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The King Can Truly Do No Wrong: Governmental Immunity and Rights Relative to the Crown in North Carolina After Bynum

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The King Can Truly Do No Wrong: Governmental Immunity and Rights Relative to the Crown in North Carolina After *Bynum*[*]

> *Under our system the people, who are [in England] called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of the monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered.*[1]
>
> —*JUSTICE SAMUEL FREEMAN MILLER*

INTRODUCTION

The notion that government entities—federal, state, or local—are largely or entirely exempt from defending ordinary actions in court has long enjoyed the comfort of being treated as "an established doctrine."[2] Indeed, despite originating entirely as a creature of common law, the courts of North Carolina view the doctrine as so well established that they have, for at least the last four decades, entirely ceded any responsibility for modifying or abrogating the rule to the North Carolina General Assembly.[3] Despite the considerable

1. United States v. Lee, 106 U.S. 196, 208 (1882).

2. *See id.* at 207 ("[T]he exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has . . . been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."); The Siren, 74 U.S. 152, 164 (1868) ("Now, no principle at common law is better settled than that the government is not liable for the wrongful acts of her public agents."); Hill v. United States, 50 U.S. 386, 389 (1850) ("No maxim is thought to be better established, or more universally assented to, than that which ordains that a sovereign, or a government representing the sovereign, cannot *ex delicto* be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends. A departure from this maxim can be sustained only upon the ground of permission on the part of the sovereign or the government expressly declared . . . ."); N.C. Ins. Guar. Ass'n v. Bd. of Trs. of Guilford Technical Cmty. Coll., 364 N.C. 102, 107, 691 S.E.2d 694, 697 (2010) ("It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless by statute it has consented to be sued or has otherwise waived its immunity from suit.").

3. Steelman v. City of New Bern, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971) ("[A]ny further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court.").

confusion[4] and disdain[5] surrounding the doctrine, both the courts and the general assembly have shown minimal interest in either revisiting the doctrine's historical (mis)conceptions or curtailing its contemporary application.[6]

The present-day scope of the doctrine of governmental immunity in North Carolina was recently outlined in *Bynum v. Wilson County*,[7] where a majority of the Supreme Court of North Carolina effectively barred plaintiffs from bringing claims for harms occurring on any county or municipal property.[8] By framing its holding in the language of precedent and underscoring its reluctance to modify or repeal the doctrine of governmental immunity without the general assembly's consent, the majority implicitly argued that its holding was representative of the current state of affairs in North Carolina.[9] However, as this Recent Development will suggest, the holding could have new and far-reaching effects on the remedies available to potential plaintiffs injured on government property, while presenting a renewed opportunity to examine the contemporary appropriateness of a doctrine that could generously be described as "unsound."[10]

Analysis proceeds in four parts. Part I provides an overview of governmental immunity in North Carolina by examining the case law that serves as the backbone of this common law doctrine. Part II presents the facts at issue and analyzes the competing opinions in the

4. *See, e.g.*, Bynum v. Wilson Cnty., 367 N.C. 355, 360, 758 S.E.2d 643, 647 (2014) (Martin, J., concurring) ("Despite efforts over many years to bring clarity and predictability to the law of governmental immunity, this goal has remained somewhat elusive.").

5. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426 (1987) (" '[S]overeignty' has become an oppressive concept in our courts. A state government that orders or allows its officials to violate citizens' federal constitutional rights can invoke 'sovereign' immunity from all liability—even if such immunity means that the state's wrongdoing will go partially or wholly unremedied."); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001) ("Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law.").

6. *See Steelman*, 279 N.C. at 589, 184 S.E.2d at 239 (holding that "any . . . modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court").

7. 367 N.C. 355, 758 S.E.2d 643 (2014).

8. *Id.* at 361, 758 S.E.2d at 647 (Martin, J., concurring) ("This reasoning would seem to create a categorical rule barring *any* premises liability claims against counties or municipalities for harms that occur on government property.").

9. *See id.* at 360, 758 S.E.2d at 647 (majority opinion) ("The rule set out by the Court of Appeals . . . is inconsistent with our precedent on governmental immunity. Accordingly, we reverse th[at] decision . . . .").

10. *See Steelman*, 279 N.C. at 595, 184 S.E.2d at 243 ("It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted.").

Bynum court's recent decision, which dramatically altered the law of governmental immunity in North Carolina. Part III continues the discussion by arguing that the concurring opinion in *Bynum* was the correct one, both in terms of respecting precedent and limiting the effects of this anachronistic doctrine. Finally, Part IV uses the *Bynum* decision to reconsider the foundation and merits of governmental immunity and urges the general assembly to find that the doctrine, derived from long-discredited notions of royal infallibility, is indefensible under both the United States and North Carolina constitutions and is generally inconsistent with the purposes of assigning tort liability.

I. GOVERNMENTAL IMMUNITY IN NORTH CAROLINA

Before turning to the impact and implications of the *Bynum* decision, it is important to examine the jurisprudential development of governmental immunity in North Carolina. While Part IV of this Recent Development will examine the contemporary criticisms of the doctrine and the responses of several state legislatures to those critiques, this Part focuses exclusively on the evolution of the doctrine and the case law that provides a backdrop for a full consideration of the decision in *Bynum*. Section A of this Part briefly sketches the foundations of the doctrine in the State and provides the necessary perspective for a full consideration of the court's task in *Bynum*. Section B of this Part details the North Carolina courts' attempts to delineate a line of case law establishing the boundaries of local government liability.

A. The History of Governmental Immunity in North Carolina

For well over a century, North Carolina has recognized the rule of governmental, or sovereign, immunity,[11] under which a county or

11. Historically, sovereign immunity applied to the state and its agencies while governmental immunity applied to municipal corporations. Older rulings held that "[c]ounties are not, in a strictly legal sense, municipal corporations, like cities and towns" and "[i]n the exercise of ordinary governmental functions, they are simply agencies of the state." O'Berry v. Mecklenburg Cnty., 198 N.C. 357, 360, 151 S.E. 880, 882 (1930). However, more recent decisions have erased both the distinction between governmental and sovereign immunity and the distinction between counties and municipalities for the purpose of immunity. *See, e.g.*, *Bynum*, 367 N.C. at 359–60, 758 S.E.2d at 646–47 (finding that Wilson "County is entitled to summary judgment on the basis of governmental immunity" and using "municipality" in a discussion of Wilson County); Estate of Williams *ex rel.* Overton v. Pasquotank Cnty. Parks & Recreation Dep't, 366 N.C. 195, 204, 732 S.E.2d 137, 144 (2012) (expressing no opinion "on whether [the county] in this case [is] ultimately entitled to governmental immunity").

municipality "is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity."[12] The courts of North Carolina have long held as "an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless by statute it has consented to be sued or has otherwise waived its immunity from suit."[13] By extension, "a subordinate division of the state, or agency exercising statutory governmental functions . . . may be sued only when and as authorized by statute."[14]

However, governmental immunity has not, at least historically, been without limits. Traditionally, the doctrine "covers *only* the acts of a municipality or a municipal corporation committed pursuant to its governmental functions."[15] According to the historical conception of the doctrine, governmental immunity did not apply when a county or municipality engaged in a proprietary activity by "undertak[ing] functions beyond its governmental and police powers and engag[ing] in business in order to render a public service for the benefit of the community for a profit."[16] The question of governmental immunity has, therefore, traditionally turned on whether the alleged conduct arose from an activity that was governmental or proprietary in nature.[17] A governmental function is an activity that is "discretionary, political, legislative, or public in nature and performed for the public good on behalf of the State rather than for itself."[18] Conversely, a

12. *Williams*, 366 N.C. at 198, 732 S.E.2d at 140 (quoting Evans *ex rel.* Horton v. Hous. Auth. of Raleigh, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004)); *see* Moffitt v. City of Asheville, 103 N.C. 237, 255, 9 S.E. 695, 697 (1889) (adopting the doctrine of governmental immunity by stating a city or town "incurs no liability for the negligence of its officers" acting under authority conferred by its charter or for the sole benefit of the public); *see also* Koontz v. City of Winston-Salem, 280 N.C. 513, 519, 186 S.E.2d 897, 902 (1972) ("This Court has not departed from the rule of governmental immunity adopted in the year 1889.").

13. N.C. Ins. Guar. Ass'n v. Bd. of Trs. of Guilford Technical Cmty. Coll., 364 N.C. 102, 107, 691 S.E.2d 694, 697 (2010) (quoting Smith v. Hefner, 235 N.C. 1, 6, 68 S.E.2d 785, 787 (1952)).

14. *Id.* (quoting Smith v. Hefner, 235 N.C. 1, 6, 68 S.E.2d 785, 787 (1952)).

15. *Williams*, 366 N.C. at 199, 732 S.E.2d at 141 (quoting Evans *ex rel* Horton v. Hous. Auth. of Raleigh, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004)) (internal quotation marks omitted).

16. *Id.* (quoting Town of Grimesland v. City of Washington, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951)) (internal quotations marks omitted).

