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William Baude

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IS QUALIFIED IMMUNITY UNLAWFUL?

William Baude

THE LAW SCHOOL
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Is Qualified Immunity Unlawful? William Baude*

Abstract: The doctrine of qualified immunity operates as an unwritten defense to civil rights lawsuits brought under 42 U.S.C. § 1983. It prevents plaintiffs from recovering damages for violations of their constitutional rights unless the government official violated “clearly established law,” usually requiring a specific precedent on point. This article argues that the doctrine is unlawful and inconsistent with conventional principles of statutory interpretation.

Members of the Supreme Court have offered three different justifications for imposing such an unwritten defense on the text of Section 1983. One is that it derives from a common law “good faith” defense; another is that it compensates for an earlier putative mistake in broadening the statute; the third is that it provides “fair warning” to government officials, akin to the rule of lenity.

But on closer examination, each of these justifications falls apart, for a mix of historical, conceptual, and doctrinal reasons. There was no such defense; there was no such mistake; lenity ought not apply. And even if these things were otherwise, the doctrine of qualified immunity would not be the best response.

The unlawfulness of qualified immunity is of particular importance now. Despite the shoddy foundations, the Supreme Court has been reinforcing the doctrine of immunity in both formal and informal ways. In particular, the Court has given qualified immunity a privileged place on its agenda reserved for few other legal doctrines besides habeas deference. Rather than doubling down, the Court ought to be beating a retreat.

* Neubauer Family Assistant Professor of Law, University of Chicago Law School. I owe thanks to Douglas Gates, Kelly Holt, and Neha Nigam for helpful and dogged research assistance, to the SNR Denton and Alumni Faculty Funds for research support, and to Nathan Chapman, Justin Driver, William Hubbard, Aziz Huq, Robert Leider, Richard McAdams, Jennifer Nou, Zach Price, Richard Re, Stephen Sachs, Joanna Schwartz, and James Stern, as well as to Judge David Barron and other participants in the Sidebar Workshop at the University of Chicago Law School and a faculty workshop at the Antonin Scalia Law School for helpful comments. But my reliance on their help should not insulate me from any liability for my own mistakes.

Introduction.....	2
I. The Legal Justifications for Qualified Immunity.....	5
A. The Historical Good Faith Defense.....	7
1. The Court’s Account.....	8
2. The Historical Problems.....	11
B. The Second-Best Theory.....	17
1. The <i>Crawford-El</i> Account.....	18
2. The “Under Color of” Problem.....	19
3. The Mismatch Problem.....	22
C. The Lenity Theory.....	25
1. The Court’s Account.....	25
2. The Civil/Criminal Problem.....	29
3. The Mismatch Problem.....	31
D. What Immunity Can Be Justified?.....	34
1. Justifying Qualified Immunity?.....	34
2. Justifying Other Immunities.....	36
II. Implications.....	37
A. Qualified Immunity Doctrine.....	37
B. The Qualified Immunity Docket.....	39
Conclusion.....	44

Introduction

The doctrine of qualified immunity prevents government agents from being held personally liable for constitutional violations unless the violation was of “clearly established law.” This doctrine rests on two pillars – its practical consequences, and its technical legal justification.

There is a lot of research on the first pillar, the practical consequences of the doctrine. Does it insulate officials too much from liability, leaving them without adequate incentives to respect the constitutional rights of those they encounter?¹ Is it basically redundant in light of the incredibly widespread indemnification regimes that prevent of-

¹ Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 *Geo. L.J.* 1479, 1522-1524 (2016); 2 Sheldon Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983* § 8:5 (2016).

ficers from having to pay on their own dime?² Does it stall the growth of constitutional doctrine?³ Does it actually facilitate the recognition of new constitutional rights?⁴ This research addresses important questions about how qualified immunity does and should work.

But there has been less careful scrutiny of the second pillar, the legal justifications the Supreme Court has given for adopting qualified immunity in the first place. In part, this may be because the justifications are themselves obscure. But once we trace the doctrine back, we can see that at various times, the Justices have hinted at three major legal justifications for qualified immunity.

In this article I proceed to take those legal rationales seriously and see if they hold up. I conclude that for the most part, they do not. The modern doctrine of qualified immunity is inconsistent with conventional principles of law applicable to federal statutes – what Stephen Sachs and I have elsewhere called “The Law of Interpretation.”⁵ While this inquiry may seem narrow,⁶ it is also the first step to reform. Clearing away the legal rationales for qualified immunity lets us see whether there is some other reason that we nonetheless ought to retain the doctrine.

Indeed, one reason that the Court’s immunity jurisprudence is so impervious to practical criticism may be a sense that immunity somehow derives from ordinary principles of statutory interpretation, and so it is not the Court’s job to change it. That would analogize qualified immunity to AEDPA’s restrictions on habeas relief, which the Court has called “a provision of law that some federal judges find too confining, but that all federal judges must obey.”⁷ But if qualified immunity is not the result of ordinary principles of statutory interpretation, then the decision to keep or change it is the Court’s responsibility.⁸ Thus, the investigation of the Court’s legal justifications for quali-

² Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014).

