 U.S.C. § 1983 for actions within the scope of their employment).

<sup>77</sup> 95 P.3d at 510 (Werdegar, J., concurring and dissenting).

<sup>78</sup> *Id.*

as “ultimate interpreter of the Constitution” in matters properly within their jurisdiction, no genuine threat to the rule of law exists. San Francisco’s compliance with our interim order eloquently demonstrates this.<sup>79</sup>

Werdegar argued that the majority used an unreasonably alarmist interpretation of the facts in the case before it to justify its “strong claim[ ] of judicial power over the executive.”<sup>80</sup> In explaining her dissent from this holding, Werdegar reasoned that the court should have refrained from such a strong claim of judicial authority until and unless it was confronted with “a real threat to the separation of powers . . . that provides manifest necessity for the claim.”<sup>81</sup> In Werdegar’s view, the situation in San Francisco was one that could have, and should have, been resolved by a simple interim order directing the city to cease licensing same-sex marriages rather than by the announcement of a hard-line categorical pronouncement concerning the power of the judiciary over the executive.<sup>82</sup>

Justice Werdegar also introduced a number of policy arguments that cut against the majority’s holding. First, she pointed to the different institutional capacities of the judiciary and the executive branch. The former “is necessarily reactive, waiting until invited to serve as neutral referee,” while the latter “is necessarily active, managing events as they occur.”<sup>83</sup> Because of this key difference, and the fact that courts must depend on the executive to effect judicial orders, courts should be reluctant to announce “categorical rules” limiting executive power “that will not stand the test of harder cases,” such as those in which the government actor is not a local government, but rather the governor or attorney general.<sup>84</sup> In advancing this argument, Werdegar treated local government officials simply as executive branch officers, rejecting the implicit assumption of the majority that local governments are a different species of government actor, bound by a different set of constraints. Second, Werdegar rejected the discretionary/ministerial distinction as inconsistent with the school desegregation cases in which both the California and United States Supreme Courts held that “school officials’ oaths of office to obey the Constitution had sufficient gravity in such cases to permit them to obey the higher law, even *before* the courts had spoken state by state.”<sup>85</sup> To Werdegar, these cases demonstrated that the law does not contemplate, and will not tolerate, a realm of “ministerial functions” within which executive officers operate as “statutory automatons, denied even the scope to obey their oaths of office to follow

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<sup>79</sup> *Id.* at 511 (citation omitted).

<sup>80</sup> *Id.* at 512.

<sup>81</sup> *Id.*

<sup>82</sup> *See id.* at 510.

<sup>83</sup> *Id.* at 511.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (citing *S. Pac. Transp. Co. v. Pub. Util. Comm’n*, 556 P.2d 289, 290 n.2 (Cal. 1976) and *Cooper v. Aaron*, 358 U.S. 1, 18–20 (1958)).

the Constitution.”<sup>86</sup> Both strains of argument will resurface when this Note questions the appropriate role for local governments in challenging state statutes that allegedly violate individual constitutional rights.<sup>87</sup>

## II. KEEP AN EYE ON THE CONSTITUTION OR PAY: CONSTITUTIONAL TORT LIABILITY FOR LOCAL GOVERNMENTS AND THEIR OFFICIALS

Individual local officials and local government entities face the threat of damages under 42 U.S.C. § 1983 if they violate individual rights protected by the Constitution.<sup>88</sup> The defendant and amici in *Lockyer* argued that requiring local governments to enforce state statutes even when they were of suspect constitutional validity would expose them to tort liability and was thus patently unfair.<sup>89</sup> Even the *Lockyer* court, which rejected this broad claim, recognized that in narrow instances local officials should not be forced to incur liability for constitutional torts by carrying out their ministerial duties.<sup>90</sup> Although the court was correct in assuming that there would be few real-world situations in which compliance with a statute would give rise to liability under § 1983, the requirements placed on local governments by the system of constitutional tort liability are directly at odds with those imposed on them by the *Lockyer* majority and others who eas-

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<sup>86</sup> *Id.*

<sup>87</sup> See discussion *infra* Part IV.

<sup>88</sup> Unlike federal constitutional tort law under § 1983, California’s constitutional tort regime provides clear protection from liability for local governments acting pursuant to state statute, and it adds little to the present inquiry into how the law understands local governments as constitutional interpreters. In response to a California Supreme Court case that essentially abolished governmental immunity from tort liability, in 1963 the state legislature replaced the judicially developed system of liability and immunity with the California Tort Claims Act. CAL. GOV’T CODE §§ 810–997 (Deering 2005); see also *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457 (Cal. 1961). This statutory regime establishes a baseline rule *against* all kinds of tort liability for public entities except as otherwise provided by statute. CAL. GOV’T CODE § 815 (Deering 2005). Reinforcing this general rule, § 820.6 explicitly exempts government officials who act “in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable,” from any liability beyond that for which he “would have been liable had the enactment been constitutional, valid and applicable.” CAL. GOV’T CODE § 820.6 (Deering 2005). While one might wonder whether local government officials who believed that they were violating individual constitutional rights by enforcing a statute “act in good faith,” the *Lockyer* court apparently had no trouble finding that § 820.6 would shield such officials from tort liability under the state constitution. *Lockyer*, 95 P.3d at 483–84.

<sup>89</sup> See 95 P.3d at 483; Brief of Amicus Curiae County of Santa Clara in Support of Respondents at 1, *Lockyer*, 95 P.3d 459 (No. S122923) (“If, in carrying out their duties, local agencies and officials enforce constitutionally suspect statutes or ordinances, they expose themselves and their local government to the potential for crippling damage awards and attorneys’ fees liability.”).

<sup>90</sup> See *supra* notes 62–65 and accompanying text. For the majority, an ad hoc, situation-specific approach by the courts appeared to be the best way to resolve the problem: “[I]n this instance there simply is no plausible argument that the city officials would have violated ‘clearly established’ constitutional rights by continuing to enforce California’s current marriage statutes in the absence of a judicial determination that the statutes are unconstitutional.” *Lockyer*, 95 P.3d at 484 (emphasis added).



ily dismissed San Francisco's actions as extra-legal. In the realm of constitutional tort under § 1983, the law relies heavily on local government officials to be guardians of individual constitutional rights, undermining the claim that certain local government functions are merely "ministerial." Section 1983 understands local government officials to be highly sophisticated readers of the Constitution and judicial precedent, whereas the *Lockyer* court treated local government officials as incompetent to engage in constitutional interpretation.

*A. The "Reasonable" Local Government Officer as a Constitutional Expert: Individual Liability for Constitutional Torts Under § 1983*

Section 1983's regime of personal tort liability for violations of individual constitutional rights sets high expectations on local government actors, treating them as able and obligated to act on their independent understanding of the Constitution. Section 1983 provides a private right of action against any person who deprives an individual of "any rights, privileges, or immunities secured by the Constitution" while acting "under color of any statute, ordinance, regulation, custom, or usage."<sup>91</sup> But while this statute creates a broad swath of liability, qualified immunity shields local government officials almost as broadly.<sup>92</sup> Although courts sometimes mischaracterize qualified immunity as an affirmative defense,<sup>93</sup> the Supreme Court has made it clear that this privilege is "an entitlement not to stand trial or face the other burdens of litigation, . . . an *immunity from suit* rather than a mere defense to liability."<sup>94</sup>

Contemporary qualified immunity doctrine is grounded in the balance struck by the Supreme Court in *Harlow v. Fitzgerald* between "the importance of a damages remedy to protect the rights of citizens" and the competing "'need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."<sup>95</sup> As Chief Justice Warren famously noted, qualified immunity generally allows local government officers to do their jobs without worrying about being sued: "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he

<sup>91</sup> 42 U.S.C. § 1983 (2000); see also *Monroe v. Pape*, 365 U.S. 167, 168–69 (1961).

<sup>92</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). State prosecutors enjoy absolute immunity for actions related to prosecutorial functions but are protected only by qualified immunity when acting outside the scope of the prosecutorial role. *Burns v. Reed*, 500 U.S. 478, 491–96 (1991).

<sup>93</sup> See, e.g., *Varrone v. Bilotti*, 123 F.3d 75, 78 (2d Cir. 1997).

<sup>94</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("[Qualified immunity] is effectively lost if a case is erroneously permitted to go to trial."); see also *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001).

<sup>95</sup> 457 U.S. at 807 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)).

does not arrest when he has probable cause, and being mulcted in damages if he does.”<sup>96</sup>

Rejecting previous hints that qualified immunity might hinge on the subjective good faith of the government actor involved,<sup>97</sup> *Harlow* adopted an objective test, holding that “government officials performing discretionary functions[ ] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>98</sup> This rule was designed to give “ample room for mistaken judgments,”<sup>99</sup> and it shifted the balance towards more freedom for “fearless official decision-making” and away from victim compensation.<sup>100</sup> Evaluating a claim of qualified immunity involves first “determining whether a constitutional right was violated on the premises alleged,” and if so, deciding whether the right was clearly established at the time.<sup>101</sup>

Standard recitations of the *Harlow* rule frequently state that qualified immunity exists only for actions taken pursuant to discretionary authority, precluding immunity when the actor performs a ministerial duty.<sup>102</sup> While the continuing vitality of this distinction has been called into question or rejected outright by many courts,<sup>103</sup> to the extent that the ministerial duty exception does exist, *Lockyer*’s holding that local governments may not refuse to perform ministerial functions that they believe to be unconstitutional essentially requires local officials to expose themselves to § 1983 liability precisely in situations where qualified immunity will not shield them.

<sup>96</sup> *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

<sup>97</sup> *See, e.g.*, *Butz*, 438 U.S. at 484.

<sup>98</sup> *Harlow*, 457 U.S. at 818; *see also* *Davis v. Scherer*, 468 U.S. 183, 192 (1984).

<sup>99</sup> *Malley v. Briggs*, 475 U.S. 335, 343 (1986).

<sup>100</sup> Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 939 (1989).