17. *Id.*

18. *Id.* (quoting Britt v. City of Wilmington, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952)). Examples of activities that North Carolina courts have held to be governmental include the operation of a public library, *see* Seibold v. Kinston-Lenoir Cnty. Pub. Library, 264 N.C. 360, 361, 141 S.E.2d 519, 519 (1965) (per curiam) ("The operation of a public

proprietary function is "commercial or chiefly for the private advantage of the compact community."[19]

Given that "any further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court,"[20] North Carolina's "threshold inquiry in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue."[21] In the absence of a statute that preempts governmental immunity, when a county or municipality is "acting in the exercise of police power, or judicial, discretionary, or legislative authority, conferred by its charter *or by statute* . . . it is not liable."[22] Therefore, as the court's language in *Estate of Williams ex rel. Overton v. Pasquotank County Parks & Recreation Department* makes clear, the threshold question is not only whether the legislature has addressed the localities' ability to act, but also *to what degree* it has addressed the question.[23] If the legislature has merely granted counties permission to act on an issue, the degree to which it has addressed the question, in the courts' view, is substantially less and the activity is therefore more likely to be proprietary. In contrast, if the legislature has required counties to act, the activity is more likely to be governmental.[24] Accordingly, courts have focused on the statutory language granting counties the authority to act on certain matters.[25]

Highlighting this important distinction between permissive and required statutory language, several North Carolina statutes grant legislative authority to counties to perform functions that have

library meets the test of 'governmental function,' as stated in repeated decisions rendered by this Court."), and the operation of a register of deeds office, *see* Robinson v. Nash Cnty., 43 N.C. App. 33, 36, 257 S.E.2d 679, 681 (1979) (finding that the operation of a register of deeds office "is clearly a governmental function for which the county enjoys immunity from suit for negligence").

19. *Williams*, 366 N.C. at 199, 732 S.E.2d at 141 (quoting Britt v. City of Wilmington, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952)). Examples of activities that North Carolina courts have held to be proprietary in nature include the operation of a convention center, *see* Aaser v. City of Charlotte, 265 N.C. 494, 497, 144 S.E.2d 610, 613 (1965), and the act of contracting for the construction of a sewer system, *see* Town of Sandy Creek v. E. Coast Contracting, Inc., __ N.C. App. __, __, 741 S.E.2d 673, 674 (2013).

20. Steelman v. City of New Bern, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971).

21. *Williams*, 366 N.C. at 200, 732 S.E.2d at 141–42.

22. Stephenson v. City of Raleigh, 232 N.C. 42, 46, 59 S.E.2d 195, 198 (1950) (emphasis added).

23. *Williams*, 366 N.C. at 200, 732 S.E.2d at 141–42.

24. *See id.*

25. *See* McIver v. Smith, 134 N.C. App. 583, 586, 518 S.E.2d 522, 525 (1999) ("It is also noteworthy that the legislature granted counties the power to operate ambulance services in all or part of their respective jurisdictions.").

traditionally been held to be proprietary—not governmental—functions.[26] For example, pursuant to one statute, counties may construct, own, and operate other public enterprises, including airports and public transit systems.[27] Yet courts have held that such "public enterprises are proprietary by nature" and do not entitle counties to governmental immunity.[28] In these instances of permissive language, the grant of legislative authority has historically been considered instructive and "noteworthy" but not determinative.[29]

B. Consideration of Governmental Immunity by the North Carolina Courts

Given that the ultimate determination of whether an activity is governmental or proprietary therefore turns on the degree to which the legislature has addressed the issue—a "fact intensive inquiry" that "may differ from case to case"[30]—the courts' approach to previous inquiries outlines the boundaries of the doctrine. The cases that follow show not only that the courts are willing to find that a permissive grant from the legislature fails to designate a specific activity as governmental but also that the courts have been willing to distinguish proprietary portions of an inherently governmental activity to assign liability to a locality.

Aaser v. City of Charlotte,[31] one of North Carolina's leading cases on governmental immunity prior to *Bynum*,[32] clearly tracks the distinction between governmental and proprietary functions. In *Aaser*, the Supreme Court of North Carolina held that when a "city is engaging in a proprietary function . . . the liability of the city . . . to the plaintiff for injury, due to an unsafe condition of the premises, is the same as that of a private person or corporation."[33] Based on this

26. *See, e.g.*, *infra* note 27 and accompanying text.

27. N.C. GEN. STAT. §§ 153A-274 to -275 (2013).

28. *McIver*, 134 N.C. App. at 588, 518 S.E.2d at 526; *see also* Hare v. Butler, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235 (1990) ("Non-traditional governmental activities such as the operation of a golf course or an airport are usually characterized as proprietary functions.").

29. *See generally McIver*, 134 N.C. App. at 586, 518 S.E.2d at 525 (explaining that the focus should be on the *nature* of the service rather than the provider of the service).

30. Bynum v. Wilson Cnty., ___ N.C. App. ___, ___, 746 S.E.2d 296, 302 (2013) (quoting Estate of Williams *ex rel.* Overton v. Pasquotank Cnty. Parks & Recreation Dep't, 366 N.C. 195, 203, 732 S.E.2d 137, 143 (2012)), *rev'd in part*, 367 N.C. 355, 758 S.E.2d 643 (2014).

31. 265 N.C. 494, 144 S.E.2d 610 (1965).

32. *See* Bynum v. Wilson Cnty., 367 N.C. 355, 361, 758 S.E.2d 643, 647 (2014) (Martin, J., concurring) (leading with *Aaser* to show that the majority's approach is "inconsistent with our long-standing precedent").

33. *Aaser*, 265 N.C. at 497, 144 S.E.2d at 613.

reasoning, the court held that by operating and leasing a coliseum, Charlotte had engaged in a proprietary activity and could incur liability for injuries sustained on the premises.[34] In contrast, cases where the defendant county was engaged in a clearly governmental activity have established a precedent that precludes liability where the plaintiff was injured on government property, such as by falling down the steps of a register of deeds office[35] or a government-owned library.[36]

However, even if a county provides a governmental service in the broadest sense, it may still be liable if a specific part of that service is proprietary. In *Williams*, a case very similar to *Aaser*, an individual drowned in a public park that was owned and operated by the defendant, Pasquotank County.[37] However, the drowning occurred in an area of the park known as the "Swimming Hole" that was rented out to private parties in exchange for a fee.[38] The trial court, in an order upheld by a unanimous court of appeals panel,[39] denied the county's motion for summary judgment based on governmental immunity and ruled that the county "charged and collected a fee . . . [while] providing the same type of facilities and services that private individuals or corporations could provide."[40] In reviewing the lower courts' decisions, the state supreme court acknowledged that the general assembly had statutorily established that the "creation, establishment, and operation of parks and recreation programs is a proper governmental function"[41] but remanded the case for further consideration of whether the "specific operation of the Swimming

34. *See id.* at 501, 144 S.E.2d at 616 (ultimately concluding that the evidence "does not justify an inference that such activity was either dangerous or recurring or known to the city" and granting the motion for judgment of nonsuit).

35. Robinson v. Nash Cnty., 43 N.C. App. 33, 36, 257 S.E.2d 679, 681 (1979) (holding that the operation of a register of deeds office "is clearly a governmental function for which the county enjoys immunity from suit for negligence").

36. Seibold v. Kinston-Lenoir Cnty. Pub. Library, 264 N.C. 360, 361, 141 S.E.2d 519, 520 (1965) (per curiam) ("The operation of a public library meets the test of 'governmental function,' as stated in repeated decisions rendered by this Court.").

37. 366 N.C. 195, 196, 732 S.E.2d 137, 139 (2012).

38. *Id.* at 196–97, 732 S.E.2d at 139.

39. Estate of Williams *ex rel.* Overton v. Pasquotank Cnty. Parks & Recreation Dep't, 211 N.C. App. 627, 632, 711 S.E.2d 450, 454 (2011).

40. Order Denying Defendants' Limited Motion for Summary Judgment at 69, Estate of Williams *ex rel.* Overton v. Pasquotank Cnty. Parks & Recreation Dep't, No. 08 CVS 927, 2009 WL 8666345 (N.C. Super. Ct. 2009).

41. *Williams*, 366 N.C. at 201, 732 S.E.2d at 142 (quoting N.C. GEN. STAT. § 160A-351 (2013)).

Hole component of [the park], in this case and under these circumstances, [was] a governmental function."[42]

Likewise, in *Town of Sandy Creek v. East Coast Contracting*[43] the court again parsed governmental authority and noted that, although the "construction of a sewer system is a governmental function[,]" the "allegations of breaches of the duty of reasonable care [arising from contracts to build that sewer system] do not concern decisions of government discretion."[44] Thus the court found that "a local governmental unit acts in a proprietary function when it contracts with engineering and construction companies, regardless of whether the project under construction will be a governmental function once it is completed."[45] This ruling solidified the premise of *Williams*—that even where a county is operating under a broad grant of statutory authority, the courts should continue to determine whether the specific operation at issue is a governmental or a proprietary function.

Therefore, the courts' jurisprudence has firmly established a precedent under which judges must first evaluate whether, and to what degree, the legislature has addressed the issue in question. If the legislature has not addressed the activity or has merely given counties permission to engage in the activity without requiring that they do so, the activity is, at least historically, unlikely to be viewed as governmental and therefore immunized from suit. However, where the legislature is silent or merely permissive, the courts have also viewed the determination of whether an activity is proprietary or governmental to be a "fact intensive inquiry" that may "differ from case to case."[46] It was against this precedential backdrop that the Supreme Court of North Carolina took up the appeal in *Bynum*.

II. *BYNUM V. WILSON COUNTY*

Notwithstanding the extensive jurisprudential history of governmental immunity claims in North Carolina, a majority of the supreme court in *Bynum* not only found that the legislature had addressed the maintenance of public buildings to a much greater degree than had previously been contemplated but eschewed much, if not all, of the fact-specific investigation that had guided previous inquiries. Section A of this Part sets out the facts and procedural

42. *Id.* The case has not been resolved on remand.