³ Aaron Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1 (2015).

⁴ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 915 (1999); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87, 99-110 (1999).

⁵ See generally William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. (forthcoming 2017) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783398).

⁶ But see Richard H. Fallon, Jr., *Asking the Right Questions about Officer Immunity*, 80 Fordham L. Rev. 479, 506-07 (2011) (“Critics of official immunity who confine themselves to narrowly textual, historical, and precedential analysis risk missing vitally important questions of constitutional implementation that immunity doctrines inescapably implicate.”).

⁷ *White v. Woodall*, 134 S. Ct. 1697, 1701 (2014).

⁸ In this sense, my paper updates, and corrects, Jack Beermann’s “critical analysis” of Section 1983 and qualified immunity, which concluded, several decades ago, that “le-

fied immunity reinforces, rather than supplants, the many functional challenges to immunity doctrine.

The inquiry is timely, perhaps urgent. Over the past several decades the Court has been slowly changing the doctrinal formula for qualified immunity. But most recently, it has begun to strengthen qualified immunity's protection in another way – by giving qualified immunity cases pride of place on the Court's docket. It exercises jurisdiction in cases that would not otherwise satisfy the certiorari criteria, and reaches out to summarily reverse lower courts at an unusual pace. Essentially the Court's agenda is to make extra sure that lower courts do not improperly deny any immunity. This sends a strong signal to lower courts, and elevates official-protective qualified immunity cases to a level of attention exceeded only by the Court's state-protective habeas docket.

While the Court doubles down on qualified immunity, the doctrine has also come under increasing outside criticism. Recently publicized episodes of police misconduct vividly illustrate the costs of unaccountability. Indeed, the NAACP Legal Defense Fund has explicitly called for “re-examining the legal standards governing . . . qualified immunity.”⁹ The legal director of the ACLU of Massachusetts has named the doctrine of qualified immunity among various policing precedents that “we must seek to tear down.”¹⁰ And Judge Jon Newman has argued that “the defense of qualified immunity should be abolished” by Congress.¹¹ These calls make it all the more important to figure out whether the modern doctrine of qualified immunity has a legal basis in the first place.

This paper argues that it does not. Part I discusses the Court's three proffered justifications for qualified immunity, reconstructing the reasoning of each one and then explaining its legal flaws. Part II dis-

galistic analysis of § 1983” was largely “indeterminate.” Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 Stan. L. Rev. 51 (1989).

⁹ *LDF Statement on the Non-Indictment of Cleveland Police Officers in the Shooting Death of Tamir Rice* (Dec. 28, 2015) at <http://www.naacpldf.org/press-release/ldf-statement-non-indictment-cleveland-police-officers-shooting-death-tamir-rice>

¹⁰ Matthew Segal, *Beyond #BlackLivesMatter: police reform must be bolstered by legal action*, *The Guardian* (July 27, 2016) at <https://www.theguardian.com/commentisfree/2016/jul/27/beyond-black-lives-matter-police-reform-legal-action>

¹¹ Jon O. Newman, *Here's a better way to punish the police: Sue them for money*, *Wash. Post.* (June 23, 2016) at https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html. See also Aziz Huq, *Revive Congressional Authority over Courts*, *Democracy Journal*, No. 39 (Winter 2016) available at <http://democracyjournal.org/magazine/39/revive-congressional-authority-over-courts/> (arguing that Congress “should narrow or abolish the doctrine of ‘qualified immunity’”).

cusses the implications of this legal analysis going forward, with special attention to the Supreme Court's new elevation of qualified immunity to special certiorari status.

I. The Legal Justifications for Qualified Immunity

The statute colloquially known as "Section 1983," because it is codified at 42 U.S.C. § 1983, provides for liability by state actors who violate constitutional or other legal rights. It was first enacted during reconstruction as the 1871 Ku Klux Act, and originally provided:

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial law of the United States which are in their nature applicable in such cases.¹²

Now codified in the U.S. Code it provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

¹² 17 Stat. 13, 13, § 1 (Apr. 20, 1871). A few years later, the provision was rephrased and reenacted as Section 1979 of the Revised Statutes of 1874, 18 Stat. 1, 348 (Part I). Formally, that is the statute that gives the provision force today. Caleb Nelson, *Statutory Interpretation* 785-787 & n. 41 (2011).

law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.¹³

Neither version of the text, you will notice if you wade through them, makes any reference to immunity. (The reference to the “same rights” and “other remedies” in the original statute pointed to the 1866 Civil Rights Act, which provided broad federal remedial authority, Supreme Court review, and also authorized the President to direct prosecutions and use the military to enforce the Act.)¹⁴

Yet that is not the end of the matter. Seemingly categorical legal texts are frequently “defeasible,” meaning that they are subject to exceptions made by other rules of law.¹⁵ “No vehicles in the park” might forbid ambulances from entering. But a separate rule of law may nonetheless provide an exception for government vehicles or for responses to an emergency situation.¹⁶