<sup>101</sup> *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (observing that deciding first whether the right was clearly established would interfere in “the process for the law’s elaboration from case to case”); *see also* *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); Leon Friedman, *Practising Law Institute: Section 1983 Civil Rights Litigation Symposium: Qualified Immunity When Facts are in Dispute*, 16 TOURO L. REV. 857 (2000) (observing, before *Saucier*, that there was some conflict in the case law about which stage of the qualified immunity doctrine should come first). It is interesting to note that in the context of *habeas corpus*, the Court adopted an approach opposite to that taken in *Saucier*. *See* *Williams v. Taylor*, 529 U.S. 362, 390 (2000) (noting that the “threshold question” is whether the right asserted had been clearly established at the time of its alleged violation).

<sup>102</sup> *See, e.g.*, *McFall v. Bednar*, 407 F.3d 1081, 1087 (10th Cir. 2005); *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 380 (5th Cir. 2005); *Cooper v. Dillon*, 403 F.3d 1208, 1220 (11th Cir. 2005).

<sup>103</sup> *See, e.g.*, *Eddy v. V.I. Water & Power Auth.*, 256 F.3d 204, 210–11 (3d Cir. 2000); *Varrone v. Bilotti*, 123 F.3d 75, 82 (2d Cir. 1997); *Sellers ex rel. Sellers v. Baer*, 28 F.3d 895, 902 (8th Cir. 1994); *Coleman v. Frantz*, 754 F.2d 719, 727 (7th Cir. 1985); *see also* *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (omitting the “discretionary functions” language in quoting *Harlow* regarding the test for qualified immunity). *But see* *Boretti v. Wiscomb*, No. 92-2203, 1993 U.S. App. LEXIS 20608, at \*7 (6th Cir. Aug. 3, 1993).

The *Harlow* rule appears on its face to be a relatively straightforward balance between two competing goals, the compensation of victims and the freedom of government officials to govern. Attempts to apply the rule, however, reveal that it does little to answer difficult questions about how courts should strike the balance in more challenging cases. At the outset, the meaning of “clearly established” is malleable. Among other issues, “[t]he operation of this standard . . . depends substantially upon the level of generality at which the relevant ‘legal rule’ is to be identified.”<sup>104</sup> Define the right too broadly or abstractly, and qualified immunity would cease to offer any protection at all.<sup>105</sup> Define the right too narrowly, and plaintiffs could only prevail if the government agent acted in direct violation of a court order. While the Supreme Court has identified this issue clearly, it has had less success articulating general principles for resolving it. Writing for the Court in *Anderson v. Creighton*, Justice Scalia begged the question: “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . in the light of pre-existing law the unlawfulness must be apparent.”<sup>106</sup> Justice Stevens had similar trouble in *Hope v. Pelzer*, again emphasizing the importance of notice to government actors but struggling to define exactly what would give a reasonable person “fair warning.”<sup>107</sup>

Determining what clearly established law requires is an involved process. The right need not have been explicitly articulated by the Supreme Court, or any other court for that matter, “so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.”<sup>108</sup> Moreover, in attempting to anticipate the necessary implications of decided cases, the reasonable local official is expected to look to case law from both her circuit<sup>109</sup> and from all other Courts of Appeals,<sup>110</sup> that is, unless binding precedent could be extrapolated to clearly prohibit the alleged behavior.<sup>111</sup>

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<sup>104</sup> *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

<sup>105</sup> *See id.* at 640.

<sup>106</sup> *Id.*

<sup>107</sup> 536 U.S. at 739–41 (rejecting the Eleventh Circuit’s finding that *Harlow* “required that the facts of previous cases be ‘materially similar’” to the fact pattern alleged by plaintiffs and holding instead that the Court of Appeals “ought to have asked . . . whether the state of the law [at the time of the alleged violation] gave respondents fair warning that their alleged [behavior] was unconstitutional”). To see another example of the difficulty of assigning concrete meaning to “clearly established law,” one need only look to the context of *habeas corpus*, in which the Supreme Court and Congress have engaged in an ongoing dialogue on the subject. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000) (interpreting 1996 amendments to 28 U.S.C. § 2254).

<sup>108</sup> *Hope*, 536 U.S. at 740 (quoting *United States v. Lanier*, 520 U.S. 259, 269 (1997)).

<sup>109</sup> *See, e.g., Elder v. Holloway*, 510 U.S. 510, 513 (1994).

<sup>110</sup> *See Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987).

<sup>111</sup> *See Rivero v. City and County of San Francisco*, 316 F.3d 857, 865 (9th Cir. 2002) (“[T]he fact that there was a circuit split [resolved three years after the incidents at issue in the case at bar] does not mean that the law was not clear in this circuit prior to the [Supreme] Court’s decision . . .”).

Even federal judges sometimes have trouble consulting all relevant case law in determining whether a right was clearly established at the time of events in question. This problem was addressed by the Supreme Court in *Elder v. Holloway*, a case that is pragmatic and well-grounded, but which also raises serious questions about the expectations placed on local government actors.<sup>112</sup> In *Elder*, the Court faced the question of how reviewing courts should treat the failure of a lower court to consider all relevant case law when ruling on a qualified immunity claim. The Court held that “[w]hether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law,” and as such it should be reviewed de novo on appeal.<sup>113</sup> In performing such review, the court should “use its ‘full knowledge of its own [and other relevant] precedents.’”<sup>114</sup> In addition to making the formal argument that the determination of when a right is clearly established is a matter of law, the Court also justified its holding on policy grounds: “The central purpose of affording public officials qualified immunity from suit is to protect them ‘from undue interference with their duties and from potentially disabling threats of liability.’ The rule announced by the Ninth Circuit does not aid this objective.”<sup>115</sup>

The *Elder* rule has the potential to hold local officials to a higher standard of constitutional interpretation than that applied to federal judges. In *Elder* itself, it was the Chief Judge of the District of Idaho, Harold L. Ryan, who erred by overlooking controlling authority.<sup>116</sup> He had the benefit not only of his nine years on the bench but of full briefing by advocates charged with zeal and diligence. Yet the defendant-officers in the case, blessed by no specialized legal expertise, staff of law clerks, or zealous advocates, were held liable.

*Elder* brought to the fore a logical problem inherent in § 1983 liability cases in which a judgment granting qualified immunity on the grounds that the right in question was clearly established is overruled on appeal. Of course, the right to a meaningful appeal is crucial to the integrity of the judicial system. At the same time, while *Harlow* rejected a good faith standard for local officials, it did not purport to create a regime of strict liability.<sup>117</sup> It maintained a two-part test that in theory looks not only to the established law at the time of the alleged action, but also to whether a reasonable person would have been aware that the law was established.

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<sup>112</sup> 510 U.S. 510 (1994).

<sup>113</sup> *Id.* at 516.

<sup>114</sup> *Id.* (quoting *Davis v. Scherer*, 468 U.S. 183, 192 n.9 (1984)).

<sup>115</sup> *Id.* at 514–15 (citation omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)).

<sup>116</sup> See Federal Judicial Center, Judges of the United States Courts, <http://air.fjc.gov/servlet/GetInfo?jid=2080> (last visited Nov. 17, 2005).

<sup>117</sup> See also *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001).

Although *Harlow* rejected the earlier rule, the application of which required an inquiry into the actual mindset of the official seeking to assert qualified immunity, it substituted an analysis of the “reasonable person.” While some observers have concluded that in practice the second stage of the *Harlow* regime has atrophied almost completely,<sup>118</sup> for the purposes of this Note, the important fact is that courts continue to insist that they are making judgments about what a reasonable officer *would have* known, not what he possibly could have known.<sup>119</sup> Recently, the Supreme Court has injected more life into the second prong of the *Harlow* test by rejecting the old notion that qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law,”<sup>120</sup> and placing renewed emphasis on ensuring that officers have notice that their conduct is unlawful before they are subject to suit.<sup>121</sup>

*Lockyer*’s facile treatment of individual § 1983 liability also fails in the face of decisions where a reviewing court reverses a *denial* of qualified immunity, finding that the lower court incorrectly concluded that a right *was* clearly established.<sup>122</sup> While it makes sense that local government officials should be granted immunity in such situations, the fact that disagreement between judges reviewing the same set of facts is relatively common suggests that there may be more situations in which local officials might reasonably disobey a state statute than the *Lockyer* court assumed.

Although lower courts may suffer from bruised egos after being overruled as to whether or not a right was clearly established, they risk no more serious consequences. Under the *Harlow* test, however, a “reasonable person” working for a local government entity is expected to wade through the complex field of substantive constitutional rights defined according to an ever evolving doctrine of what it means for a right to be “clearly es-

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<sup>118</sup> John Jeffries has argued that in practice, “[f]or reasons of administration, the Supreme Court has curtailed the subjective branch of the inquiry, so that today qualified immunity usually turns on whether a reasonable officer ‘could have believed’ the conduct to be lawful.” John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 54–55 (1998) (emphasis added). Laura Oren has gone further, asserting that *Harlow* essentially turned a regime of qualified immunity into one of absolute immunity. See Oren, *supra* note 100, at 938.

<sup>119</sup> As Jeffries puts it, “[t]he absence of qualified immunity is . . . equivalent to a specie of negligence.” Jeffries, *supra* note 118, at 55.

<sup>120</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

<sup>121</sup> See *Holloman v. Harland*, 370 F.3d 1252, 1277 (11th Cir. 2004). The Eleventh Circuit wrote:

This circuit was recently chastised by the Supreme Court for taking an unwarrantedly narrow view of the circumstances in which public officials can be held responsible for their constitutional violations. . . .

While officials must have fair warning that their acts are unconstitutional, there need not be a case “on all fours,” with materially identical facts, before we will allow suits against them.

*Id.* (interpreting *Hope v. Peltzer*, 536 U.S. 730, 739 (2002)).

<sup>122</sup> See, e.g., *Duriex-Gauthier v. Lopez-Nieves*, 274 F.3d 4 (1st Cir. 2001).

ablished.” Unlike highly trained and specialized judges, however, local officials are expected to get it right on pain of individual damages judgments.

In the paradigmatic § 1983 suit, a case against a police or correctional officer, the allegedly unconstitutional action is rarely taken in accordance with a specific governmental policy. One might think that a local government officer would more easily escape individual liability under § 1983 when acting pursuant to statutory authorization. But this is only partially correct. As a doctrinal matter, the local official’s ultimate responsibility under § 1983 is to respect clearly established *constitutional* rights, and thus while duly enacted statutes are presumed to be constitutional, this provides no formal shield against personal liability under § 1983.