43. ___ N.C. App. ___, 741 S.E.2d 673 (2013).

44. *Id.* at ___, 741 S.E.2d at 675–76.

45. *Id.* at ___, 741 S.E.2d at 677.

46. Bynum v. Wilson Cnty., ___ N.C. App. ___, ___, 746 S.E.2d 296, 302 (2013) (quoting *Williams*, 366 N.C. at 203, 732 S.E.2d at 143).

history of Bynum, while Sections B through D detail the competing logic of the opinions put forth by the court of appeals, the supreme court's majority, and the supreme court's concurrence. While an analysis of the merits of each of the three positions is reserved for Part III, the precedential teachings provided by the cases in Part I are particularly relevant to the consideration of the opinions detailed below.

A. Facts and Procedural History

Defendant-Appellant Wilson County leased an office building ("Miller Road Building") where it housed a number of county departments and divisions, including "the county commissioners meeting room, the planning department, the inspections department, the water department, the finance department, the human resources department, and the office of the county manager."[47] Plaintiff-Appellee James Earl Bynum entered the Miller Road Building on April 15, 2008 to pay his water bill.[48] After paying his bill, Mr. Bynum fell while walking down the front exterior steps of the building and sustained serious injuries resulting in paralysis of his legs and right arm.[49]

Mr. Bynum subsequently filed a complaint, which, after amendment, alleged that defendants

> negligently failed to inspect, maintain, and repair the Miller Road building steps, failed to meet the requirements of the North Carolina Building Code, failed to install a required handrail, failed to be aware of and warn of a hidden danger, and failed to ensure that the Miller Road building was accessible to the public in a safe condition.[50]

After Mr. Bynum's death, his wife ("Ms. Bynum") continued "the action both in her individual capacity and as administratrix of [the] estate" and amended "the complaint to assert a wrongful death claim."[51]

In February 2012, Wilson County filed a motion for summary judgment asserting, *inter alia*, governmental immunity.[52] The trial

47. Bynum v. Wilson Cnty., 367 N.C. 355, 356, 758 S.E.2d 643, 644–45 (2014).
48. *Id.* at 356, 758 S.E.2d at 645.
49. *Id.*
50. *Id.* at 357, 758 S.E.2d at 645.
51. *Id.*
52. *Id.*

court denied the motion,[53] and the defendants subsequently appealed.[54] Although it dismissed the "non-immunity-related challenges" as interlocutory in nature, the North Carolina Court of Appeals ruled on the trial court's determination of governmental immunity by following established precedent from the Supreme Court of North Carolina.[55]

B. The Opinion of the Court of Appeals

Following Wilson County's appeal of the trial court's order denying its motion for summary judgment, a three-judge panel of the North Carolina Court of Appeals reconsidered the lower court's decision. Adhering to the well-established precedent of the Supreme Court of North Carolina,[56] a unanimous court of appeals determined that "the proper designation of a particular action of a county or municipality is a fact intensive inquiry, turning on the facts alleged in the complaint, and may differ from case to case."[57] In examining the facts of *Bynum*, the court of appeals relied heavily on precedent—including *Aaser*, *Sandy Creek*, and *Williams*—and focused both on the nature of the defendant-government's actions and on the interaction between defendant and plaintiff.[58]

The court of appeals' interpretation of this precedent led it to conclude that the determinative factor in deciding if "a particular injury resulted from a governmental or proprietary activity is the nature of the plaintiff's involvement with the governmental unit and the reason for the plaintiff's presence at a governmental facility."[59] While material, "the underlying tasks which the governmental entity allegedly performed in a negligent manner" are not dispositive of liability.[60] Therefore, "where a plaintiff is injured as a result of his or her involvement with a governmental function . . . the relevant governmental entity is immune from suit. . . . [But] if a plaintiff is injured as a result of his or her involvement with a proprietary

53. Order at 496, Bynum v. Wilson Cnty., No. 08 CVS 2443, 2012 WL 11818632, at *1 (N.C. Super. Ct. 2012).

54. *Bynum*, 367 N.C. at 357, 758 S.E.2d at 644–45.

55. Bynum v. Wilson Cnty., ___ N.C. App. ___, ___, 746 S.E.2d 296, 307 (2013), *rev'd in part*, 367 N.C. 355, 758 S.E.2d 643 (2014).

56. *See Bynum*, 367 N.C. at 362, 758 S.E.2d at 648 (Martin, J., concurring) ("[W]e have performed case-by-case inquiries in our previous governmental immunity cases.").

57. *Bynum*, ___ N.C. App. at ___, 746 S.E.2d at 302 (quoting Estate of Williams *ex rel.* Overton v. Pasquotank Cnty. Parks & Recreation Dep't, 366 N.C. 195, 203, 732 S.E.2d 137, 143 (2012)).

58. *Id.* at ___, 746 S.E.2d at 303.

59. *Id.*

60. *Id.*

function . . . then governmental immunity is not available."[61] Accordingly, the court ruled that since North Carolina has "long held that a municipal corporation selling water for private consumption is acting in a proprietary capacity and can be held liable for negligence just like a privately owned water company,"[62] the trial court did not err in denying the defendant's motion for summary judgment on governmental immunity grounds.[63]

C. The Supreme Court's Majority Opinion

Following the court of appeals' rejection of its appeal, Wilson County requested further review from the Supreme Court of North Carolina. In language that now reads more like a roadmap to the court's eventual conclusion than a synopsis of the hurdle that laid before the county, the plaintiff identified Wilson County's burden on appeal:

> The case here passes every test argued by Wilson County and the various *amici* except one—that if any part of a building is used for a governmental purpose then the entire building, steps, parking lot and land are immunized from suit despite the fact proprietary functions are also taking place on site. This Court has never gone there.[64]

In taking up Wilson County's appeal from the lower court, the majority of the supreme court not only jumped at the above "invitation" from the plaintiff-appellee's brief, but also apparently extended governmental immunity to include any building that is owned, used, constructed, or maintained by a county—whether or not that building is used (in whole or in part) for a governmental purpose.[65] In short, the majority of the court not only went where it has never gone before but, apparently, beyond.

Justice Jackson, writing for the majority—in a statement that both the court of appeals and the concurring justices would likely agree with—begins her analysis with the observation that the

61. *Id.*

62. *Id.* (quoting Fussell v. N.C. Farm Bureau Mut. Ins. Co., 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010)).

63. *Bynum*, ___ N.C. App. at ___, 746 S.E.2d at 307.

64. Plaintiffs-Appellees' New Brief at 25, Bynum v. Wilson Cnty., 367 N.C. 355, 758 S.E.2d 643 (2014) (No. 380PA13), 2013 WL 6901617, at *26.

65. *See* Bynum v. Wilson Cnty., 367 N.C. 355, 361, 758 S.E.2d 643, 647 (2014) (Martin, J., concurring) ("This reasoning would seem to create a categorical rule barring *any* premises liability claims against counties or municipalities for harms that occur on government property.").

availability of governmental immunity "turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature."[66] This threshold statement of law is consistent with the long-standing jurisprudence on governmental immunity detailed in cases like *Williams*, *Aaser*, and *Sandy Creek*. However, in applying the test established by cases like *Williams*[67] to determine if a specific activity is governmental or proprietary, the majority opinion broke sharply from precedent in a shift made clear and denounced by the concurrence.

The focal point of the majority's concern with the lower court's decision, and its basis for departing from precedent, was that the court's reasoning would "subject[] different plaintiffs injured by the same act or omission to different immunity analyses on the basis of their reasons for visiting the same county property."[68] The supreme court, relying heavily on *Williams*, firmly stated that the rule set out by the court of appeals was inconsistent with established precedent.[69] Moreover, the majority found that the general assembly had statutorily assigned the "responsibilities of locating, supervising, and maintaining the county buildings that provide [discretionary, legislative, or public] functions."[70] Specifically, the majority focused on Chapter 153A of the North Carolina General Statutes, which requires all counties in North Carolina to "supervise the maintenance, repair, and use of *all county property*"[71] and "to perform duties and responsibilities associated with enforcing State and local laws and ordinances relating to, *inter alia*, construction and maintenance of buildings."[72] Directly after citing these statutes, the majority found that the legislature had addressed this activity to a sufficient degree to rule it a governmental activity under *Williams* and summarily concluded that "the fact that the legislature has designated these responsibilities as governmental is dispositive."[73] Without so much as discussing the effect of this holding on rulings such as *Aaser* or *Sandy*

66. *Id.* at 358, 758 S.E.2d at 646 (majority opinion) (quoting Estate of Williams *ex rel.* Overton v. Pasquotank Cnty. Parks & Recreation Dep't, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012)).

67. *See supra* notes 37–42 and accompanying text.

68. *Bynum*, 367 N.C. at 360, 758 S.E.2d at 647.

69. *See id.* ("The rule set out by the Court of Appeals . . . is inconsistent with our precedent on governmental immunity.").

70. *Id.*

71. N.C. GEN. STAT. § 153A-169 (2013) (emphasis added).

72. *Bynum*, 367 N.C. at 360, 758 S.E.2d at 647 (citing N.C. GEN. STAT. §§ 153A-351 to -352 (2013)).