Perhaps more to the point, legal provisions are often subject to defenses derived from common law. The common law rules of self-defense, duress, and necessity, for example, can all apply even to criminal statutes that do not mention them at all.¹⁷ Similarly, I have elsewhere defended the current doctrine of state sovereign immunity even though it, too, is an unwritten defense that goes almost unmentioned in the text of the Constitution.¹⁸ So perhaps Section 1983¹⁹ permits

¹³ 42 U.S.C. § 1983. The equivalent federal cause of action has subsequently been supplied by federal common law, see *Bivens v. Six Unknown Named Narcotics Agents*, 403 U.S. 388 (1971), and one might imagine that it would have produced distinct questions of unwritten immunity, cf. Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 *Cornell L. Rev.* 482, 548 (1982). But Section 1983 came first, and so far the Court has just mechanically equated the two sets of immunities, *Wilson v. Layne*, 526 U.S. 603, 609 (1999) so this article won't consider them separately.

¹⁴ Civil Rights Act of 1866, 14 Stat. 27, 29, §§ 3, 8-10 (Apr. 8, 1866).

¹⁵ Baude & Sachs, *supra* note 5, at 32-35.

¹⁶ *Id.* at 35.

¹⁷ *Id.* at 32.

¹⁸ William Baude, *Sovereign Immunity and the Constitutional Text*, 103 *Va. L. Rev.* (forthcoming 2017) available at <http://ssrn.com/abstract=2714540>.

¹⁹ For ease of exposition and recognition, I refer to the statute anachronistically as “Section 1983”—not the Ku Klux Act, Section 1979, or its other nicknames—regardless of which historical period I am talking about.

such an unwritten immunity defense despite its seemingly categorical provisions for liability.

To say that an unwritten defense *can* exist, however, is not to say that any particular unwritten defense is in fact legally justified. Such defenses come from other legal sources and so they must be justified on their own legal terms. That is why it is so important to understand the legal basis for qualified immunity put forward by the Supreme Court. This requires some disentangling of the Court's many immunity cases, but over time different opinions of the Court have pointed toward three possible bases for the doctrine.

The first, which is the most well-known and the most thoroughly criticized, is that qualified immunity derives from a putative common law rule that existed when Section 1983 was adopted.²⁰ But the historical premise of this argument has been undermined and it is not clear how much the Court continues to stand by it. In its place, immunity's defenders can look to two other arguments that are quite underexamined. One is that qualified immunity is a legitimate compensation for a different error the Court putatively made in construing the scope of Section 1983 in the first place. The other is that qualified immunity derives from principles of fair notice analogous to the criminal law rule of lenity. But upon closer examination neither of these rationales can sustain the modern doctrine of qualified immunity either.

Let us examine each one in turn.

A. The Historical Good Faith Defense

To understand the first account of qualified immunity we first need a word about the historical transformation caused by Section 1983. Before the Civil War, suits for damages against government officials were not litigated directly as constitutional torts. Rather, constitutional claims emerged as part of a suit to enforce general common law rights. As Akhil Amar has helpfully summarized it: "Plaintiff would sue defendant federal officer in trespass; defendant would claim federal empowerment that trumped the state law of trespass under the principles of the supremacy clause; and plaintiff, by way of reply, would play an even higher supremacy clause trump: Any federal empowerment was *ultra vires* and void" because the defendant acted unconstitutionally.²¹

For instance, a New York merchant might bring a trespass action, demanding \$100,000 against a U.S. military officer for taking command of his horses, mules and wagons. The officer would respond that he had a lawful right to do so because of orders given as part of an

²⁰ Cf. Baude & Sachs, *supra* note 5, at 66-67 (discussing idea of "adoption rules").

²¹ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1506 (1987).

authorized military action. And the merchant would then respond that any such orders were necessarily unconstitutional under the Takings or Due Process Clause, thus stripping the officer of his defense and bringing him back into the trespass claim.²² Constitutional rights were litigated through the framework of general common law torts, not as freestanding damages claims.²³

As we've seen Section 1983 changed this framework. It created a direct cause of action for "the deprivation of any rights . . . secured by the Constitution" and thus eliminated the need to first allege a common law claim or common law damages. (In Hohfeld's terms,²⁴ we might say that this effectively changed the treatment of most constitutional rights from being treated as rules about power to being treated as duties.)²⁵ In doing so, it raised questions about how the new constitutional claims related to the old common law claims, and whether the common law had any role to play in the new constitutional suits.

1. The Court's Account

The most widely-known theory of qualified immunity draws upon this historical background in a general way, arguing that the immunity is a common-law backdrop that could be read into the statute – like, perhaps, the absolute immunities of legislative and judicial officials. To do so, it proceeds by drawing analogies to the rules that governed common law torts.

The Court's 1967 decision in *Pierson v. Ray* pioneers the key intellectual move.²⁶ Several Mississippi police officers had in 1961 arrested a group of people under an anti-loitering law for refusing to leave a segregated bus terminal.²⁷ In 1965 the Supreme Court seemed

²² This example is drawn from *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851). But there are many more. See, e.g., *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806).

²³ Claims for equitable relief had a related but more complicated history, see e.g., John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 Wm. & Mary Bill Rts. J. 1 (2013); Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 688-691 (2009), but it is beside the point for present purposes, since qualified immunity applies to damages claims, not claims for equitable relief.