Although local officers are normally expected to follow statutory law without questioning its constitutional validity,<sup>123</sup> “an official may nevertheless be liable for enforcing a statute that is ‘patently violative of fundamental constitutional principles.’”<sup>124</sup> Thus even when “the allegedly unconstitutional action undertaken by the individual defendant consists solely of the enforcement of an ordinance which was duly enacted,” a court may find that qualified immunity cannot shield the defendant.<sup>125</sup> Courts have not articulated what difference, if any, exists between this “patently violative” standard and the normal “clearly established” test for qualified immunity under § 1983. Whatever the standard may be, it seems unlikely to yield a bright-line rule that leaves local officials secure in the distinction between questionable and inviolable statutes.

Remarkably, even a local official who acts in reliance on a favorable court judgment is not automatically shielded from § 1983 liability.<sup>126</sup> The Ninth Circuit has observed that “the pronouncement of one state court on a constitutional issue does not necessarily shield a government official from liability.”<sup>127</sup> Reliance on federal court decisions can be equally risky. In *Hallstrom v. City of Garden City*, the plaintiff sued a local government entity and various officers in their individual capacities after being held in jail for four days without a hearing for refusing to show her driver’s license or answer routine booking questions, on the assertion that such

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<sup>123</sup> See *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979) (“The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.”). But see *Cooper v. Dillon*, 403 F.3d 1208, 1219–21 (11th Cir. 2005) (rejecting plaintiff’s attempt to invoke the “grossly and flagrantly unconstitutional” exception to qualified immunity for an officer acting pursuant to a state statute).

<sup>124</sup> *Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002) (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994)); see also *Gorromeo v. Zachares*, 15 Fed. App’x 555, 557 (9th Cir. 2001).

<sup>125</sup> *Grossman*, 33 F.3d at 1209.

<sup>126</sup> See *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1483 (9th Cir. 1992).

<sup>127</sup> *Ward v. County of San Diego*, 791 F.2d 1329, 1333 (9th Cir. 1986).

demands violated her constitutional rights.<sup>128</sup> A panel of the Ninth Circuit upheld a damages award under § 1983, finding that a reasonable officer could not have concluded that holding her for four days conformed to Supreme Court precedent clearly establishing the right to a prompt hearing before a magistrate judge.<sup>129</sup> But while Supreme Court and Ninth Circuit precedents clearly recognized the right to a prompt hearing, the Idaho district court had granted summary judgment against plaintiffs asserting colorably similar claims to those raised in *Hallstrom*, and the defendant officers in *Hallstrom* argued that they had a right to rely on these cases.<sup>130</sup> In dismissing the relevance of these cases, the Ninth Circuit observed:

While at one level it may seem harsh not to allow law enforcement officers to rely on local judicial officers' opinions, the Supreme Court requires what is essentially an artificial test, one that specifically looks to objective, not subjective reasonableness. A judicial officer's misjudgment will not obviate or excuse another official's obligation to act with *objective* reasonableness.<sup>131</sup>

*Hallstrom* indicates that courts expect "reasonable" local officials to maintain an independent constitutional conscience, even in the face of apparently conflicting judicial authority. This notion undermines the *Lockyer* principle that local officials must not violate a clear legislative command until a court has spoken.

#### *B. The Limits of State Sovereign Immunity: Municipal Liability Under § 1983*

Municipalities and local governments can also be sued under § 1983 for monetary, declaratory, or injunctive relief for an alleged deprivation of constitutional rights, privileges, or immunities under color of state law.<sup>132</sup> In many ways, this liability goes far beyond that of individual officers because unlike officials sued in their personal capacities, municipalities do not enjoy either absolute or qualified immunity.<sup>133</sup> Nor do "municipal

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<sup>128</sup> 991 F.2d at 1476.

<sup>129</sup> *Id.* at 1483.

<sup>130</sup> *Id.* Coincidentally, one of these cases, *Shaw v. Boise City*, No. 84-1088, 1985 WL 11183 (D. Idaho, Sept. 12, 1985) was decided by Harold L. Ryan, the same judge who would later make the error leading to *Elder v. Holloway*, 510 U.S. 510 (1994).

<sup>131</sup> *Hallstrom*, 991 F.2d at 1483; *see also* *Malley v. Briggs*, 475 U.S. 335, 346 n.9 (1986) (rejecting the contention that the Court's rule would hold police officers to a higher standard than magistrate judges by explaining that when a magistrate commits "an unacceptable error indicating gross incompetence or neglect of duty[, t]he officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate.").

<sup>132</sup> *See* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (concluding that Congress intended to include local governments "among those persons to whom § 1983 applies").

<sup>133</sup> *See* *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

corporation[s] or other governmental entit[ies] which [are] not an arm of the State” enjoy sovereign immunity under the Eleventh Amendment.<sup>134</sup> Unlike individual officials, cities live under a regime of strict liability for constitutional torts under § 1983.<sup>135</sup>

When a city acts pursuant to state statute, rather than to a locally enacted law, one might object that the real actor is the state, rather than the local government, and therefore the Eleventh Amendment should shield the city from liability. This is not the direction that state sovereign immunity doctrine has taken, however. Whether or not state sovereign immunity applies in a given case hinges on the nature of the defendant entity, not the nature of the specific act at issue.<sup>136</sup> This can be seen most clearly in cases that attempt to determine whether courts should award hard-to-classify defendant entities protection under the umbrella of state sovereign immunity.

While the Rehnquist Court expanded the protections of state sovereign immunity, erecting increasingly mechanical rules barring suits against the states,<sup>137</sup> the threshold issue of whether a defendant is entitled to immunity continues to require individualized analysis in many cases. There are many “hybrid entit[ies]” that have some characteristics of a state agency but also share similarities with local governments or private organizations.<sup>138</sup> In such ambiguous cases, courts ask whether state sovereign immunity extends to that *entity*, *not* whether it covers that particular *situation*.<sup>139</sup>

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<sup>134</sup> Alden v. Maine, 527 U.S. 706, 756 (1999).

<sup>135</sup> See Jeffries, *supra* note 118, at 69 (noting that in *Owen v. City of Independence*, “the city had to pay damages for failure to provide a ‘name-clearing hearing’ before anyone knew such exercises were required”). The major limit on local government liability under § 1983 is that it cannot rest on simple respondeat superior theory. See *Monell*, 436 U.S. at 691. Although local governments can be held liable for constitutional torts regardless of the good faith of the officers or agents who committed them, see *Owen*, 445 U.S. at 638, “recovery from a municipality is limited to acts that are, properly speaking, acts ‘of the municipality’—that is, acts which the municipality has officially sanctioned or ordered.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). While the debate over the precise meaning of “officially sanctioned” rages on, it holds little relevance to this Note. Actions taken pursuant to statute clearly fall within the scope of § 1983 as officially sanctioned, so this discussion is confined to the relatively settled territory of state sovereign immunity.

<sup>136</sup> Cf. Anthony J. Harwood, *A Narrow Eleventh Amendment Immunity for Political Subdivisions: Reconciling the Arm of the State Doctrine with Federalism Principles*, 55 *FORDHAM L. REV.* 101, 103, 120 (1986) (discussing the difference between entities that enjoy Eleventh Amendment immunity as “arms of the state” and “political subdivisions” that do not). Although Harwood argues for a revised system that would focus on the nature of the claim being brought, he notes that under existing law, “the threshold question in determining the eleventh amendment immunity of a government entity is whether *the entity* is an arm of the state or a political subdivision.” *Id.* at 120 (emphasis added).

<sup>137</sup> See *Alden*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); but see *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

<sup>138</sup> *Takle v. Univ. of Wisc. Hosp. and Clinics Auth.*, 402 F.3d 768, 769 (7th Cir. 2005) (addressing the question of whether a hospital with historical ties to the state and continued funding from the state should be treated as a state agency or private enterprise).

<sup>139</sup> See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977); *Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir.



Indeed, the core conception of state sovereign immunity as *immunity* from suit, rather than as simply a defense, precludes any interpretation that would carve up an entity by function and extend protection only to some actions. State sovereign immunity exists “to protect not only the state’s fiscal independence but also its ‘dignity.’”<sup>140</sup> Neither purpose would be served by requiring a case-by-case analysis of whether a given entity could be sued for a particular action.

When a defendant entity exhibits some characteristics of state government and others of local government, cities serve as the paradigmatic local government to which state sovereign immunity does not extend. As the Supreme Court has framed it, “[t]he issue here thus turns on whether [the defendant] is to be treated as an arm of the State partaking of the State’s Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend.”<sup>141</sup>

State sovereign immunity doctrine’s focus on the nature of the defendant entity rather than the nature of the action that caused the alleged injury undermines *Lockyer*’s attempt to parse local governments based on function. A city sued for a constitutional tort under § 1983 cannot argue that it was required by state law to undertake the action. Although local governments sometimes appear to act as arms of the state, the Supreme Court “has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a ‘slice of state power.’”<sup>142</sup> In addition, the entity-based approach to state sovereign immunity also destabilizes a primary justification for a strong version of legal capacity doctrine by suggesting that in the realm of constitutional tort the city’s interests and actions are *not* treated as simply subsidiary matters subsumed by state sovereignty.<sup>143</sup>

Section 1983 liability and the doctrines that sometimes shield government actors from such liability reflect both the importance of local governments to the regime of constitutional rights protection and the trust placed in local government officials to interpret the Constitution. Hence, *Lockyer*’s treatment of local governments as “statutory automatons”<sup>144</sup> does

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2005) (addressing five factors in determining that the defendant air pollution control district was not a state entity protected by sovereign immunity: whether a money judgment would be satisfied out of state funds, whether the entity performs a central governmental function, whether the entity has the power to sue and be sued, whether the entity has the power to take property in its name, and whether the entity has corporate status separate from the state); *Takle*, 402 F.3d at 771.

<sup>140</sup> *Takle*, 402 F.3d at 769.

<sup>141</sup> *Mr. Healthy*, 429 U.S. at 280.

<sup>142</sup> *Lake County Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 401 (1979).

<sup>143</sup> See discussion *infra* Part III.