73. *Id.*

Creek, the majority opinion reversed the lower courts' decisions and remanded.[74]

D. The Supreme Court's Concurring Opinion

The concurring opinion[75] wastes little time in voicing the concern "that the reasoning employed in the majority opinion may categorically bar claims for harms occurring on county or municipal property."[76] While acknowledging the shortcomings of the "efforts over many years to bring clarity and predictability to the law of governmental immunity[,]"[77] the concurring opinion correctly notes that *Bynum* upends existing precedent.[78] Justice Martin notes that the majority would reject *Aaser* and instead find that "a municipality that owns and operates a sports arena to produce revenue would be immune from claims arising from its failure to properly maintain its facility."[79] Likewise, in *Williams*, the majority's reasoning would have rendered moot the fact "that the County charged rental fees for use of the 'Swimming Hole' in which the decedent drowned—because the property was owned by the County."[80]

In contrast to the majority, the concurring justices' analysis turned on the question of whether the building itself served a governmental—rather than proprietary—function. The concurring opinion notes that the Miller Road Building, "which is open to the public, houses the county commissioner's meeting room, the county manager's office, and several county departments, including water, finance, planning, inspections, human resources, and geographic information systems."[81] Additionally, the Miller Road Building provides the citizens of Wilson County a "convenient location . . . to access numerous government offices and services" and, as the majority pointed out, "serves the County's discretionary, legislative, and public functions, several of which only may be performed by the Wilson County government."[82]

74. *Id.*

75. The concurring opinion was written by Justice Martin and was joined by Justices Edmunds and Beasley. *Id.* at 360–362 (Martin, J., concurring).

76. *Id.* at 360, 758 S.E.2d at 647.

77. *Id.*

78. *Id.* at 361, 758 S.E.2d at 647 ("This result is inconsistent with our long-standing precedent.").

79. *Id.*

80. *Id.* at 361, 758 S.E.2d at 648.

81. *Id.* at 362, 758 S.E.2d at 648.

82. *Id.*

Using this line of reasoning, the concurring opinion arrives at the same result as the majority while addressing the majority's legitimate concern of "subjecting different plaintiffs injured by the same act or omission to different immunity analyses on the basis of their reasons for visiting the same county property."[83] While that concern may in fact be legitimate, the concurrence makes clear that the majority opinion was not a necessary outcome in this case. Indeed, under the concurring opinion's holding, Mr. Bynum—visiting the Miller Road Building for a proprietary reason—would be treated no differently than someone visiting the building to attend a meeting of the county commissioners, to register a deed, or to take advantage of any number of the other *governmental* services offered at the building. As instructed by precedent, the three concurring justices focus on the "character of the municipality's acts, rather than the nature of the plaintiff's involvement"[84] and hold in no uncertain terms that "this multi-use governmental office building undoubtedly serves a governmental function . . . [and a]ccordingly, plaintiffs' claims are barred by governmental immunity."[85] Thus the concurrence both respected precedent and avoided the unfortunate circumstance of treating similarly situated plaintiffs disparately based on the reason for their involvement with the county. By disposing of the issue without so much as mentioning the reason for Mr. Bynum's presence at the Miller Road Building, the concurrence implies that the majority need not have upended governmental immunity precedent in contravention of its own edict that "any modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not th[e] Court."[86]

III. THE CONCURRING OPINION WAS THE CORRECT—AND PREFERABLE—INTERPRETATION

This Part argues that the concurring opinion was both the correct result in terms of respecting precedent on the issue and also the better result in terms of limiting the corrosive effect of the doctrine of governmental immunity in North Carolina. As the concurrence points out, the majority opinion in *Bynum* expands the doctrine of governmental immunity to cover injuries occurring on any governmental property. This result is not in keeping with the court's previous jurisprudence and eschews the precedent established by

83. *Id.* at 360, 758 S.E.2d at 647 (majority opinion).
84. *Id.* at 359, 758 S.E.2d at 646.
85. *Id.* at 362, 758 S.E.2d at 648 (Martin, J., concurring).
86. Steelman v. City of New Bern, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971).

cases like *Williams*. The concurring opinion deftly sidesteps the majority's professed need to expand the coverage of the doctrine and, in so doing, correctly constrains governmental immunity to its precedential moors. Instead, the *Bynum* majority has enacted a much broader categorical bar than any previous precedent—one that precludes premises liability for any property owned or leased by a county.

In fairness to the majority, the plaintiff's assertion that the "case here passes every test argued by Wilson County and the various *amici* except one"[87] is not an accurate representation. Indeed, two separate briefs argued that the court of appeals' failure to consider the statutory authority for counties to acquire property (including by lease)[88] and to supervise the maintenance, repair, and use of all county property[89] is grounds for reversal under the *Williams* test as required by statute.[90] In its brief on appeal to the supreme court, Wilson County argued that its "statutory obligations to engage in inspection and maintenance of governmental property demonstrate that these acts are performed for the public good and are governmental in nature."[91] Likewise, the *amicus curiae* brief from the North Carolina League of Municipalities clearly notes that the opinion of the court of appeals "contains no references to Chapter 153A of the North Carolina General Statutes" and suggests that, if it had, the lower court would have found that the "[r]esponsibility to supervise maintenance, repair, and use of county property is delegated, again by statute, to boards of county commissioners."[92] These briefs argue that if the court of appeals had taken Chapter 153A into account, it would have found the activity in question to be governmental in nature and therefore immunized from suit by governmental immunity.

What these briefs fail to identify, and why the concurring opinion was correct in sidestepping the argument, is how a finding that Chapter 153A of the General Statutes immunizes municipal governments from premises liability would square with the North Carolina courts' historical treatment of these types of actions. Indeed, while both of these briefs make extended use of *Williams* as the

87. Plaintiff-Appellees' New Brief, *supra* note 64, at 25.

88. N.C. GEN. STAT. § 153A-158 (2013).

89. *Id.* § 153A-169.

90. *See infra* notes 91–92 and accompanying text.

91. Defendant-Appellant Wilson County's New Brief at 21, Bynum v. Wilson Cnty., 367 N.C. 355, 758 S.E.2d 643 (2014) (No. 380PA13), 2013 WL 6143823, at *21.

92. North Carolina League of Municipalities' *Amicus Curiae* Brief at 18, *Bynum*, 367 N.C. 355, 758 S.E.2d 643 (No. 380PA13), 2013 WL 6143826, at *18.

leading case on governmental immunity, neither argues that the *Williams* court's failure to mention Chapter 153A was an omission worthy of revisiting. Remarkably, the court's extended discussion of governmental immunity in *Williams* seems all but wasted considering that the second paragraph of that opinion states that the alleged negligence occurred at a public park that was "owned by defendant Pasquotank County and maintained and operated by defendant Pasquotank County Parks & Recreation Department."[93] If Chapter 153A immunizes counties from premises liability, as the majority concludes, then the fact that the park was owned by Pasquotank County should have been the end of any discussion regarding their liability. Indeed, the court's ruling in *Williams* would seem to suggest that if Mr. Bynum had been injured while *inside* the water department's offices, a proper inquiry would be whether the provision of water service was a governmental or proprietary function.[94] But post-*Bynum*, as the concurrence points out, that distinction, along with *Sandy Creek*'s demarcation between the governmental act of providing sewer service and the proprietary act of contracting for the construction of a sewer[95]—to make no mention of the entirely proprietary act in *Aaser*—no longer appears to merit consideration.[96]

Moreover, neither the briefs for Wilson County and the North Carolina League of Municipalities nor the majority opinion in *Bynum* acknowledge the gallons of ink expended in the fact-specific inquiries[97] of previous governmental immunity claims. Under the

93. Estate of Williams *ex rel.* Overton v. Pasquotank Cnty. Parks & Recreation Dep't, 366 N.C. 195, 196, 732 S.E.2d 137, 139 (2012).

94. *See Bynum*, 367 N.C. at 361–62, 758 S.E.2d at 648 (Martin, J., concurring) ("[U]nder the majority's reasoning, it would have been irrelevant in *Estate of Williams* that the County charged rental fees for use of the 'Swimming Hole' in which the decedent drowned—because the property was owned by the County . . . and therefore the County had the statutory responsibility to maintain and repair the property, making the County immune to the tort claim. Rather than issuing such a holding in *Estate of Williams*, we remanded to the Court of Appeals, explaining, '[E]ven if the operation of a parks and recreation program is a governmental function by statute, the question remains whether the specific operation of the Swimming Hole component of [the county-owned public park], in this case and under these circumstances, is a governmental function.' " (citations omitted)).

95. Town of Sandy Creek v. E. Coast Contracting, Inc., ___ N.C. App. ___, ___, 741 S.E.2d 673, 677 (2013).

96. *Bynum*, 367 N.C. at 362, 758 S.E.2d at 648 (2014) (Martin, J., concurring) ("By adopting what seems to be a categorical rule, the majority opinion may inadvertently broaden the scope of governmental immunity.").

97. *See, e.g.*, Bynum v. Wilson Cnty., ___ N.C. App. ___, ___, 746 S.E.2d 296, 302 (2013), *rev'd in part*, 367 N.C. 355, 758 S.E.2d 643 (2014) ("[T]he proper designation of a particular action of a county or municipality is a fact intensive inquiry . . . ."); *Williams*, 366

Bynum court's new conception of governmental immunity, the discussion of premises liability should have begun and ended where the property in question was a public library,[98] the register of deeds office at the county courthouse,[99] a series of public parks,[100] or other premises associated with the government.[101] Yet, in each of these prior cases, the result turned on the question of whether the property supported activities that were governmental or proprietary in nature.[102] Despite maintaining that precedent supports the holding in *Bynum*, neither the briefs in support of the appellee's position nor the majority opinion explain why these previous discussions were necessary—or even relevant—in light of the interpretation of Chapter 153A that each urges.