²⁴ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 Yale L.J. 16, 32-44 (1913).

²⁵ Cf. John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 Va. L. Rev. 333, 340-41 (1998) ("Rules about duty and rules about power differ importantly, especially with respect to the consequences of their violation. . . . Criminals are punished, and trespassers must provide compensation, but the law attaches no price to an act that fails to comply with a power rule."); John Harrison, *Power, Duty, and Facial Invalidity*, 16 U. Pa. J. Const. L. 501, 510 (2013).

²⁶ 386 U.S. 547 (1967).

²⁷ *Id.* at 549-550.

to hold the Mississippi statute unconstitutional in very similar circumstances.²⁸ In 1967 the Court then ruled that the police should not be held liable under the Fourth Amendment for the arrests. Why? Because in a common law suit for false arrest “a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved,” and that could arguably be extended to “excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional.”²⁹

And the newer constitutional tort, the Court held, should be read the same way:

[Section] 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause. We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under [Section] 1983.³⁰

On its face one might have expected this reasoning to be limited to false arrests or other torts with similar elements, but the Court rapidly expanded it to executive action generally.³¹ On its face one might also expect this reasoning to support a subjective defense of good faith, but the Court has since transformed it into an objective analysis of “clearly established law.”³²

The Court has not repeated this common law “background” argument as frequently once these transformations of the immunity were ratified, perhaps because looking at the history would cause one to question the transformations. But in a recent opinion the Court did gesture at the argument once again; so perhaps it should not be entirely ignored.

²⁸ *Thomas v. Mississippi*, 380 U.S. 524, 524 (1965). I say “seemed to” because the decision was a one-sentence summary reversal of the sort that Bickel called “opinions that do not opine and . . . per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.” Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1, 3 (1957).

²⁹ *Id.* at 555.

³⁰ *Id.* at 556-57 (quoting *Monroe v. Pape*, 365 U.S., at 187).

³¹ *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974).

³² *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

That recent opinion was Chief Justice Roberts’s opinion for the Court in *Filarsky v. Delia*.³³ The actually contested issue in the case was immunity for non-employees who work with the government in a particular capacity. The Court ruled that such immunity was largely available to non-employees, but before doing so it went out of its way to reinforce the historical theory of immunity:

At common law, government actors were afforded certain protections from liability, based on the reasoning that “the public good can best be secured by allowing officers charged with the duty of deciding upon the rights of others, to act upon their own free, unbiased convictions, uninfluenced by any apprehensions.” *Wasson v. Mitchell*, 18 Iowa 153, 155–156 (1864) (internal quotation marks omitted); see also W. Prosser, *Law of Torts* § 25, p. 150 (1941) (common law protections derived from the need to avoid the “impossible burden [that] would fall upon all our agencies of government” if those acting on behalf of the government were “unduly hampered and intimidated in the discharge of their duties” by a fear of personal liability). Our decisions have recognized similar immunities under § 1983, reasoning that common law protections “‘well grounded in history and reason’ had not been abrogated ‘by covert inclusion in the general language’ of § 1983.” *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).³⁴

The foundation of immunity had not been questioned by the parties, so the passage’s purpose is slightly unclear. The Court relied on history to answer the actual question presented (whether immunity should depend on employee status),³⁵ so it is possible that it needed to first re-assert that history was a useful guide to this area. In any event, it was a reminder that the Court does not assert that qualified immunity can be justified on sheer policy grounds but rather must be grounded in some kind of construction of the statute in light of its history.

Preliminarily, note that the Court’s references to common law here are concrete and historically fixed. The Court is not using com-

³³ 132 S. Ct. 1657 (2012).

³⁴ *Id.* at 1661-1662.

³⁵ *Id.* at 1662-1665.

mon law in the Benthamite sense³⁶ of including all judge-made law. Indeed *Filarsky* is consistent with the Court’s previous insistence that “[w]e do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy.”³⁷ And it is consistent with the Court’s “reemphasi[s] that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress’ intent by the common-law tradition.”³⁸

And while “[i]t could be argued” that Section 1983 calls for “*contemporary* common law and equity principles,”³⁹ the Court has disavowed that argument as well. Instead, it looks to the *traditional* common law, asking whether those immunities “were so well established in 1871, when § 1983 was enacted, that ‘we presume that Congress would have specifically so provided had it wished to abolish’ them.”⁴⁰

Similarly, the Court does not treat immunity as a question of “interstitial law,”⁴¹ that incorporates the law of the relevant state, even though it has done so for other procedural issues.⁴²

2. The Historical Problems

There are several historical problems with the Court’s account of common law qualified immunity. The first is that there was no well-established good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment. The second is that the good faith defense that did exist in some common law suits was part of the elements of a common law tort, not a general immunity. The third is that qualified immunity today is much broader than a good-faith defense.

³⁶ See Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 Va. L. Rev. 1, 15 (2015).

³⁷ *Tower v. Glover*, 467 U.S. 914, 922-23 (1984).