<sup>144</sup> *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 511 (Cal. 2004) (Werdegar, J., concurring and dissenting).

not account for existing doctrines. While *Lockyer* instructs local government officials to turn a blind eye to the constitution when carrying out legislatively imposed duties, qualified immunity jurisprudence commands these same officials to conform *all* of their actions to the Constitution, offering safe harbor only to those who maintain vigorous independent constitutional consciences at all times. Sovereign immunity doctrine is equally uninterested in whether local governments act pursuant to state statute or on their own authority, imposing § 1983 liability for all local government acts that violate individual constitutional rights. Imposing such liability makes sense because local officials and local entities frequently stand at the intersection between government and individuals, policing the streets, monitoring the schools, and shaping land-use policy. For constitutional rights to maintain their meaning, local governments must enforce them with zeal and determination. Section 1983 provides one indication that the legal system recognizes the importance of this role, and it creates an incentive for local governments to live up to their duty.

### III. LIMITING THE ABILITY OF LOCAL GOVERNMENTS TO RAISE CONSTITUTIONAL CLAIMS: THE CONTOURS OF LEGAL CAPACITY DOCTRINE

#### A. “City as State Creature” Doctrine, Alive in the Ninth Circuit

Given the *Lockyer* Court’s emphatic rejection of the course of action pursued by San Francisco, refusing to perform ministerial duties it judged to be unconstitutional, a city faced with the type of quandary confronting San Francisco in early 2004 might consider bringing a suit against the state to challenge the constitutionality of the statute. This route might appear foreclosed, however, by a number of cases from the early twentieth century such as *Hunter v. City of Pittsburgh*,<sup>145</sup> *City of Trenton v. New Jersey*,<sup>146</sup> and *Williams v. Mayor and City Council of Baltimore*,<sup>147</sup> in which the Supreme Court used categorical language to bar governments from bringing suit against their states under the Federal Constitution. As the Court states in *Williams*: “A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.”<sup>148</sup> This position reflected the proposition that local governments exist at the pleasure of state legislatures that “could at any time terminate the existence of the [municipal] corporation itself, and provide other and different means for the government of the district comprised within the limits

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<sup>145</sup> 207 U.S. 161 (1907).

<sup>146</sup> 262 U.S. 182 (1923).

<sup>147</sup> 289 U.S. 36 (1933).

<sup>148</sup> *Id.* at 40.

of the former city.”<sup>149</sup> While some federal and state courts continue to treat these statements as unchallenged doctrine and to deny all attempts by local governments to bring suits against the state,<sup>150</sup> many others have questioned the precise meaning and scope of the rule that these classic cases appear to establish.<sup>151</sup>

The Ninth Circuit has taken a particularly hard line in this area, following the extreme rhetoric in the classic Supreme Court cases and adopting a categorical rule against suits by local governments against the state.<sup>152</sup> Unfortunately, the circuit has done so with little analysis. In *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, the court began by stating that it was “well established that ‘(political) subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment.’”<sup>153</sup> Without further discussion or explanation, the court held broadly that the plaintiff city could not challenge a state agency’s “plans and ordinances on [any] constitutional grounds. Because all of its claims are based on the Constitution, the city’s challenge was properly dismissed.”<sup>154</sup> The court embraced an expansive understanding of state power,

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<sup>149</sup> *City of Trenton*, 262 U.S. at 189–90; see also *Hunter*, 207 U.S. at 179 (“[T]he State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.”).

<sup>150</sup> See, e.g., *Indian Oasis-Babaquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1242 (9th Cir. 1996); *City of New York v. New York*, 655 N.E.2d 649, 651 (N.Y. 1995).

<sup>151</sup> See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998); *Indian Oasis-Babaquivari*, 91 F.3d at 1250 (Reinhardt, J., dissenting); *Rogers v. Brockett*, 588 F.2d 1057, 1068–69 (5th Cir. 1979); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 199–200 (Ky. 1989). See also *Barron*, *supra* note 42, at 562–68.

<sup>152</sup> See, e.g., *City of South Lake Tahoe v. Cal. Tahoe Reg’l Planning Agency*, 625 F.2d 231, 233–34 (9th Cir. 1980). In *Indian Oasis-Babaquivari*, the Ninth Circuit reaffirmed its categorical prohibition on suits by local governments against the state. 91 F.3d at 1242–43. The majority again failed to address the reasoning of other cases that had reached conclusions different from that in *City of South Lake Tahoe* (e.g., *San Diego Unified Port Dist. v. Gianturco*, 457 F. Supp. 283 (S.D. Cal. 1978); *Star-Kist Foods, Inc. v. County of L.A.*, 719 P.2d 987 (Cal. 1986)), “[b]ecause a panel of this circuit may not overturn circuit precedent ‘unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions.’” *Indian Oasis-Babaquivari*, 91 F.3d at 1242 (quoting *Clow v. U.S. Dep’t of Housing and Urban Dev.*, 948 F.2d 614, 616 n.2 (9th Cir. 1991)). Over a vigorous dissent, the majority rejected plaintiff’s contention that *Seattle Sch. Dist. No. 1* had implicitly overruled *City of South Lake Tahoe*’s per se rule on the grounds that “the exercise of jurisdiction in a case is not precedent for the existence of jurisdiction.” *Id.* at 1243 (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)). The dissent argued that

[a]lthough the Court in [*Seattle Sch. Dist. No. 1*] does not squarely hold that the school districts have standing to sue the state, it in no way passed over the issue *sub silentio*. To the contrary, it made its position quite clear, and then ruled on the merits for the school districts.

*Id.* at 1247–48 (Reinhardt, J., dissenting).

<sup>153</sup> 625 F.2d at 233 (alteration in original) (quoting *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973)).

<sup>154</sup> *Id.* at 233–34.

as the plaintiff city was not attempting to sue the state itself, or even a state agency,<sup>155</sup> but simply another governmental subdivision.<sup>156</sup>

As noted by Justice White in his dissent from the Supreme Court's denial to grant certiorari in the case, the law governing the ability of local governments to sue their states under the Constitution was far less clear in 1980 than the Ninth Circuit evinced.<sup>157</sup> The year before, the Fifth Circuit had released an extensively researched decision concluding that the classic cases do not justify such a per se rule.<sup>158</sup> Moreover, in *Board of Education of Central School District No. 1 v. Allen*, the Supreme Court had entertained the appeal of a local school board asserting a constitutional challenge to a state statute requiring it to lend books to a parochial school student.<sup>159</sup> In a number of later cases, such as *Washington v. Seattle School District No. 1*,<sup>160</sup> courts have also reached the merits in cases brought by local governments against the states.<sup>161</sup> These cases demonstrate flexibility in legal capacity doctrine not reflected in the Ninth Circuit's reading.

#### *B. A More Complex Modern Conception of the Legal Capacity of Local Government*

Not all courts have hewn so closely to the rhetoric of *Hunter*, *City of Trenton*, and the other classic cases on municipal capacity. Most prominently, in *Rogers v. Brockette* the Fifth Circuit allowed a local school district to challenge a Texas statute that allegedly interfered with a federal school breakfast program in violation of the Supremacy Clause.<sup>162</sup> In reaching its conclusion, the court advanced a more nuanced reading of the Court's strong language in cases like *Hunter* and *City of Trenton*. The *Rogers* court traced that line of cases back to *Trustees of Dartmouth College v. Woodward*,<sup>163</sup> which established "the general principle that the entire Constitution does not interfere in a state's internal organization of its political

<sup>155</sup> See, e.g., *Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) (holding that the Tahoe Regional Planning Agency was not an arm of the state, and therefore not protected by state sovereign immunity).

<sup>156</sup> See *City of South Lake Tahoe*, 625 F.2d at 233.

<sup>157</sup> *City of South Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 449 U.S. 1039, 1041–42 (1980) (White, J., dissenting).

<sup>158</sup> See *Rogers v. Brockette*, 588 F.2d 1057, 1067–71 (5th Cir. 1979), cited in *City of South Lake Tahoe*, 449 U.S. at 1042. See also *infra* notes 162–168 and accompanying text.

<sup>159</sup> 392 U.S. 236 (1968).

<sup>160</sup> 458 U.S. 457 (1982).

<sup>161</sup> See also *Indian Oasis-Babaquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1246–48 (9th Cir. 1996) (Reinhardt, J., dissenting) (arguing that the Ninth Circuit's earlier hard-line take on capacity/standing in suits by local governments against their states had been implicitly overruled by the Supreme Court); *Bd. of Natural Res. v. Brown*, 992 F.2d 937 (9th Cir. 1993); Barron, *supra* note 42, at 562–68.

<sup>162</sup> 588 F.2d 1057, 1071 (5th Cir. 1979).

<sup>163</sup> 17 U.S. 518 (1819).

functions.”<sup>164</sup> Read in this light, “*Hunter, Trenton*, and allied cases are substantive holdings that the Constitution does not interfere in states’ internal political organization. They are not decisions about a municipality’s standing to sue its state.”<sup>165</sup> Indeed, as the *Rogers* court noted, even *Hunter* did not contemplate an absolute bar on all possible cases that a municipal corporation might bring against the state that created it.<sup>166</sup>

In order to explain the disjunction between this holding and the standard interpretation of municipal standing cases, the *Rogers* court argued that the term “standing” was used by *Hunter* and other early twentieth century cases in a way that does not conform to the current technical meaning of the term.<sup>167</sup> Rather than viewing standing as “a preliminary or threshold question,” those earlier courts used it to refer to whether the plaintiff “was correct in its claim on the merits that the statutory or constitutional provision in question protected its interests.”<sup>168</sup>

Under this rubric, a more precise modern approach to the question of whether a local government may bring suit against its state should be broken down into two components: legal capacity (legal authority) and legal standing.<sup>169</sup> Courts sensitive to this distinction have generally concluded that the classic cases do not establish a per se rule that local governments lack the capacity to sue their creators, “but rather that the State’s authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.”<sup>170</sup> This Section expands on this trend of cabining the reach of legal capacity doctrine, and proposes that legal capacity doctrine should pose no barrier to suits by local governments challenging the constitutionality of state statutes when individual rights are allegedly being violated.<sup>171</sup> A more restrictive view of legal capacity doctrine not only would bar local governments from raising constitutional doubts in court, but also would

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<sup>164</sup> *Rogers*, 588 F.2d at 1069.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1069 (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907) (contemplating that cities might be allowed to sue the state to protect property “owned by them in their private capacity” rather than property held in their governmental capacity)); see also *Gomillion v. Lightfoot*, 364 U.S. 339, 343–44 (1960). Although the *Rogers* court also cited *City of Trenton* to support its assertion, the *City of Trenton* Court emphasized that “[t]he basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class.” *City of Trenton v. New Jersey*, 262 U.S. 182, 191–92 (1923).