To be certain, the position advocated by the plaintiff and ultimately adopted by the court of appeals would have equally upended governmental immunity jurisprudence in the state of North Carolina had the supreme court affirmed it. When confronted with the court of appeals' holding, the majority opinion was right to be concerned that the existing quagmire of governmental immunity jurisprudence would be exacerbated by a rule that subjects "different plaintiffs injured by the same act or omission to different immunity analyses on the basis of their reasons for visiting the same county property."[103] Indeed, the inconsistent outcomes that would inevitably result from such a test are perhaps the best argument in favor of respecting the precedential cases that ignored the plaintiffs' actions and focused exclusively on the acts of the municipality.[104] As the

N.C. at 201, 732 S.E.2d at 142 ("Whether defendants are entitled to governmental immunity in this case turns on the facts alleged in the complaint.").

98. Seibold v. Kinston-Lenoir Cnty. Pub. Library, 264 N.C. 360, 360, 141 S.E.2d 519, 519 (1965) (per curiam).

99. Robinson v. Nash Cnty., 43 N.C. App. 33, 33–34, 257 S.E.2d 679, 679 (1979).

100. *E.g.*, *Williams*, 366 N.C. at 196, 732 S.E.2d at 139 (publicly owned park, "Fun Junktion," with a "Swimming Hole" rented out to private parties); Glenn v. City of Raleigh, 246 N.C. 469, 470, 98 S.E.2d 913, 914 (1957) (publicly owned, for-profit recreation ground).

101. *See, e.g.*, Aaser v. City of Charlotte, 265 N.C. 494, 497, 144 S.E.2d 610, 613 (1965) (city-owned sports coliseum).

102. *See, e.g.*, *Williams*, 366 N.C. at 201, 732 S.E.2d at 142 ("[T]he question remains whether the specific operation of the Swimming Hole component of Fun Junktion, in this case and under these circumstances, is a governmental function.").

103. Bynum v. Wilson Cnty., 367 N.C. 355, 360, 758 S.E.2d 643, 647 (2014) (Martin, J., concurring).

104. *See, e.g.*, *Williams*, 366 N.C. at 199, 732 S.E.2d at 141 ("In determining whether an entity is entitled to governmental immunity, the result therefore turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature.").

concurring opinion deftly illustrates, however, this concern did not necessitate the adoption of a novel interpretation of governmental immunity to avoid treating similarly situated plaintiffs differently. By maintaining focus on the character of Wilson County's actions—and not on those of the plaintiff—the concurrence avoids this inherently unfair result and exposes the flaw in the majority's concern with the opinion from the court of appeals.

The ease with which the three concurring justices arrive at the conclusion that "this multi-use governmental office building undoubtedly serves a governmental function"[105] is eclipsed only by the fact that they would have granted governmental immunity to Wilson County *without mentioning the reason for Mr. Bynum's presence at the building*. In fact, nowhere in their opinion do the three concurring justices find it relevant to mention that Mr. Bynum was there to pay a water bill or that the provision of water service is an inherently proprietary function of government. Not only is this approach in line with the courts' precedent that it is the acts of the municipality, and not those of the plaintiff, that are relevant to governmental immunity,[106] but it also limits the scope of the fact-specific inquiry to be undertaken. Moreover, the concurrence avoids the expansive reading of Chapter 153A adopted by the majority to protect the defendant county. Perhaps more than any other aspect of the opinions, the concurring justices' handling of the concerns raised by the court of appeals' opinion suggests that the majority opinion is a solution in search of a problem.

From *Bynum* emerges a categorical rule that bars premises liability for any property owned or leased by a county based on the majority's broad—and unnecessary—reading of Chapter 153A's delegation of the responsibility to supervise the maintenance and repair of all county property. If the majority's concern regarding disparate treatment for similarly situated individuals were well founded, the result in *Bynum* could perhaps be understood as necessary despite its precedential inappropriateness. However, the ease with which the three concurring justices dispatched that concern demonstrates that this result was not required. Instead, the majority holding in this case uses Chapter 153A to unnecessarily broaden the scope of governmental immunity beyond its already unsound

105. *Bynum*, 367 N.C. at 362, 758 S.E.2d at 648 (Martin, J., concurring).

106. *See, e.g.*, *Williams*, 366 N.C. at 199, 732 S.E.2d at 141 ("In determining whether an entity is entitled to governmental immunity, the result therefore turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature.").

moorings.[107] However, as the next Part argues, the general assembly can and should return a semblance of accountability to the doctrine.

IV. A CALL TO ACTION FOR THE GENERAL ASSEMBLY

Although the decision significantly muddied the waters of governmental immunity, what remains clear after *Bynum* is that North Carolinians continue to confront a problem in desperate need of a solution. Fortunately, the courts have consistently recognized the general assembly's authority to modify or abrogate the doctrine of governmental immunity in the state. This Part argues that, in light of the court's expansion of governmental immunity in *Bynum*, it is now incumbent on the general assembly to clarify and limit the doctrine. To that end, this Part briefly overviews the actions taken by other state legislatures before turning to the argument, advanced by a number of contemporary scholars, that governmental immunity can no longer be normatively justified as sound public policy.

Although the rule that emerges from *Bynum* may prove less unwieldy than its predecessors due to its threshold reliance on Chapter 153A,[108] it exacerbates the disconnect between the current state of governmental immunity and the underlying policy that originally gave rise to the doctrine. The doctrine of governmental immunity has long been fraught with inconsistencies and worrisome consequences that the legislature would have been wise to address. Yet after *Bynum*, the need for action is even more pressing. On the one hand, the long-held conception that governmental immunity rests exclusively on public policy grounds[109] is difficult to square with the general assembly's nearly complete abdication of its responsibility to define the scope of that policy interest.[110] On the other hand, it is

107. *See Bynum*, 367 N.C. at 362, 758 S.E.2d at 648 (Martin, J., concurring). To be certain, the doctrine of governmental immunity was well-entrenched prior to the *Bynum* ruling. S*ee* Koontz v. City of Winston-Salem, 280 N.C. 513, 519, 186 S.E.2d 897, 902 (1972) ("This Court has not departed from the rule of governmental immunity adopted in the year 1889."). However, as the court has previously noted and as Part IV of this Recent Development argues, even the historical conception of the doctrine was unsound and in desperate need of review from the legislature. *See* Steelman v. City of New Bern, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971) ("It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted.").

108. *See Bynum*, 367 N.C. at 360, 758 S.E.2d at 647.

109. *See* N.C. Ins. Guar. Ass'n v. Bd. of Trs. of Guilford Technical Cmty. Coll., 364 N.C. 102, 107, 691 S.E.2d 694, 697 (2010) (finding that governmental immunity is "an established principle of jurisprudence, resting on grounds of sound public policy").

110. As recently as 1995, the general assembly attempted to reform municipal governmental immunity but was unable to pass any meaningful legislation. *See* Jeremy D.

difficult to interpret the judiciary's professed lack of a cohesive standard[111] and repeated acknowledgement that changes to the doctrine should come from the legislative branch[112] as anything less than a repeated request to take up an issue that increasingly belongs less to the common law and more to its statutory counterpart.[113] Although the ruling in *Bynum* suggests that courts may be willing, albeit inadvertently, to modify governmental immunity,[114] their continued reluctance to explicitly do so requires that the general assembly address this issue.

A. National Legislative and Judicial Reception to the Doctrine

In fairness to the general assembly, only three states expressly recognize absolute immunity in their constitutions[115] while only one state allows government tortfeasors to be sued to the same extent as their private counterparts.[116] But despite a growing number of states that have transitioned from defining governmental immunity through common law to setting its boundaries by statute, North Carolina has proven remarkably content to allow the judiciary to continue to

Arkin, Recent Development, *Police Chase the Bad Guys, and Plaintiffs Chase the Police*: Young v. Woodall *and the Standard of Care for Officers in Pursuit*, 75 N.C. L. REV. 2468, 2493 (1997). However, the general assembly has passed legislation permitting a municipality to waive immunity through the purchase of insurance or risk-sharing pools. *See infra* note 153 and accompanying text.

111. *See Bynum*, 367 N.C. at 360, 758 S.E.2d at 648 (Martin, J., concurring) ("Despite efforts over many years to bring clarity and predictability to the law of governmental immunity, this goal has remained somewhat elusive."); *see also* Evans *ex rel.* Horton v. Hous. Auth. of Raleigh, 359 N.C. 50, 54, 602 S.E.2d 668, 671 (2004) ("We have provided various tests for determining into which category [(governmental or proprietary)] a particular activity falls . . . .").

112. *E.g.*, *Steelman*, 279 N.C. at 595, 184 S.E.2d at 243 ("[A]ny modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court.").

113. *See supra* note 3 and accompanying text.

114. The courts have not explicitly abandoned the stance that "the repeal of the doctrine of sovereign immunity should come from the General Assembly." *Steelman*, 279 N.C. at 595, 184 S.E.2d at 243. However, as Justice Martin points out, the holding in *Bynum* does modify the doctrine and "may inadvertently broaden the scope of governmental immunity." *Bynum*, 367 N.C. at 362, 758 S.E.2d at 648 (Martin, J., concurring).