³⁸ *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

³⁹ Beermann, *supra* note 8, at 101 (emphasis added); see also *id.* (“Congress, the argument goes, knew that rules for such proceedings evolve and did not indicate an intention to freeze § 1983 into the rules of 1871.”).

⁴⁰ *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554–555 (1967)). It is debatable whether this is an accurate citation of *Pierson*, which referred to the “prevailing view,” *id.* at 555, and therefore can be read to focus on “modern rather than nineteenth century tort doctrine.” Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1983*, 133 U. Pa. L. Rev. 601, 609 (1985); David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. Rev. 497, 525 (1992); see also *Smith v. Wade*, 461 U.S. 30, 34 n.2 (1983). But it is the Court’s position now, anyway.

⁴¹ William Baude, *Beyond DOMA, Choice of State Law in Federal Statutes*, 64 Stan. L. Rev. 1371, 1423-1427 (2012).

⁴² Kreimer, *supra* note 40, at 615.

a. As many scholars of official liability have pointed out, at and shortly after the founding, lawsuits against officials for constitutional violations did not generally permit a good faith defense.⁴³

A paradigm example is Chief Justice Marshall's 1804 opinion in *Little v. Barreme*,⁴⁴ in which a naval captain George Little, mistakenly captured a Danish boat, *The Flying-Fish*, and was subsequently sued.⁴⁵ The Court thought it plain that federal law allowed the boat to be seized only if it was going to a French port, which it was not.⁴⁶ But President Adams had issued broader instructions to seize boats regardless of where they were going, which the Court sympathetically noted were "much better calculated to give [the law] effect," and without which it "was so obvious . . . that the law would be very often evaded."⁴⁷

The question in Captain Little's case was whether his reliance on the President's instructions could "excuse him" him from liability even though the seizure was unlawful.⁴⁸ The executive construction was a sympathetic one, and Chief Justice Marshall thought that the ship had been "seized with pure intention."⁴⁹ Nonetheless, the Court concluded, "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."⁵⁰ In other words, there was strict liability for the violation.

A personal aside by Chief Justice Marshall helps to show the deep roots of the strict liability principle. Marshall explained that "the

⁴³ See generally David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14-21 (1972); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Res. L. Rev. 396, 414-422 (1987).

⁴⁴ 6 U.S. (2 Cranch) 170 (1804). See also James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862 (2010) ("No case better illustrates the standards to which federal government officers were held than *Little v. Barreme*").

⁴⁵ *Little*, 6 U.S. (2 Cranch) at 176. The opinion does not explain who "Barreme" was. In case you were wondering (as I was) Francois Barreme was the "the supercargo (i.e., the agent for the ship's owner)." Frederick Leiner, *Millions for Defense: The Subscription Warships of 1798*, at 100 (2014). Thanks to Kevin Walsh and Ryan Williams for pointing me here.

⁴⁶ *Little*, 6 U.S. (2 Cranch) at 177-178

⁴⁷ *Id.* at 178.

⁴⁸ *Id.* The opinion refers to the seizure as "unlawful" rather than specifically "unconstitutional," though it certainly seems as though an unlawful seizure of a ship would have violated either the Fourth Amendment or the Fifth Amendment – more likely the Fifth. See Nathan S. Chapman, *Due Process Abroad* (on file with the author) (discussing *Little v. Barreme* as a due process case); cf. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 606 n.154 (1999) (denying that the Fourth Amendment applied to ships).

⁴⁹ 6 U.S. (2 Cranch) at 179.

⁵⁰ *Id.*

first bias of my mind was very strong in favor of the opinion that though the instruction of the executive could not give a right, they might yet excuse from damages,” before he ultimately acquiesced in the strict liability rule established by the Court.⁵¹ But even Marshall envisioned creating an excuse only because “a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas.”⁵²

In other words, even when Marshall was tempted to rule in favor of the military officer abroad, he recognized the general principle of liability for domestic violations by civil officials – the circumstances that describe every modern qualified immunity case decided by the Court.⁵³ (Lest you worry about the officials themselves, they regularly petitioned Congress for indemnification and “succeeded in securing indemnifying private legislation in roughly sixty percent of cases in which they petitioned.”)⁵⁴

This pattern of liability became more complicated over time, especially when the government officials were sued for common law torts without constitutional claims.⁵⁵ Even so one could still find cases applying strict liability throughout the nineteenth century. For instance, in 1891, the Supreme Judicial Court of Massachusetts, through Justice Holmes, held that members of a town health board could be held liable for mistakenly killing an animal they thought to be diseased, even when the government commissioners had ordered it killed.⁵⁶

In any event, the even more important fact is that after Section 1983 was enacted, the Court *specifically rejected* the application of a good-faith defense to constitutional suits under *that statute*. The key case is *Myers v. Anderson*, decided in 1915, where the Court found a state statute to violate the Fifteenth Amendment’s ban on racial dis-

⁵¹ *Id.*

⁵² *Id.* See also *id.* (“That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me, strongly to imply the principle . . .”).