<sup>167</sup> See *Rogers*, 588 F.2d at 1070 (“[W]hen [*Hunter* and *City of Trenton*] were decided, “standing” generally meant something somewhat different from what it means today. . . . In speaking of “standing,” cases in the *Hunter* and *Trenton* line meant only that, on the merits, the municipality had no rights under the particular constitutional provisions it invoked.”).

<sup>168</sup> *Id.*

<sup>169</sup> See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 199 (Ky. 1989); Harold A. Olsen, Note, *Procedural Barriers to Suits Against the State by Local Government*, 62 *BROOK. L. REV.* 431, 437 (1996).

<sup>170</sup> *Gomillion*, 364 U.S. at 344.

<sup>171</sup> See discussion *infra* Part IV.B.2.

undermine assertions that local governments are competent to reach legitimate conclusions about constitutional rights.

The primary thrust of much of legal capacity jurisprudence is to protect states from interference with their right to create and manage their internal governmental structures.<sup>172</sup> Many cases have dealt with attempts by cities to resist state-imposed changes to their geographical boundaries, consolidations of different municipalities, and other structural alterations.<sup>173</sup> Generally, courts have been unwilling to allow cities to claim rights for themselves based on individual rights provisions, such as the Just Compensation Clause, Equal Protection Clause, and Contract Clause.<sup>174</sup> As the Sixth Circuit has reasoned, because of “the nature of the relationship between a public corporation and its creating state,” a municipal corporation “is prevented from attacking the constitutionality of state legislation on the grounds that *its own* rights have been impaired.”<sup>175</sup> This reading is faithful to the language and reasoning of *Hunter*, which focused on the properly unfettered power of states to control the ability of municipal corporations to “acquire, hold, and manage personal and real property.”<sup>176</sup>

Some courts have expressed the concern that because local governments are creatures of the state, “both are essentially the same entity and therefore not adversaries” in many situations.<sup>177</sup> The Fifth Circuit rejected similar reasoning about suits by state agencies in *Rogers*:

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<sup>172</sup> See, e.g., *Heimbach v. Regan*, 575 F. Supp. 767, 768–69 (S.D.N.Y. 1983).

<sup>173</sup> See *Rogers v. Brockette*, 588 F.2d 1057, 1067–68 (5th Cir. 1979) (listing the variety of underlying objections and constitutional claims that local governments have attempted to assert).

<sup>174</sup> See *Star-Kist Foods, Inc. v. County of L.A.*, 719 P.2d 987, 991 (Cal. 1986). Connecticut appears to have an exception to this general rule “allow[ing] a municipality, adversely affected by a statute, which is properly in court on a nonconstitutional question to challenge the constitutionality of that statute.” *Town of Berlin v. Santaguida*, 435 A.2d 980, 982–83 (Conn. 1980).

<sup>175</sup> *S. Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 504 (6th Cir. 1986) (emphasis added) (noting that cities have been allowed to sue to protest violations of the Supremacy Clause).

<sup>176</sup> *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907):

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. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.

<sup>177</sup> *Town of Burlington v. Dep’t of Educ.*, No. 80-359-Z, 1980 U.S. Dist. LEXIS 14998, at \*2 (D. Mass. Nov. 19, 1980).

Some state agencies may well be so closely identified with the state government, and so thoroughly controlled by the body they are suing that the litigation amounts to a suit by the state against itself; such a suit lacks the live adversariness we must find before we can entertain a case. The [Garland Independent School District (“GISD”)] is not this sort of agency, however. Both legally and practically, the GISD seems sufficiently independent of the state of Texas to ensure that a suit between them will be a genuinely adversary contest.<sup>178</sup>

As discussed above, the Supreme Court has rejected the notion that local governments are simply branches of the state, at least for the purposes of state sovereign immunity, despite the fact that their power originates with the state.<sup>179</sup> Furthermore, if a local government differs strongly enough from the state to bring suit, it seems unlikely that interests will align so as to undermine the adversarial process.<sup>180</sup>

Under the more nuanced and limited reading of the Fifth, Sixth, and Tenth Circuits, the *Hunter-City of Trenton* line of cases says nothing about whether a municipal corporation should be permitted to sue the state to vindicate the individual constitutional rights of private individuals but stands for the more limited proposition that “a municipal corporation, *in its own right*, receives no protection from the Equal Protection or Due Process Clauses vis-a-vis its creating state.”<sup>181</sup> Specifically, *City of Trenton* “stand[s] only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights.”<sup>182</sup> So construed, legal capacity doctrine should pose no barrier to suits by local governments seeking to protect individual constitutional rights of real persons.<sup>183</sup>

### C. California’s Even More Expansive Legal Capacity Doctrine

In *Star-Kist Foods, Inc. v. County of Los Angeles*, the California Supreme Court rejected the per se rule articulated in *City of South Lake Tahoe*.<sup>184</sup> Noting that the Ninth Circuit had “provide[d] little guidance as to

<sup>178</sup> 588 F.2d at 1065 (internal citations omitted).

<sup>179</sup> See discussion *supra* Part II.B.

<sup>180</sup> See *Rogers v. Brockett*, 588 F.2d 1057, 1065–66 (5th Cir. 1979) (discussing factors leading the court to conclude that the school board was not simply a unified part of the state, such as the ability to levy taxes and being subject to democratic election).

<sup>181</sup> *S. Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986) (emphasis added).

<sup>182</sup> *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998).

<sup>183</sup> See discussion *infra* Part IV.B.2.

<sup>184</sup> 719 P.2d 987, 990 (Cal. 1986).

the court's reasoning," the California Supreme Court instead followed the more considered reasoning of *Rogers v. Brockette*,<sup>185</sup> *San Diego Unified Port District v. Gianturco*,<sup>186</sup> and other cases that had held that the "'no standing' rule . . . does not extend to supremacy clause challenges to state laws."<sup>187</sup> Moreover, the court formulated a general rule from these cases, suggesting that California courts should be willing to entertain suits brought by local governments against states when the claims asserted concern constitutional provisions designed to protect the balance of power between states and the federal government, not just when they involve the Supremacy Clause.<sup>188</sup> In *Star-Kist Foods*, the court allowed a city to assert a defense that a state statute violated the Commerce Clause's guarantee that Congress should have "exclusive control over commerce."<sup>189</sup> In justifying this more expansive approach to legal capacity, the court reasoned that "[s]tate action cannot be so insulated from scrutiny that encroachments on the federal government's constitutional powers go unredressed."<sup>190</sup> If cities were not permitted to assert structural constitutional claims in the case at bar, "there is a real possibility that the constitutionality of the Legislature's scheme . . . would have gone unchecked."<sup>191</sup>

Whether California's more expansive understanding of legal capacity doctrine now allows local governments to assert the equal protection rights of its citizens remains somewhat unclear even after *Star-Kist Foods*. The source of the confusion is the court's pronouncement that "the Fourteenth Amendment . . . 'confer[s] fundamental rights on individual citizens,' [and] [p]olitical subdivisions cannot assert 'constitutional rights which are intended to limit governmental action vis-a-vis individual citizens.'"<sup>192</sup> This statement, reminiscent of *Rogers*, *Gomillion*, and other federal cases could mean one of two things: that local governments do not themselves have rights under the Fourteenth Amendment or, more broadly, that local governments may not assert even the Fourteenth Amendment rights of third parties because of some notion of legal capacity, even assuming they could overcome the prudential concerns associated with asserting third-party standing. There is some indication that *Star-Kist Foods* intended the first, narrower, reading, as the court observed that it is a "well-established rule that subordinate political entities . . . may not challenge state action as violating *the entities'* rights under the due process or equal protection clauses of the Fourteenth Amendment."<sup>193</sup> In light of California's general rationale

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<sup>185</sup> 588 F.2d 1057.

<sup>186</sup> 457 F. Supp. 283 (S.D. Cal. 1978).

<sup>187</sup> *Star-Kist Foods, Inc. v. County of L.A.*, 719 P.2d 987, 990 (Cal. 1986).

<sup>188</sup> *See id.* at 991–92.

<sup>189</sup> *Id.* at 992.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 991 (quoting *San Diego Unified Port Dist. v. Gianturco*, 457 F. Supp. 283 (S.D. Cal. 1978)).

<sup>193</sup> *Id.* at 990 (emphasis added).



for a more limited reading of capacity doctrine than that adopted by the Ninth Circuit, this statement can be read to leave open the possibility of a suit by a local government seeking to assert the individual rights of its citizens in attacking a state statute.<sup>194</sup>

#### IV. ALLOWING LOCAL GOVERNMENTS NOT TO BE LAWBREAKERS: AN EXPANDED ROLE FOR LOCAL GOVERNMENTS IN PROTECTING INDIVIDUAL CONSTITUTIONAL RIGHTS

As the law stands after *Lockyer*, local governments in California confronted by statutes that potentially require them to violate individual constitutional rights have no legally sanctioned option but to follow the statute's commands, commit the potential violation, and hope to get sued so that the courts can rule on the legality of the statute.<sup>195</sup> Under this regime, local governments and their elected representatives must become lawbreakers, either by violating a state statute or by contravening core protections of the Constitution that they have sworn an oath to uphold. This situation does not have to continue. Local governments already play an important role in safeguarding individual constitutional rights,<sup>196</sup> and it would not take a titanic doctrinal shift to provide local governments a way out of their current conundrum. This Section briefly outlines additional problems created by the current system and then examines two avenues that the law might open to local governments facing a potentially unconstitutional statutory directive: permitting them to refuse to enforce the statute or authorizing them to bring their claim of unconstitutionality to court.