115. ALA. CONST. art. 1, § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity."); ARK. CONST. art. 5, § 20 ("The State of Arkansas shall never be made defendant in any of her courts."); W. VA. CONST. art. 6, § 35 ("The state of West Virginia shall never be made defendant in any court of law or equity . . . .").

116. WASH. REV. CODE ANN. §§ 4.92.090, 4.96.010 (West 2006) ("The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.").

define the doctrine.[117] Considering only legislation that would have affected the *Bynum* decision, at least thirteen states have abolished the distinction between governmental and proprietary functions[118] that has caused so much consternation in North Carolina courts[119] and that serves no purpose within the broader framework of public policy.[120] Additionally, a growing number of states have chosen to statutorily identify the instances in which a government entity has

117. North Carolina is nowhere to be found among either the thirty-three states that have statutory immunity for discretionary government functions; the twenty-four states that recognize immunity for issuance, denial, or revocation of a license; or the twenty-four states that recognize immunity for failure to inspect or make adequate inspection of property. Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 805 & n.28, 807 & nn.33–34 (2007).

118. IDAHO CODE ANN. § 6-903 (2012) ("[E]very governmental entity is subject to liability . . . whether arising out of a governmental or proprietary function."); IOWA CODE § 670.2 (2015) ("[E]very municipality is subject to liability . . . whether arising out of a governmental or proprietary function . . . ."); MINN. STAT. § 466.02 (2014) ("[E]very municipality is subject to liability . . . whether arising out of a governmental or proprietary function."); MISS. CODE ANN. § 11-46-3 (West 1999) ("[T]he 'state' and its 'political subdivisions,' . . . are not now, have never been and shall not be liable, and are, always have been and shall continue to be immune from suit at law or in equity . . . notwithstanding that any such act, omission or breach constitutes or may be considered as the exercise or failure to exercise any duty, obligation or function of a governmental, proprietary, discretionary or ministerial nature and notwithstanding that such act, omission or breach may or may not arise out of any activity, transaction or service for which any fee, charge, cost or other consideration was received or expected to be received in exchange therefor."); OHIO REV. CODE ANN. § 2744.02(A)(1) (LexisNexis 2008) ("[A] political subdivision is not liable . . . in connection with a governmental or proprietary function."); OKLA. STAT. ANN. tit. 51, § 152.1 (West 2008) ("The state [and] its political subdivisions, . . . whether performing governmental or proprietary functions, shall be immune from liability for torts."); OR. REV. STAT. § 30.265 (2007) ("[E]very public body is subject to civil action for its torts . . . whether arising out of a governmental or proprietary function . . . ."); S.D. CODIFIED LAWS § 21-32A-3 (2004) ("[A]ny public entity is immune from liability for damages whether the function in which it is involved is governmental or proprietary."); TENN. CODE ANN. § 29-20-201 (2012) ("[A]ll governmental entities shall be immune from suit . . . from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary."); WASH. REV. CODE ANN. § 4.92.090 (West 2006) ("The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages . . . ."); W. VA. CODE ANN. § 29-12A-4 (LexisNexis 2008) ("[T]he provisions of this article shall apply to both governmental and proprietary functions."); WYO. STAT. ANN. § 1-39-102 (1996) ("[T]his act abolishes all judicially created categories such as 'governmental' or 'proprietary' functions and 'discretionary' or 'ministerial' acts previously used by the courts to determine immunity or liability."); Darling v. Augusta Mental Health Inst., 535 A.2d 421, 424 (Me. 1987) ("Since the 'proprietary activity' exception to sovereign immunity has its source solely in the common law, . . . that exception has been abrogated by the Tort Claims Act." (internal citation omitted)).

119. *See supra* note 4.

120. *See infra* Section IV.C.

immunity, rather than defaulting to immunity in the absence of a statutory waiver.[121] Some states specifically permit a government entity to be sued only in instances of injuries caused by the condition or use of public property.[122]

However, despite frequently expressing skepticism about both its merits[123] and the consistency of its application[124] and acknowledging the changing judicial reception to it in other jurisdictions,[125] North Carolina courts have maintained that "the repeal of the doctrine of sovereign immunity should come from the General Assembly."[126] In light of the courts' steadfast refusal to revisit the issue, it is critical that the general assembly move to limit the doctrine. In doing so, the general assembly should note—and this Part argues—that the doctrine should be significantly curtailed as both repugnant to the notion of government accountability contained in the state's constitution and subversive to the compensation and deterrence policy rationales that underlie tort law.

121. Rosenthal, *supra* note 117, at 805–09 ("For example, thirty-three states recognize discretionary-function immunity, twenty-three recognize immunity for injuries caused by reliance on statutes or other enactments, twenty-three immunize the collection of a tax, seventeen immunize specified intentional torts of public employees, and forty states confer immunity from punitive damages. Other common immunities conferred on state and local governments or their employees include immunity for issuance, denial, or revocation of a license; a failure to inspect or to make an adequate inspection of property; the adoption or failure to adopt legislation or other legislative functions; acts or omissions in the execution or enforcement of the law; the institution of judicial or administrative proceedings; the plan or design for public improvements; the condition of property or facilities used for recreational purposes or of unimproved public property; a failure to provide adequate police service or protection or to provide adequate jails or other corrections or penal facilities; the probation, parole, release, or escape of arrestees, convicts, or prisoners; a failure to provide adequate firefighting or other emergency service; a failure to provide adequate medical care or to prevent disease or impose a quarantine; and specified unintentional torts.").

122. *See id.* at 809–10 & n.48.

123. *See* Steelman v. City of New Bern, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971) ("It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted.").

124. *See* Bynum v. Wilson Cnty., 367 N.C. 355, 360, 758 S.E.2d 643, 647 (2014) (Martin, J., concurring) ("Despite efforts over many years to bring clarity and predictability to the law of governmental immunity, this goal has remained somewhat elusive.").

125. *See Steelman*, 279 N.C. at 593, 184 S.E.2d at 242 ("Since 1957 fifteen jurisdictions, in addition to Florida, have overruled or greatly modified the immunization of municipalities from tort liability.").

126. *Id.* at 595, 184 S.E.2d at 243.

B. Governmental Immunity Undermines Accountability To the People

In a case that has been quite fairly termed the "fountainhead of all of our constitutional law,"[127] Chief Justice John Marshall succinctly stated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[128] If this statement remains true today—and there is no reason to suspect it does not—it presents serious questions about the constitutionality of a doctrine that creates an impenetrable barrier to those who would claim the protection of the laws. The foundation for the doctrine itself can be found nowhere in the Constitution.[129] Beyond being unable to locate the constitutional underpinnings of the doctrine, at least two noted constitutional scholars, Erwin Chemerinsky and Akhil Reed Amar, have concluded that the immunity "doctrine conflicts with too many basic constitutional principles to survive."[130] While these arguments may someday prove compelling to the United States Supreme Court, it is the North Carolina Constitution to which our state courts and the general assembly should turn for guidance on this issue.

The principle that the government of this state must be accountable to her people is firmly embedded in the North Carolina Constitution,[131] and the doctrine of governmental immunity runs so contrary to that notion as to be unsupportable. If, as Professor Amar has suggested, the opening phrase of the U.S. Constitution, "We the people,"[132] makes the citizens sovereign and embodies the principle of

127. James Rosen, *Video and Transcript: 2011 FOX Interview with Rehnquist*, FOX NEWS (Sept. 4, 2005), http://www.foxnews.com/story/2005/09/04/video-and-transcript-2001-fox-interview-with-rehnquist/ (interview taken May 21, 2001).

128. Marbury v. Madison, 5 U.S. 137, 163 (1803).

129. To refute originalist supporters of sovereign immunity, Professor Chemerinsky argues that "[t]he text of the Constitution is silent about sovereign immunity. Not one clause of the first seven articles even remotely hints at the idea of governmental immunity from suits. No constitutional amendment has bestowed sovereign immunity on the federal government." Chemerinsky, *supra* note 5, at 1205. For the nonoriginalists, he offers a lengthy rebuke of the notion that "sovereign immunity is a value that should be seen as embodied in the Constitution." *Id.* at 1210–16.

130. *Id.* at 1203; *see also* Amar, *supra* note 5, at 1426 ("A state government that orders or allows its officials to violate citizens' federal constitutional rights can invoke 'sovereign' immunity from all liability—even if such immunity means that the state's wrongdoing will go partially or wholly unremedied."). Although both authors center their respective critiques of state sovereign immunity against allegations of a citizen's federal constitutional rights, there is no reason to believe that there should be less of a remedy when the violation is physical instead of constitutional.

131. *See infra* notes 134–41 and accompanying text.

132. U.S. CONST. pmbl.

government accountability to them,[133] then surely the opening phrase of the state constitution, "We, the people of the State of North Carolina,"[134] confers no less a responsibility on our state officials.[135] Moreover, the courts of North Carolina need not make Professor Amar's logical leap from "We the people" to citizen sovereignty.[136] Indeed, the state constitution goes beyond its federal counterpart and expressly provides that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."[137]

Furthermore, others have argued that the First Amendment's right-to-petition clause, which guarantees the "right of the people . . . to petition the Government for a redress of grievances,"[138] clearly establishes "the right of the individual to seek redress from government wrongdoing in court, a right historically calculated to overcome any threshold government immunity from suit."[139] But the North Carolina Constitution affirms that right in even more specific language than its federal counterpart. Indeed, the North Carolina Constitution grants the people a right "to apply to the General Assembly for redress of grievances"[140] while also quite separately granting them the right to "remedy by due course of law" for "an injury done him in his lands, goods, person, or reputation" to "be administered without favor, denial, or delay."[141] Certainly, it is difficult to imagine how *Bynum* was "administered without favor" when the court granted immunity based solely on Wilson County's standing as a government entity.