⁵³ See Appendix A. One pending case, *Hernandez v. Mesa*, No. 15-118, will consider whether qualified immunity should be granted to a border patrol agent who shot a Mexican boy across the U.S.-Mexico border.

⁵⁴ Pfander & Hunt, *supra* note 44, at 1868.

⁵⁵ See generally Engdahl, *supra* note 43, at 48-55; Woolhandler, *supra* note 43, at 436-457; Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209, 220-222 (1963); Richard Fallon & Daniel Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1749-1750, 1833 (1991).

⁵⁶ *Miller v. Horton*, 152 Mass. 540, 542, 26 N.E. 100, 100 (1891). See also John H. Wigmore, *Justice Holmes and the Law of Torts*, 29 Harv. L. Rev. 601 (1916) (praising decision); Yosaf Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 Stan. L. Rev. 3, 29-31 (1962) (questioning decision).

crimination in voting.⁵⁷ The case was brought under Section 1983, and among other things, the state officials argued that they could not be liable for money damages if they had in good faith thought the statute constitutional.⁵⁸ Section 1983, they claimed, had been intended to preserve “traditional limits” such as a common-law requirement “that malice be alleged” in voting rights cases.⁵⁹

The Court did not spend much time rejecting this argument in its opinion, but it did reject it nonetheless. The Court observed that “[t]he nonliability in any event of the election officers for their official conduct is seriously pressed in argument” by the appellants. But, it concluded, this argument is “fully disposed of . . . by the very terms of” the statute.⁶⁰ In other words, no qualified immunity.

While the Court did not elaborate, it is possible that it did not think that the text of Section 1983 permitted unwritten defenses at all. It is also possible, however, that the Court agreed with the analysis that the lower court had provided in upholding liability. The lower court had been both slightly more specific in denying the good-faith defense:

The common sense of the situation would seem to be that, the law forbidding the deprivation or abridgment of the right to vote on account of race or color being the supreme law, any state law commanding such deprivation or abridgment is nugatory and not to be obeyed by any one; and *any one who does enforce it does so at his known peril* and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.⁶¹

⁵⁷ *Myers v. Anderson*, 238 U.S. 368, 378-379 (1915). See also Kreimer, *supra* note 40, at 633; Woolhandler, *supra* note 43, at 457.

⁵⁸ See Brief for Plaintiffs in Error, *Myers v. Anderson*, at 23-45.

⁵⁹ *Id.* at 34-35. Interestingly, in their initial brief, the officials conceded: “we are not making *here* any contention that Congress *might not*, if it had chosen to do so, have provided for liability in damages on the part of the Election Officials, in a case of this sort without proof of malice or corrupt motive.” *Id.* at 35. But in a supplemental brief they argued that if the statute robbed them of immunity, “it is not appropriate legislation under the second section of the Fifteenth Amendment” and “would completely destroy the autonomy of the states, and would in effect deprive them of a republican form of government secured to them by the Constitution of the United States.” Supplemental Brief for Plaintiffs in Error, at 3. See *infra* Part II.A.

⁶⁰ *Myers v. Anderson*, 238 U.S. 368, 378-379 (1915). The Court also referenced *Guinn v. United States*, 238 U.S. 347 (1915), decided the same day, but *Guinn* was a criminal conspiracy prosecution that did not discuss immunity, *id.* at 354, so it was presumably invoked for a merits question, not an immunity question.

⁶¹ *Anderson v. Myers*, 182 F. 223, 230 (C.C.D. Md. 1910) (emphasis added).

It was not until later in the twentieth century that the Court first grafted a good-faith defense to the constitutional cause of action.

b. This problem with the Court's qualified immunity doctrine is well-known. That is why in *Filarsky* and earlier cases the Court does not try to point to a good-faith defense from constitutional causes of action, but rather points to a cause of action in *common law* cases. But there is an additional problem. Even to the extent that this category of cases could be imported to the cause of action under Section 1983, these cases generally do not describe a freestanding common law defense, like state sovereign immunity.⁶² Instead, they are describing individual elements of the common law tort.

This distinction is important because an element of a specific tort does not provide evidence of a more general backdrop that one would expect to export to other claims – let alone to export from common law claims to constitutional claims. For instance, a Fourteenth Amendment antidiscrimination claim requires the plaintiff to demonstrate discriminatory intent by the defendant.⁶³ But it does not follow that intent (let alone discriminatory intent) is an element of a due process claim.⁶⁴ Similarly, bad faith or flagrancy were simply elements of certain torts brought against public officials. It did not follow that they were elements of all torts, let alone all constitutional claims, against public officials.

For instance, in one of the earliest Supreme Court cases to discuss the negative effects of damages against officers in doubtful cases is an admiralty decision called *The Marianna Flora*.⁶⁵ In that case the Court declined to “introduce a rule harsh and severe in a case of first impression.”⁶⁶ But the Court used this reasoning as part of its definition of the substantive rules of capture, which were part of its general powers of “conscientious discretion” within its admiralty jurisdiction. The reasoning was tethered to specific facts about rules of capture in admiralty, not a general defense.