##### A. *Some Consequences of Preventing Local Governments from Challenging the Constitutionality of State Statutes*

According to the *Lockyer* majority, there is no problem with the current system. Local governments faced with a statute they believe to be unconstitutional may simply carry out their duties, while advising people whose rights are in question to sue them.<sup>197</sup> It is a bold claim to assert that cities should *welcome* becoming defendants accused of violating someone's constitutional rights. In addition, this is a strained and roundabout

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<sup>194</sup> While none of the courts interpreting *Star-Kist Foods* have dealt with this question, none have foreclosed this interpretation. *See, e.g.*, Bd. of Supervisors of Butte County v. McMahon, 268 Cal. Rptr. 219, 224 (Ct. App. 1990). Read in light of the distinction between legal capacity and legal standing, *see supra* note 169 and accompanying text, the language and analysis of *Star-Kist Foods* and other cases that have rejected a per se rule against the assertion of constitutional claims by local governments begin to seem more relevant to a legal standing inquiry than one interested in legal capacity; *see also* Olsen, *supra* note 169, at 463–64 (observing that the confusion of standing and capacity “is especially evident in the exceptions to the no capacity rule”).

<sup>195</sup> *See Lockyer v. City and County of San Francisco*, 95 P.3d 459, 478–79 (Cal. 2004).

<sup>196</sup> *See* discussion *supra* Part II.

<sup>197</sup> *See Lockyer*, 95 P.3d at 485.

method for a local government to bring its constitutional concerns before a judge. Even those who believe a contested statute to be constitutional would not benefit when both parties to the lawsuit are in agreement. In *Perez v. Sharp*, which overturned California's ban on mixed-race marriage, the defendant County of Los Angeles mounted a no-holds-barred defense, arguing among other things that the existing statute "prevent[ed] the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior."<sup>198</sup> It is simply impossible to imagine that San Francisco would defend the state's ban on same-sex marriage with similar vigor. An even greater problem arises for the city if the private citizens choose *not* to sue, leaving the city in the position of violating individual constitutional rights indefinitely. The contrasting experiences of New York and San Francisco with litigation over the constitutionality of banning marriage for same-sex couples provide a good illustration of the shortfalls inherent in the *Lockyer* court's suggested approach.

Like Mayor Newsom, New York City Mayor Michael Bloomberg has expressed the belief that same-sex couples should be allowed to marry.<sup>199</sup> Both men also agree that their states' highest court should rule as quickly as possible on the continued validity of a ban on marriages for same-sex couples.<sup>200</sup> But unlike San Francisco, New York City has not issued any marriage licenses to same-sex couples. Instead, as the *Lockyer* court envisioned, New York is now the defendant in a suit brought by a number of couples denied marriage licenses by the city.<sup>201</sup> By defending this lawsuit, and in particular, by choosing to appeal a trial court's ruling that New York's marriage statute did not survive constitutional scrutiny,<sup>202</sup> Mayor Bloomberg and his administration have come under intense criticism for being overly "legalistic" and trying to have it both ways.<sup>203</sup> Moreover, the city may have appealed the trial court decision because it believes that the New York State Constitution does not require marriage for same-sex couples, rather than out of a commitment to vigorously defend itself against all constitutional claims.<sup>204</sup> In a similar situation, San Francisco might simply have let the trial court decision stand. This would have left the state's marriage laws under an even greater cloud of uncertainty, which

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<sup>198</sup> 198 P.2d 17, 23 (Cal. 1948). The *Lockyer* court specifically pointed to *Perez* as the appropriate mechanism by which constitutional attacks on the state's ban on same-sex marriage should have been brought before a court. 95 P.3d at 485.

<sup>199</sup> See William Glaberson & Jim Rutenberg, *City to Appeal Move Backing Gay Marriage*, N.Y. TIMES, Feb. 6, 2005, at A1.

<sup>200</sup> See *id.*

<sup>201</sup> See *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005).

<sup>202</sup> See *id.*

<sup>203</sup> See Glaberson & Rutenberg, *supra* note 199, at A1.

<sup>204</sup> See *id.* Rather than defending the cause in court, Mayor Bloomberg has promised to lobby for a change in the state's marriage laws before the legislature.

would not have benefited either side. It is to everyone's benefit that these claims be litigated and defended against with vigor.

While the situation in New York demonstrates some of the difficulties that can arise when a city waits to be sued, more serious problems may develop if a suit is *not* brought and the allegedly unconstitutional statute goes unchallenged. Though the *Lockyer* court proposed that if San Francisco believed the state's marriage ban was unconstitutional it "could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court,"<sup>205</sup> cities in the Bay Area had, in fact, been denying marriage licenses to same-sex couples annually since the late 1990s in response to the requests of marriage equality activists during "Freedom to Marry Week."<sup>206</sup> Prior to San Francisco's actions in 2004, these activists had limited their actions to seeking largely symbolic gestures of support from sympathetic local governments rather than bringing suit against them.<sup>207</sup> In part, this reflects the enormous investment of time, money, and emotion that would have been required for an individual couple to mount a full-fledged challenge to California's marriage laws. Given that this issue was a pillar in a national campaign to build a more robust regime of protection for gay and lesbian civil rights, however, additional forces were at work.

Organizations devoted to protecting the civil rights of gay, lesbian, bisexual, and transgender ("GLBT") people have managed to run a relatively systematic and coordinated national campaign to advance their shared cause.<sup>208</sup> Before San Francisco's unexpected move in 2004, groups such as Lambda Legal Defense and Education Fund, the ACLU's Lesbian and Gay Rights Project, Gay and Lesbian Advocates and Defenders ("GLAD"), and the National Center for Lesbian Rights ("NCLR"), approached the national campaign for marriage equality like a chess game. The fact that no legal challenge had been mounted against California's marriage laws before 2004 reflected a conscious decision. As Kate Kendell, Executive Director of NCLR, noted after a conference call with gay rights leaders and lawyers in February 2004: "There wasn't unanimity that this was the right time."<sup>209</sup>

For the most part, coordination and control have been positive tools in the fight for GLBT civil rights, but for a mayor charged with enforcing

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<sup>205</sup> *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 485 (Cal. 2004). Concerns about what can happen if citizens whose rights have allegedly been violated do choose to sue sympathetic local governments are discussed below. See *infra* Part IV.B.1.

<sup>206</sup> See Mike Adamick, *Same-sex Partners Demand Rights, Advocates Receive Support in Oakland, Berkeley, S.F.*, OAKLAND TRIB., Feb. 15, 2003, at A1.

<sup>207</sup> See Elaine Herscher, *Gays, Lesbians to Celebrate "Freedom to Marry Day,"* S.F. CHRON., Feb. 12, 1998, at A6 ("San Francisco Mayor Willie Brown has backed [Freedom to Marry Day] with a city proclamation.").

<sup>208</sup> See, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2159–79 (2002).

<sup>209</sup> Gordon, *supra* note 1, at A1.

a law that he believes violates the constitutional rights of the citizens who elected him, such careful strategizing may be a less attractive option. This disagreement between Mayor Newsom and some civil rights lawyers about the timing of a challenge to California's marriage laws raises the question of how much control over protecting constitutional values should be entrusted to impact litigation and legal policy groups. Ironically, those who may stand to lose the most under a regime in which local governments are permitted to play a more active role in individual rights protection are civil rights organizations focused on the areas in which those local governments act.

The *Lockyer* scenario may present a somewhat distorted version of the general tension surrounding local governments' enforcement of individual constitutional rights, given that major impact litigation groups made strategic decisions about whether to pursue a suit against the city. The GLBT community is relatively well organized and has talented lawyers working for it throughout the country. While the absence of a challenge to a law allegedly discriminating against GLBT individuals may represent a conscious choice by cause lawyers, other rights holders—the mentally ill or homeless, for example—may lack the organization, legal representation, and financial backing to mount a challenge to violations of their constitutional rights.

Given that waiting to be sued is an unappealing proposition, a local government official who believes that a statute imposing a ministerial duty is unconstitutional might wish to take proactive steps to challenge it. But between *Lockyer*'s strict prohibition of disobeying state statutes and the dominant conception of legal capacity/standing doctrine, there is little room to maneuver. The law should recognize this shortcoming and either allow officials to disobey the statute, as San Francisco did, or permit them to raise their concerns in court. The remainder of this Note explores these two alternatives, touching briefly on the advantages and pitfalls of each.

## *B. Two Alternatives to the Current Regime*

### *1. Sanctioning Direct Non-enforcement*

As Justice Werdegar suggested in her *Lockyer* opinion, allowing cities to refuse to perform ministerial duties after concluding that performing them would violate the constitution is unlikely to lead to a breakdown of our system of government.<sup>210</sup> Indeed, in the early twentieth century, it was plausible to argue that because “any act done by an officer in pursuance of an unconstitutional statute would be a violation of his duty under his oath to support the Constitution,” such officers must be allowed to assert unconstitutionality as a defense “to any proceeding to enforce a statute

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<sup>210</sup> See *Lockyer*, 95 P.3d at 511 (Werdegar, J., concurring and dissenting); see also discussion *supra* Part I.C.

by mandamus . . . [h]owever inconvenient it may be to have petty administrative officials constantly questioning the statutes under which they are ordered to act . . . .”<sup>211</sup> Even without the abandoned historical argument that unconstitutional laws were not properly conceived of as laws at all,<sup>212</sup> it seems a fair suggestion to say that allowing local officials to disobey statutes based on their alleged unconstitutionality would create at most an inconvenience, albeit a potentially substantial one. In order to make this point, it is helpful to confront the frightening specter that San Francisco’s actions evoked—the struggle among courts, the federal government, state governments, and local governments over race-based discrimination that occupied the nation during the civil rights movement.<sup>213</sup>

For many, the suggestion that local governments should be permitted to act on their independent view of the Constitution recalled negative memories of local governments engaged in forceful and reactionary resistance to racial integration. Upon closer examination, however, there is little similarity between San Francisco in 2004 and Little Rock, Arkansas, in 1957, when federal troops were called in to prevent the Arkansas National Guard from blocking African American students attempting to attend classes at a formerly all-white high school. While the local government in Little Rock was eventually sued for refusing to integrate its school system, the real culprit standing in the way of integration, at least in the view of the Supreme Court, was the state government, not the city.<sup>214</sup>

From a doctrinal perspective, the actions of the Little Rock School Board and the City of San Francisco are even more distinct. Most importantly, although the resistance by both localities was bolstered in part by constitutional rhetoric,<sup>215</sup> Little Rock and many other local governments

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<sup>211</sup> Recent Case, *Constitutional Law—Who Can Set Up Unconstitutionality—Whether Public Official Has Sufficient Interest*, 34 HARV. L. REV. 86, 86 (1920). Justice Kinnard’s opinion in *Lockyer* cites this Note in support of his claim that there are only limited situations in which local government officials may disobey state statutes and expect courts to hear their constitutional claims in defense, a proposition for which the Note provides no support. 95 P.3d at 503 (Kinnard, J., concurring and dissenting).