While the United States and North Carolina implicitly and explicitly reject all manner of royal prerogatives, the doctrine of sovereign immunity undeniably descends from the English legal maxim that "the King can do no wrong."[142] As Professor Chemerinsky

133. *See* Amar, *supra* note 5, at 1449–50.

134. N.C. CONST. pmbl.

135. *Id.*

136. *See* Amar, *supra* note 5, at 1449–50.

137. N.C. CONST. art. 1, § 2.

138. U.S. CONST., amend. I.

139. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 980 (1997).

140. N.C. CONST. art. I, § 12.

141. N.C. CONST. art. I, § 18.

142. Chemerinsky, *supra* note 5, at 1201; *see also* Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 87 (1989) (explaining the

has detailed at the federal level, "government accountability can be found in many parts of the Constitution" and "[s]overeign immunity is inconsistent with this basic precept."[143] This statement is no less true at the state level. In fact, it may be more true, given that the state constitution provides for additional protections and the connection between the sovereign and her citizens is, if anything, greater than at the federal level.[144]

C. Governmental Immunity Is Not a Sound Public Policy

Despite common misuse in contemporary American conversation, the phrase "begging the question"[145] is rightly reserved for circular arguments like the cursory and oft-repeated axiom of North Carolina courts that governmental immunity "rest[s] on grounds of sound public policy."[146] In a manner that ill fits a doctrine enjoying such longevity, the truth of this proposition has long been assumed without the proof normally required of such an assertion. The court's insistence on this well-established doctrine, which has significant and often harmful repercussions for individuals, suggests that it ought to be firmly based in a sound public policy rationale. Yet the case law's silence on what exactly this policy rationale is suggests that it must be revisited and explored in greater depth.

Cases like *Bynum* present a rare opportunity to revisit the justifications for the doctrine and reevaluate—rather than just accept—the proposition that governmental immunity is grounded in sound public policy reasoning.[147] This Section does just that by evaluating the doctrine under the two most commonly accepted

origins of sovereign immunity in English law); BLACK'S LAW DICTIONARY app. B at 1956 (10th ed. 2014) ("*Rex non potest peccare.* The king can do no wrong.").

143. Chemerinsky, *supra* note 5, at 1214.

144. *See, e.g.*, V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 874 (2004) ("And, yet, there is a kernel of truth that remains to the proposition that the state governments are, at least relatively, closer to the people than is the federal government.").

145. *See, e.g.*, Philip B. Corbett, *Begging the Question, Again*, N.Y. TIMES (Sept, 25, 2008), http://afterdeadline.blogs.nytimes.com/2008/09/25/begging-the-question-again/?_r=0 (noting frequent misuse of "begging the question" in the *New York Times* and providing the correct definition as "refer[ring] to a circular argument . . . that assumes as proved the very thing one is trying to prove").

146. N.C. Ins. Guar. Ass'n v. Bd. of Trs. of Guilford Technical Cmty. Coll., 364 N.C. 102, 107, 691 S.E.2d 694, 697 (2010).

147. While this section focuses exclusively on the public policy of immunizing localities from tort liability, other justifications for the doctrine could be offered. To the extent that such potential justifications merit consideration, they were not addressed by the *Bynum* court and are outside the scope of this Recent Development.

rationales for tort liability: the need to compensate injured individuals and the need to deter future tortious acts.[148]

1. Compensation

While it appears that no body of scholarship has taken the position that injured individuals do not deserve to be compensated, many writers have taken issue with the equity of compensating injured individuals at the expense of fellow citizens who bear little or no responsibility for the injury.[149] Arguments that taxpayers are the proper party to bear this economic cost, since they are, by and large, the voters responsible for electing the responsible government officials,[150] have encountered marked hostility and have been unpersuasive to those jurisdictions that continue to immunize local governments against tort liability.[151] Critics of allowing government liability based on the compensation rationale have concluded that "[a]t most, we are left with an argument for providing those injured by tortious government conduct with some form of publicly funded insurance—although . . . the justification for having taxpayers fund this obligation rather than leaving the insurance decision to each individual is entirely unclear."[152]

However, the general assembly's grant of legislative authority permitting local governments to waive immunity through the purchase of liability insurance and participation in risk-sharing pools[153] provides some insight into the true public policy of this state. North Carolina's decision to grant authority to local governments to purchase insurance or participate in local government risk pools with a cost to be ultimately borne by the taxpayers seems difficult to

148. *See* Chemerinsky, *supra* note 5, at 1216; *see also* Rosenthal, *supra* note 117, at 824 (pointing out the Supreme Court's "repeat[ed]" reasoning that constitutional torts both effectively compensate the injured and also provide adequate deterrence, before discussing the difficulties of this view).

149. *See, e.g.*, Rosenthal, *supra* note 117, at 827 (noting that the argument cannot apply to those who voted against current elected officials and that, whereas shareholders can always sell their shares and they do exercise effective control, taxpayers are limited by the cost of moving and the one-man-one-vote principle).

150. *See* Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 923 (2001).

151. *See* Rosenthal, *supra* note 117, at 827 ("But this is hardly corrective justice from the standpoint of those voter-taxpayers who backed the losing candidate in the last election. Moreover, a shareholder who is dissatisfied with management policy may always sell, but a taxpayer can relocate to another jurisdiction only at considerable cost. And taxpayers do not have the kind of effective control over government policy vested in owner-shareholders.").

152. *Id.* at 826.

153. N.C. GEN. STAT. § 160A-485(a) (1999).

square with the alleged public policy rationale behind sovereign immunity—that citizens have no economic obligation to indemnify the government for its own negligent actions. At the very least, this legislative enactment suggests that the state's public policy is that local governments should pursue the most cost-effective means to ensure that a remedy exists for citizens injured by governmental malfeasance. But if we are to understand that the public policy of this state is that taxpayers should not be made to compensate individuals injured by government negligence, then the purchase of insurance surely runs counter to that proposition. Certainly the general assembly would not allow local governments to expend taxpayer funds on the purchase of insurance if it is an unnecessary expenditure, given that they will otherwise never be liable for their negligence.[154] In light of *Bynum*, there appears to be no reason for the general assembly to permit, or for local governments to undertake, the wasteful and unnecessary purchase of premises liability insurance given the court's treatment of Chapter 153A and its unwillingness to subject them to the liability covered by such a policy.

Moreover, it may be suggested that continuing to uphold the doctrine of governmental immunity represents a value judgment that protecting citizens from paying their marginal share of compensation is more important than guaranteeing the right of injured individuals to receive compensation.[155] If this is truly the value judgment that has been made, it is not justified by any of the legislative enactments or judicial opinions on the topic. Further, this argument flies in the face of the United States Supreme Court's statement that injuries caused by state actors should not be borne solely by the injured:

> [I]t is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus . . . it is fairer to allocate any resulting financial loss [from tort liability] to the inevitable costs of government borne by all the taxpayers, than

154. *See, e.g.*, Gerald R. Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588, 594 ("[Although in] most states statutes now authorize the purchase of liability insurance covering specific immune governmental activities . . . absent such authorization, the courts have held the purchase to be ultra vires as well as a *wasteful, unnecessary expenditure* of public funds." (emphasis added) (citations omitted)).

155. Rosenthal, *supra* note 117, at 826 ("[S]ince the economic cost of damages awards falls on taxpayers not responsible in any direct fashion for tortious conduct, the corrective-justice rationale for governmental damages liability for common-law torts is also wanting.").

> to allow its impact to be felt solely by those whose rights . . . have been violated.[156]

Where the general assembly has indicated through its authorization of local governments to purchase liability insurance that it is not opposed to taxpayers bearing a marginal cost for the protection of those injured by government malfeasance, the argument that it is the public policy of this state not to place the burden of tort liability on citizens largely breaks down. Moreover, if the general assembly is prepared to sanction the supreme court's approach in *Bynum* through continued silence on the topic, it should also be prepared to defend the implicit normative judgment that a citizenry that reaps the benefits of governmental activity need not bear the burdens of governmental failures.

2. Deterrence

Using tort liability to deter a government actor—who ultimately transfers the cost of damages to the citizenry—clearly differs from using tort liability to deter an individual actor who must bear his own costs. Despite the difficulties inherent in deterring government actors through tort liability, achieving the desired deterrent effect is not impossible. Yet the *Bynum* decision has little to no deterrent effect, instead allowing a county to ignore its lawful duty to maintain government buildings with complete impunity. This result fails to further tort liability's goal of deterrence in any way. Deterrence of government actors takes one of two forms, each of which is discussed in turn: voters leaving the tax base, or "foot voting"—similar to shareholders selling their stock—and voters holding public officials accountable at the ballot box.