The role of good faith as an element of specific torts (rather than a defense) is even more apparent from *Pierson*, where the Court pointed to the elements of the false arrest tort at common law.⁶⁷ It pointed to the Second Restatement of Torts, which described a “privilege[] to arrest,”⁶⁸ an Eighth Circuit case arising in diversity that applied Mis-

⁶² See Baude, *supra* note 18, at 8-9.

⁶³ *Washington v. Davis*, 426 U.S. 229, 239-242 (1976).

⁶⁴ See *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

⁶⁵ *The Marianna Flora*, 24 U.S. 1 (1825) (Story, J.).

⁶⁶ *Id.* at 56.

⁶⁷ *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

⁶⁸ Restatement (Second) of Torts § 121 (1965).

souri law consistent with the Second Restatement,⁶⁹ and a torts treatise to similar effect.⁷⁰

Interestingly, Prosser's 1941 treatise, a few pages after the page cited in *Filarsky*, does note "courts *are* being driven slowly" (in the present tense) to extend a good faith immunity "[e]ven as to officers acting under an unconstitutional statute."⁷¹ But the "slow[]" evolution Prosser describes almost entirely post-dated the enactment of Section 1983. Only two of the cases he cited were from before 1871, one on each side of the immunity question.⁷²

To be sure, because some constitutional doctrine itself borrows concepts or rules from the common law, it is possible to see the elements of an individual common law tort appear in that garb. But that should occur on the merits side of the ledger; there is no justification for it to be read into the statutory remedy.

c. Finally, even if one were to grant the existence of a good faith defense and import it to constitutional claims, modern immunity cases have distorted those common law rules to a troubling degree. First, qualified immunity is now applied "across the board" to all constitutional claims regardless of "the precise character of the particular right"⁷³ – and perhaps to statutory claims as well⁷⁴ – rather than being limited to the kinds of claims where good faith was traditionally relevant. Second, instead of the subjective inquiry into intent or motive that marked the good faith inquiry, qualified immunity has become an

⁶⁹ *Missouri ex rel. Ward v. Fid. & Deposit Co. of Md.*, 179 F.2d 327, 331 (8th Cir. 1950).

⁷⁰ 1 Harper & James, *The Law of Torts* s 3.18, at 277–278 (1956).

⁷¹ W. Prosser, *Law of Torts* § 25, p. 153-154 (1941).

⁷² Compare *Kelly v. Bemis*, 70 Mass. 83 (1855) with *State v. McNally*, 34 Me. 210, 221 (1852).

⁷³ *Anderson v. Creighton*, 483 U.S. 635, 642-643 (1987). As late as 1963, Professor Jaffe assumed that the growth of discretionary official immunity would nonetheless exclude "the historic liability of sheriffs and peace officers" and "a police officer, for example, who negligently operates a Black Maria." Jaffe, *supra* note 55, at 221-222. But it does not.

⁷⁴ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established *statutory or* constitutional rights of which a reasonable person would have known.") (emphasis added). Mitchell N. Berman, R. Anthony Reese, and Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix" Florida Prepaid (and How Not to)*, 79 Tex. L. Rev. 1037, 1123 (2001) ("[T]he lower federal courts have held the qualified immunity defense to be available against a wide variety of federal statutory claims. Even though qualified immunity is plainly available as a defense to some statutory claims, however, the courts have acknowledged that the defense is incompatible with certain federal statutes."); see also Kathleen Lockard, *Qualified Immunity As A Defense to Federal Wiretap Act Claims*, 68 U. Chi. L. Rev. 1369, 1392-1400 (2001) (arguing against qualified immunity defense to wiretap claims).

objective standard based on case law.⁷⁵ This means that even the official who acts in *bad faith* is entitled to the defense if a different official could have made the mistake reasonably.⁷⁶ Third, as I will discuss in more depth, qualified immunity’s objective defense has become more and more protective, outstripping other comparable defenses⁷⁷ and leading the Court on the kind of pro-immunity crusade that it normally reserves for legal edicts like AEDPA and the Federal Arbitration Act.⁷⁸

While the Court may not cop to the full force of these historical critiques, some Justices have acknowledged elements of them. For instance, in 1992 Justice Kennedy complained that “qualified immunity for public officials” had “diverged to a substantial degree from the historical standards.”⁷⁹ He specifically noted that it was “something of a misnomer to describe the common law as creating a good-faith defense; we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort.”⁸⁰ Justice Kennedy found these deviations problematic because immunity doctrine is supposed to be “rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in freewheeling policy choices.”⁸¹

In a different opinion six years later, Justice Thomas also endorsed a historical criticism of this rationale, joining a dissent that observed that “our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume.”⁸²

But both of these justices regularly join the Court’s more recent qualified immunity cases without dissent. While the historical justification for qualified immunity is the most prominent and most-known, upon closer examination, the Court’s opinions contain two alternative legal rationales. And each of these rationales is sufficiently plausible that it is important that it be considered on its own terms. Let us turn to them next.

B. The Second-Best Theory

⁷⁵ *Harlow*, 457 U.S. at 816-818.