<sup>212</sup> See *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) (“An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”).

<sup>213</sup> Cf. Easterbrook, *supra* note 41, at 924 (“Defense of presidential constitutional power sends chills up many spines. Some fear that Presidents will confuse the Constitution with their parties’ platforms. Others remember the struggle to carry out *Brown v. Board of Education* and equate a power to decide constitutional questions with the power to nullify the Constitution.”).

<sup>214</sup> See *id.* at 8–10, 12. The Little Rock School Board had taken prompt steps to implement an integration plan after *Brown v. Board of Education*, including efforts to include the local community in the process so that integration would proceed smoothly. The Board abandoned this plan only after public hostility “engendered largely by the official attitudes and actions of the Governor and the Legislature” had “harden[ed] the core of opposition to the Plan” so as to make it unworkable in the Board’s view. *Id.* at 10, 12; see also Barron, *supra* note 42, at 571–72 (noting the “localist underpinnings” of *Cooper*).

<sup>215</sup> While the Little Rock School Board did not assert constitutional defenses in court, the Arkansas state government justified its resistance to the court-approved desegregation

that resisted integration during the Civil Rights Movement acted in defiance of recent and directly relevant judicial precedent. San Francisco, in contrast, acted in the *absence* of a clearly applicable judicial opinion.<sup>216</sup> For those concerned about the rule of law, this should be a crucial difference. Empowering government actors in the face of disagreement with other non-judicial government actors is not an attack on judicial supremacy.<sup>217</sup>

Claims are also overblown that the state government will not be able to function if local governments may choose not to perform ministerial duties.<sup>218</sup> As Justice Werdegar noted in her concurrence and dissent in *Lockyer*, San Francisco never expressed any intent not to comply with a court order to cease issuing licenses to same-sex couples.<sup>219</sup> If the courts believed that San Francisco's actions would really cause irreparable injury, they had the opportunity to issue an injunction and stop the city almost immediately. Those opposed to San Francisco's actions brought their concerns before a state judge less than twenty-four hours after the first license issued.<sup>220</sup>

Even after accepting that chaos will not follow from allowing local governments to disobey laws based on constitutional doubts, other objections remain. For example, allowing local governments the power of non-enforcement could impede the ability of the legislature to enlist local governments in statewide programs. Under the current system, the default position is that statutes are enforced until enjoined or struck down by the courts. A system of local government non-enforcement could reverse this presumption by requiring the legislature not only to enact legislation ordering local governments to perform a given function, but also to defend the statute against a court challenge before it would be implemented. Although this would only be true of statutes that could be challenged as violating individual constitutional rights, and only the subset of that category that local governments actually decided to challenge, enough non-frivolous constitutional objections might be raised to hamper the work of the legislature. While the current regime already allows private individuals to bring the challenges that local governments would raise under a revised system, enlisting local governments to police the legislature would presumably increase the number of such claims actually brought. If not, there would be little reason to change the law in the first place.

Given the potentially serious consequences of giving local governments the power not to enforce state statutes that they believe violate individual

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plan in part on federalism grounds. *See Cooper*, 358 U.S. at 10.

<sup>216</sup> *See supra* note 30 and accompanying text.

<sup>217</sup> *See* discussion *supra* Part I.C; *see also supra* note 39 (discussing the decision of Alabama Supreme Court Justice Roy S. Moore to defy a court order to remove a Ten Commandments monument from the courthouse).

<sup>218</sup> *See* Brief of Amicus Curiae County of Santa Clara in Support of Respondents, *supra* note 89, at 1.

<sup>219</sup> *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 510 (Cal. 2004) (Werdegar, J., concurring and dissenting); *see supra* note 78 and accompanying text.

<sup>220</sup> *Lockyer*, 95 P.3d at 465.

constitutional rights, this option should only be adopted if it offers substantially more benefits than the alternative, which is to recognize local governments as having both legal capacity and legal standing to bring their concerns to court.

## 2. *Empowering Cities To Sue*

Allowing local governments to challenge state statutes in court on the grounds that they violate individual constitutional rights would require a less radical shift in legal doctrine and lead to fewer secondary consequences than would allowing direct non-enforcement of constitutionally suspect laws. First, it would only require local governments to use the same level of constitutional judgment required to defend statutes against constitutional challenges brought by private parties, as was contemplated by *Lockyer* and is taking place in New York. Second, it would maintain the current default of legislative control in the absence of imminent and irreparable harm. Third, it would build on the ongoing expansion of legal capacity doctrine rather than requiring more substantial legal change. Finally, the scope of a local government challenge would be relatively narrow. Allowing San Francisco to sue the state over the constitutionality of its marriage laws would not turn local governments into free-roaming constitutional police, bringing enforcement actions whenever they see individual constitutional rights being violated. Rather, local governments could intervene in the name of individual rights only when the potential violation of those rights implicates the government or its officials.

Properly conceived, legal capacity should present no barrier to cities that wish to challenge a state statute on the grounds that enforcing it would violate individual constitutional rights.<sup>221</sup> Despite the strong language of the classic legal capacity cases and the Ninth Circuit's modern-day adherence to that rhetoric, courts that give a more nuanced treatment to the issue have reasoned that legal capacity doctrine speaks only to a city's ability to assert its *own* constitutional rights. In other words, cities are not "persons" protected by the Constitution's guarantees of equal protection, due process, and the like. In a theoretical suit by San Francisco over marriage equality or some procedurally similar issue, however, the city would not assert its own constitutional rights<sup>222</sup> but rather the individual rights that allegedly would be violated if the city acted in accordance with statutory law.<sup>223</sup>

<sup>221</sup> See discussion *supra* Parts III.A–III.C.

<sup>222</sup> See, e.g., *City of Trenton v. New Jersey*, 262 U.S. 182, 183 (1923) (describing city's allegation that a state court judgment against it violated the city's due process rights under the Fourteenth Amendment).

<sup>223</sup> Cf. *City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002) (holding that the city had alleged sufficient harm to itself to support standing); *Sch. Bd. of Richmond v. Baliles*, 829 F.2d 1308, 1310 (4th Cir. 1987) (describing school board's claim that the constitutional rights of its students were being violated by state law); *Safe Alternatives for Fruit Fly Eradication v. Berryhill*, No. 84-1662, 1984 U.S. Dist. LEXIS 16830, at \*6–\*10

Unfortunately, by leaping the hurdle of legal capacity in this manner, cities may have more trouble overcoming the barrier of legal standing. While legal capacity is a doctrine primarily concerned with limiting suits based on structures and hierarchies within the structure of state government, standing focuses on a court's jurisdiction to hear a claim. In suits against states, just as in suits against private entities, the law would not normally allow cities to act as third-party plaintiffs to assert the rights of their citizens.<sup>224</sup> The California Supreme Court has explained that

[T]he question of standing to sue is different from that of capacity. Incapacity is merely a legal disability, such as infancy or insanity, which deprives a party of the right to come into court. The right to relief, on the other hand, goes to the existence of a cause of action. It is not a plea in abatement, as is lack of capacity to sue. Where the complaint states a cause of action in someone, but not in the plaintiff, a general demurrer for failure to state a cause of action will be sustained.<sup>225</sup>

In order to have standing to assert her claims in federal court, a plaintiff must overcome two hurdles: the "constitutional" requirements imposed by Article III, and the "prudential" rules created by the courts themselves. In order to meet the "constitutional" requirements, a plaintiff must allege: (i) that she has suffered an injury that is sufficiently concrete and actual, (ii) that there is a causal connection between the injury and the conduct complained of, and (iii) that there is a likelihood that the injury would be redressed by a favorable court decision.<sup>226</sup> Although these "constitutional requirements" are not explicitly listed in the Constitution itself, the Supreme Court has held that they are inflexible and must be satisfied by all plaintiffs in federal court.<sup>227</sup>

In addition to these minimum requirements, the Court has developed a set of "prudential" requirements designed to optimize the functioning of the judicial system and the adjudication process.<sup>228</sup> Most relevant to this Note, the Court has held that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the

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(C.D. Cal. May 9, 1984) (describing cities' attempt to challenge state pesticide policies under various federal laws on behalf of their citizens).

<sup>224</sup> See, e.g., *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197–98 (9th Cir. 2004); *City of Alameda v. FG Managing Member, Inc.*, No. C 04-04010, 2004 U.S. Dist. LEXIS 22150, at \*10–\*11 (N.D. Cal. Oct. 26, 2004).

<sup>225</sup> *Parker v. Bowron*, 254 P.2d 6, 9 (Cal. 1953); see also *Tinsley v. Palo Alto Unified Sch. Dist.*, 154 Cal. Rptr. 591, 598 (Ct. App. 1979).

<sup>226</sup> See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env'tl Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>227</sup> See, e.g., *Friends of the Earth*, 528 U.S. at 180–81.

<sup>228</sup> See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975).



legal rights or interests of third parties.”<sup>229</sup> Among the justifications put forward for this rule have been concerns about the properly limited role of the judiciary in a democratic society, as well as respect for the right-holders themselves. Such respect recommends “the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them.”<sup>230</sup> As the *Rogers* court argued, this rule also functions to ensure that courts view a problem from the appropriate perspective:

One reason to confer standing on a party is to encourage the court to approach the case from that party’s point of view; the rule against asserting third parties’ rights is intended partly to ensure that the court will approach the case from the point of view of those whom Congress wants to aid or protect or whose rights Congress wants to vindicate.<sup>231</sup>

State courts are not formally bound by either the constitutional or prudential requirements imposed by federal courts.<sup>232</sup> But while the California Supreme Court has explicitly rejected the need to abide by these requirements, the state courts have departed from the federal standard only in rare instances.<sup>233</sup> When they have done so, however, they have justified the departure by the need to avoid injustice, especially in “cases litigating issues in the public interest,”<sup>234</sup> thus creating an exception to standing doctrine in state courts just where cities like San Francisco need it.