Despite recent critiques of foot voting in protest of substantial tort liability, the Supreme Court of the United States, as well as the scholars reacting to its decisions, have long accepted the idea that tort liability can be counted upon to deter officials from engaging in governmental misconduct in the same manner as private tort law.[157] Critics of this theory correctly note that "shareholders of private corporations . . . can readily sell their stock at any time, yet taxpayers

156. Owen v. City of Independence, 445 U.S. 622, 655 (1980). Although this part of *Owen* dealt more narrowly with the question of whether a city could claim a good-faith defense for violation of a newly recognized constitutional right, *id.*, the reasoning is nonetheless more generally applicable—*a fortiori* the burden of damages that result from government tortious conduct ought to be spread among all taxpayers rather than being borne by the injured individual.

157. *See* Rosenthal, *supra* note 117, at 824 & nn.110–11.

must fund essentially unlimited liability and face substantial costs if they wish to 'exit' the jurisdictions that tax them to fund governmental liabilities."[158] But nowhere in the various critiques of this theory is it suggested that government liability has *no* effect on the choices made by citizens to move in to or out of a particular jurisdiction. It is not difficult to imagine the quality of public buildings, roads, schools, and emergency services playing a factor in a decision of whether and where to relocate—and each of these services is a factor of the funds available after any hypothetical tort liability.[159] A government that exposes itself to substantial tort liability will inevitably experience a decline in its ability to provide other government services[160] that could spur "foot voting" among citizens with certain minimum expectations regarding the provision of services from their municipality. Thus, the admittedly limited ability (at least compared to shareholders of publicly traded companies) of citizens to "vote with their feet" still provides more of a deterrent than the post-*Bynum* system's complete absence of any deterrent effect.

In addition to relocating, voters can also deter tortious government conduct via the ballot box. Critics of this approach to justifying governmental tort liability suggest that government officials already have an incentive to keep the public safe since, even in the absence of tort liability, government officials will presumably be voted out of office if they fail to protect their citizens.[161] This

158. *Id.* at 825–26.

159. Even those who suggest that the limited ability of individuals to relocate reduces the deterrent effect on local governments to avoid tort liability admit that "at least some businesses and individuals are able to opt out of the local political process by moving to a different location, and . . . new businesses and residents are always free to select their desired location." *Id.* at 847; *see also* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 155 (2007) (theorizing that so long as moving costs are low, local governments and their monopoly service-providing bureaus will be subject to adequate competitive pressure to ensure responsiveness and the lowest-cost provision of services); PAUL E. PETERSON, CITY LIMITS 22–38, 71 (1981) (identifying the primary interest of a city as its overall economic productivity, which in turn depends on maintaining a favorable average ratio of benefits received to taxes paid—particularly for those who pay a disproportionate share of taxes and are therefore the most mobile); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (positing that the mobile consumer-voter chooses from among local governments the one that best provides the public goods on which he places the greatest premium, such as schools, "beaches, parks, police protection, roads, and parking facilities").

160. Alternatively, the locality could alleviate any shortfall through increased taxes, although that move is arguably more likely to be noticed and poorly received by the citizenry than a marginal decline in the provision of government services.

161. Rosenthal, *supra* note 117, at 848 ("[P]olitical vulnerability . . . can be at least as important as the threat of damages liability.").

argument presumes that the imposition of tort liability does little to change or enhance the deterrent effect government officials already experience through voter accountability. To support this conclusion, these critics point to major catastrophes like the 1947 Port of Texas City disaster that killed 560 people, wounded 3000, and caused damages of over $300 million,[162] or the government's failure to foresee and repair the problems that inevitably led to the collapse of the levees protecting New Orleans in the wake of Hurricane Katrina.[163] Noting that "political forces come powerfully into play when the government endangers the public's safety," scholars are quick to point out that "[a]ny instance of government bungling that compromises the public's safety is likely to have potent political consequences."[164]

There is certainly little doubt that voters did not need the added incentive of tort damages in order to hold government officials responsible for their failure to keep the public safe in either event. However, the aforementioned examples are highly visible, catastrophic, and large-scale events, whereas the events that tort liability has the tendency to deter occur on a smaller stage and with less public scrutiny. Therefore, it is essential that tort liability spark the deterrent effect where voter accountability is not likely to do so. As noted by one scholar, when citizens pursue claims against the government "valuable information is unearthed and exposed" and, consequently, "[w]ith exposure comes publicity."[165] Indeed, the observations of these critics are perhaps the strongest evidence of the need for government liability *in cases exactly like that of Mr. Bynum*—where awareness, and corresponding outrage, are most likely to be lacking.

162. *See generally* BILL MINUTAGLIO, CITY OF FIRE: THE EXPLOSION THAT DEVASTATED A TEXAS TOWN AND IGNITED A HISTORIC LEGAL BATTLE (2004) (giving an account of the explosion and ensuing legal battles).

163. *See* Rosenthal, *supra* note 117, at 849; *see also* John Schwartz, *Army Builders Accept Blame over Flooding*, N.Y. TIMES (June 2, 2006), http://www.nytimes.com/2006/06/02/us/nationalspecial/02corps.html (describing the Army Corps of Engineers' acceptance of responsibility for failing to adequately design and maintain New Orleans' levee system before Hurricane Katrina); John Schwartz, *New Study of Levees Faults Design and Construction*, N.Y. TIMES (May 22, 2006), http://www.nytimes.com/2006/05/22/us/22corps.html (reporting on a study finding a "complex web of public and private organizations" responsible for the failure of the levee system).

164. Rosenthal, *supra* note 117, at 850.

165. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 859–60 (2001).

Considered in this light, tort liability serves two critical purposes in allowing the public to deter governmental wrongdoing. First, by threatening to divert resources from other projects the public cares about, tort liability creates public awareness of the government's failure that would otherwise be missing. The voting public is exceedingly more likely to care about—or even be aware of—Mr. Bynum's plight when it threatens to impact the funding of a governmental program directly impacting the public. Second, a finding of liability gives judicial credence and authority to the notion that the government has failed in one of its basic obligations—protecting the citizenry.[166] Liability—and its corresponding award of damages—signals to the voting public that the government has failed to live up to its burden and that those responsible for that failure should be held accountable at the ballot box. It is not enough to say that these effects would be "indeterminate" or that they would be less effective than in the realm of private tort law. What matters is that they would provide *some* deterrence—something that is noticeably absent under the current system established by *Bynum*.

The disconnect between the stated public policy rationales for governmental immunity and the actual effect of the legislation put forth by the general assembly and of the court's decision in *Bynum* is clear. It can no longer be said that the public policy of the state is to protect citizen taxpayers from the nominal burden of compensating individuals injured through the negligence of a municipality.[167] The general assembly has, for years, permitted counties to provide for the compensation of injured individuals through insurance and risk pooling agreements with a cost that is consistently borne by all citizens of a locality.[168] Moreover, the suggestion that high-profile government misfeasance draws a fair comparison to less well-known cases like those of Mr. Bynum is prima facie absurd. The prophylactic exposure and publicity of a public suit and award of damages is a necessary component of the deterrence of governmental neglect.

166. *See, e.g.*, Amato v. City of Saratoga Springs, 170 F.3d 311, 317–18 (2d. Cir. 2000) ("A judgment against a municipality not only holds that entity responsible for its actions and inactions, but also can encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue."); Gilles, *supra* note 165, at 861 ("In addition to serving an informational function, municipal liability claims serve a 'fault-fixing' function, localizing culpability in the municipality itself, and forcing municipal policymakers to consider reformative measures.").

167. *See supra* Section IV.B.

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

Thus, the continued efficacy of governmental immunity in this state is a barrier to both of the underlying goals of tort policy.

CONCLUSION

Despite the *Bynum* majority's professed belief that its decision rests squarely on the shoulders of a century's worth of established governmental immunity jurisprudence, the practical implication of the holding is to render moot the very case law on which it claims to be built. No longer is the City of Charlotte liable for damages where the coliseum was clearly a proprietary activity.[169] No longer does it matter where in Pasquotank County's park a citizen was injured.[170] And no longer does it matter that, even though providing sewer service is a governmental function, the act of contracting for sewer construction is proprietary.[171] Even more noteworthy than this marked departure from governmental-immunity precedent is the opinion's modification of the doctrine despite the court's long-held belief that any such modification should come via legislation. Further, the court fails to even acknowledge the sea of change that it has unleashed.

Although the *Bynum* court departed significantly from precedent by extending and clarifying the common-law barriers that insulate government entities from accountability for their actions, the court created a unique opportunity for the general assembly to revisit the doctrine of sovereign immunity and definitively establish the public policy of this state. It is incumbent upon the general assembly to repeal this vestige of royal prerogative and restore the remedial rights of its citizens that are mandated by the goals of tort law and guaranteed by the state's constitution.

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169. *See* Bynum v. Wilson Cnty., 367 N.C. 355, 361, 758 S.E.2d 643, 647 (2014) (Martin, J., concurring) (contrasting the majority's approach to sovereign immunity with the court's decision in Aaser v. City of Charlotte, 265 N.C. 494, 144 S.E.2d 610 (1965)).

170. *See Bynum*, 367 N.C. at 361, 758 S.E.2d at 648 (Martin, J., concurring) (citing Estate of Williams *ex rel.* Overton v. Pasquotank Cnty. Parks & Recreation Dep't, 366 N.C. 195, 732 S.E.2d 137 (2012)) ("In contrast, under the majority's reasoning, it would have been irrelevant in *Estate of Williams* that the County charged rental fees for use of the 'Swimming Hole' in which the decedent drowned—because the property was owned by the County . . . .").

171. Town of Sandy Creek v. E. Coast Contracting, Inc., ___ N.C. App. ___, ___, 741 S.E.2d 673, 677 (2013).

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