Because the requirement is court-imposed, even federal courts are free to modify, limit, or ignore the bar against “third-party standing” if they so choose, and they have been willing to do so under certain circumstances.<sup>235</sup> As the Supreme Court has observed recently, courts have generally waived the third-party standing rule in situations in which: (i) “the party asserting the right has a ‘close’ relationship with the person who possesses the right,” and (ii) “there is a ‘hindrance’ to the possessor’s ability to protect his own interests.”<sup>236</sup> While these judicially created exceptions

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<sup>229</sup> *Id.* at 499.

<sup>230</sup> *Duke Power Co. v. Carolina Envt’l Study Group, Inc.*, 438 U.S. 59, 80 (1978).

<sup>231</sup> *Rogers v. Brockette*, 588 F.2d 1057, 1062 (5th Cir. 1979).

<sup>232</sup> *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 (1977).

<sup>233</sup> *See, e.g., Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221 Cal. Rptr. 99, 104 (Ct. App. 1990); *cf. Pac. Legal Found. v. Cal. Coastal Comm’n*, 655 P.2d 306, 313–14 (Cal. 1982).

<sup>234</sup> *Stocks v. City of Irvine*, 170 Cal. Rptr. 724, 731 (Ct. App. 1981).

<sup>235</sup> *See Kowalski v. Tesmer*, 543 U.S. 125, 127 (2004); *see also Note, Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 427–28 (1974) (suggesting that courts have excused the third-party standing limitation in cases where they believe that plaintiffs deserve to prevail on the underlying substantive constitutional claim and imposed the limitation when they concluded that the underlying claim lacked merit).

<sup>236</sup> *Kowalski*, 543 U.S. at 127.

could be further expanded to allow suits by local governments on behalf of their citizens, it would be preferable to understand such suits in the context of existing exceptions. This approach is pragmatically attractive and recognizes that the doctrine of third-party standing encompasses valid concerns.

Before reaching these exceptions, however, local governments suing in federal court must meet “constitutional” standing requirements. Although cities may not initially appear to have suffered “personal” injury distinct from the constitutional damage done to individual citizens whose rights are violated, as required to escape the constraints of legal capacity, there are at least two possible injuries that they could assert. First, the strict liability tort regime established for local governments by § 1983 means that any constitutional violation committed by a local government exposes it to damages.<sup>237</sup> While the *Lockyer* court correctly pointed out that individual liability only attaches to local officials if the constitutional violation was clear at the time, this offers no consolation for the government entity itself, which has a real interest in avoiding a potential damages judgment. Second, local governments could assert an injury in being forced to become lawbreakers. As the Supreme Court observed in *Board of Education v. Allen*, a personal stake in the outcome of litigation can arise when government officials who have taken an oath to uphold the Constitution are put “in the position of having to choose between violating their oath and taking a step—refusal to comply with [a statute]—that would be likely to bring their expulsion from office and also a reduction in state funds.”<sup>238</sup>

If a local government has met the constitutional standing requirements, it should have little trouble overcoming the first prong of the exception to third-party standing—asserting a close relationship with the right-holder. Cities like San Francisco would argue that if required to comply with a statute, they themselves would necessarily violate the rights of third parties. It is exactly in situations such as this where courts have been confronted by “dutyholder-plaintiffs” that they have relaxed the bar on third-party standing.<sup>239</sup>

The requirement that there be some barrier to the right-holders asserting their own rights presents a more difficult problem. With regard to California’s marriage laws, the standard barriers of stigma and lack of plaintiffs would probably not have prevented same-sex couples from challenging the statute. Rather, the lack of suit likely reflected a strategic choice on the part of the GLBT community, under the leadership of non-profit civil rights organizations. In many instances, however, those whose rights are being violated may be unable to mount a legal challenge for many reasons, including apathy or lack of resources. While such hurdles practically inhibit a

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<sup>237</sup> See discussion *supra* Part II.B.

<sup>238</sup> 392 U.S. 236, 241 n.5 (1968).

<sup>239</sup> Note, *supra* note 235, at 425 n.17.

suit, they most likely do not present enough of a barrier to trigger the third-party standing rule.

Suits by local governments to assert individual rights might be attractive precisely because of third-party standing doctrine's concern that the identity of the plaintiff will shape the perspective from which courts view an issue. With local government bodies as plaintiffs, the underlying constitutional claims begin to seem more legitimate. Even if the local government is perceived as being at the margins of society at large, at the very least it represents a diverse population, not all of whom belong to the injured class. Were San Francisco, Benton County, New Paltz, and Asbury Park to go to courts around the country to argue for marriage equality, judges concerned about acting anti-democratically might approach the case more sympathetically than if Lambda, the ACLU, or GLAD brought suit on behalf of individual plaintiffs. These are arguments that apply uniquely to government bodies, which could justify a departure from the third-party standing rules originally developed to bar third-party suits brought by private persons or associations.

For proponents of the current system, in which cities are prevented from raising direct challenges to statutes they believe to be unconstitutional, the prospect of recognizing a right of local governments to sue their states might raise the specter of governmental gridlock and of a chilling effect on state legislatures. In the extreme, such a system could force legislatures to justify many of their enactments in court. In fact, one of the premises for advocating change in the current system is that more legislation *will* get into court more quickly. But one need not expect an unreasonable avalanche of suits brought by local governments. Few, if any, local governments have the resources necessary to bring frivolous lawsuits. Indeed, this is one advantage of expanding the ability of cities to sue rather than empowering them to disobey legislation directly. The higher costs of the former option are likely to cut down on claims that do not rest on a firm and genuine constitutional conviction. While empowering cities to sue would probably bring more legislation before the courts, such legislation would likely be constitutionally suspect.

To supporters of San Francisco's approach, however, empowering cities to sue may seem too slow and too limited. From this perspective, local governments should not be forced to participate in violating individual constitutional rights for the years that a judicial challenge might take to creep through the court system. Furthermore, the burden should not be on cities to make the initial investment of time and energy to file a lawsuit against a statute but rather on the state to take cities to court if it disagrees with their interpretation. In addition, a court case simply does not carry the full power of direct municipal action. As discussed above, San Francisco's actions had consequences far beyond attracting judicial attention

to an allegedly unconstitutional statute.<sup>240</sup> Indeed, in light of the *Lockyer* court's refusal to adjudicate the underlying issue of the validity of the state's marriage law, San Francisco's action served this narrow purpose poorly, or at least indirectly, but that did not render the action useless.

#### CONCLUSION

On March 14, 2005, more than a year after the City of San Francisco issued a marriage license to Del Martin and Phyllis Lyon, and just six months after the California Supreme Court declared their marriage void, a California Superior Court held that the state's ban on marriage for same-sex couples could not survive under the California Constitution.<sup>241</sup> On September 6, 2005, the California Legislature became the first in the nation to pass a bill legalizing marriage for same-sex couples.<sup>242</sup> These were momentous developments even though the California Supreme Court may overrule the Superior Court, and the governor has already vetoed the legislature's bill.<sup>243</sup> If California does end up sanctioning marriage for same-sex couples, it will not be solely the result of marriage licenses granted by San Francisco in 2004. Nonetheless, the San Francisco marriages altered the landscape of the marriage equality debate, in California as well as nationally.<sup>244</sup> For good or ill, in the wake of thousands of same-sex marriages granted at San Francisco City Hall, judges and politicians with the ultimate power to determine the legality of the state's ban on such unions now live in a state that has already seen same-sex couples wed. It is understandable that the exercise of such power by one local government would spur the California Supreme Court to come down hard on San Francisco for abandoning its "proper" place in the governmental hierarchy. Given the highly charged nature of the debate over marriage for same-sex couples, it is equally understandable that non-judicial observers on both sides of the issue would raise structural objections to San Francisco's entrance into the fray. But, while such structural arguments are tempting, this

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<sup>240</sup> See discussion *supra* Part I.A.

<sup>241</sup> Tentative Decision on Applications for Writ of Mandate and Motions for Summary Judgment, *supra* note 29, at 23.

<sup>242</sup> See Lynda Gledhill, *Gay Marriage up to Governor Now, Legislation Clears Assembly by Narrowest of Margins on Second Try*, S.F. CHRON., Sept. 7, 2005, at A1.

<sup>243</sup> See Lynda Gledhill & Wyatt Buchanan, *Governor's Gay-Rights Moves Please No One, Marriage Bill Vetoed, Partner Benefits Preserved*, S.F. CHRON., Sept. 30, 2005, at A1.

<sup>244</sup> See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1764-66 (2005) ("San Francisco's decision to marry gays and lesbians . . . generated ripple effects that conventional expressions of dissent had never generated. It was not merely that the decision emboldened other jurisdictions in New Jersey, New York, New Mexico, and Oregon to follow suit. The decision also meant that attorneys general in other states had to decide whether to recognize those marriages. The California courts were forced to decide whether the marriages were lawful. And elected officials across the country found it difficult to avoid taking a position on the issue because it was no longer merely a theoretical debate.").

Note has argued that they fail to take into account the complex role that local governments play in constitutional rights protection.

Our systems of law and government depend on local governments to uphold the constitutions of the United States and of their states. In passing municipal ordinances and applying ambiguous state and federal laws, local governments must always obey constitutional constraints. Given that all government functions ultimately must comply with the Constitution, those seeking to bar local governments from attempting to conform their actions to the Constitution should bear the persuasive burden. Indeed, the regime of constitutional tort liability under § 1983 takes exactly this approach, imposing strict liability on local governments for constitutional rights violations and holding individual officials to a high standard if they wish to escape liability through the doctrine of qualified immunity. *Lockyer* and classic legal capacity doctrine reject this underlying presumption of constitutional democracy without even acknowledging the conflict, let alone giving a convincing justification for limiting local governments' ability to engage in meaningful constitutional interpretation. In light of the responsibility and trust that we place in local governments to interpret and obey the Constitution in other areas, the narrow view of local governments that emerges from *Lockyer* and the Ninth Circuit's interpretation of legal capacity are anomalous, less than fully coherent, and in need of reform. Local governments should be trusted to reach valid conclusions about the constitutionality of state statutes, and they should be empowered to take meaningful legal action to assert those views when they believe that following the statutory mandate would lead to the violation of individual constitutional rights.