⁷⁶ See *Anderson*, 483 U.S. at 641 (1987). See also David E. Pozen, *Constitutional Bad Faith*, 129 Harv. L. Rev. 885, 898-899 (2016) (noting that through qualified immunity doctrine, “the Court has disavow[ed] the core conception of bad faith in its efforts to police the police”).

⁷⁷ See *infra* Part I.C.

⁷⁸ *Infra* Part II.B.

⁷⁹ *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) (internal quotation marks and citations omitted).

⁸⁰ *Id.* at 172.

⁸¹ *Id.* at 170.

⁸² *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). For further discussion, see Part I.B. *imminently infra*.

1. The *Crawford-El* Account

One of the two alternative legal justifications for qualified immunity is in a surprisingly obscure dissenting opinion in *Crawford-El v. Britton*. In *Crawford-El*, the Court considered and rejected the application of a heightened pleading standard in qualified immunity cases.⁸³ Justice Scalia dissented, joined by Justice Thomas. Justice Scalia did not really maintain that the pleading standard could be justified on its own terms, but instead put forth what we might call a legal theory of the second-best, which articulated a new theory of qualified immunity.⁸⁴

Our qualified immunity jurisprudence is inconsistent with the intended meaning of the statute, Justice Scalia conceded. But qualified immunity operates as a defense to the scope of liability under Section 1983, and we have so misinterpreted Section 1983 that qualified immunity is only a fair response.

Here is the critical paragraph:

[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume. That is perhaps just as well. The § 1983 that the Court created in 1961 bears scant resemblance to what Congress enacted almost a century earlier. I refer, of course, to the holding of *Monroe v. Pape*, which converted an 1871 statute covering constitutional violations committed “*under color* of any statute, ordinance, regulation, custom, or usage of any State,” into a statute covering constitutional violations committed *without* the authority of any statute, ordinance, regulation, custom, or usage of any State, and indeed even constitutional violations committed in stark violation of state civil or criminal law. As described in detail by the concurring opinion of Judge Silberman in this case, *Monroe* changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law. (The present suit, involving the constitutional violation of misdirecting a package, is a good enough ex-

⁸³ *Crawford-El v. Britton*, 523 U.S. 574 (1998).

⁸⁴ *Id.* at 611-612 (Scalia, J., dissenting).

ample.) Applying normal common-law rules to the statute that Monroe created would carry us further and further from what any sane Congress could have enacted.⁸⁵

Justice Scalia's theory is an example of what various scholars have called "compensating adjustments"⁸⁶ or "equilibrium adjustments,"⁸⁷ whereby the Court will sometimes correct the course of an old doctrine by inventing a new one that tacks back the other way.

These adjustments should be familiar to those who have read Justice Scalia's other opinions about official liability. In cases about the scope of the federal cause of action created by *Bivens v. Six Unknown Named Narcotics Agents*,⁸⁸ for instance, Justice Scalia repeatedly and uniformly refused to recognize a cause of action. He did not attempt to justify these votes on *Bivens's* own terms, but rather on the grounds that *Bivens* was a mistake – a "relic of the heady days in which this Court assumed common-law powers to create causes of action," which it has since "abandoned."⁸⁹

Under the second-best theory of qualified immunity, it does not matter whether it can be justified on first principles. It is a judicially-invented immunity for a judicially "invented" statute.⁹⁰ Two wrongs, Justice Scalia might say, can make a right.⁹¹

2. The "Under Color of" Problem

Yet this theory suffers from two legal deficiencies as well. The first problem is that Justice Scalia's premise—that *Monroe v. Pape* is wrongly decided as an original matter—appears to be wrong. *Monroe v. Pape* confronted the tricky question of when illegal executive action is

⁸⁵ *Id.* at 611 (internal citations omitted).

⁸⁶ Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. Chi. L. Rev. 421, 439-440 (2003); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 Wm. & Mary L. Rev. 1733 (2005).

⁸⁷ Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harv. L. Rev. 476, 478 (2011).

⁸⁸ 403 U.S. 388 (1971).

⁸⁹ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). See also *Minnecci v. Pollard*, 132 S. Ct. 617, 626 (2012) (Scalia, J., concurring) (same); *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (same). One can therefore imagine a separate and distinct second-best argument for qualified immunity in the *Bivens* context, although to date the Court has just mechanically equated immunities under *Bivens* with immunities under Section 1983, *supra* n. 13.

⁹⁰ *Crawford-El*, 523 U.S. at 611-612 (Scalia, J., dissenting).

⁹¹ Cf. Antonin Scalia, *Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking, Regulation*, July-Aug. 1977, at 38; but see *Am. Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 204 (1990) (Scalia, J., concurring in the judgment) ("two wrongs do not make a right.").

covered by Section 1983.⁹² The statute refers to action taken “under color of” state law,⁹³ which obviously applies to action that is authorized by state law, but what about actions that are actually illegal as a matter of state law? *Monroe v. Pape* held that they were covered too, and Justice Scalia disagreed.⁹⁴

Justice Scalia instead endorsed Justice Frankfurter’s dissent in *Monroe*.⁹⁵ That is often a good practice. Frankfurter was a perspicacious skeptic in federal jurisdiction cases (think of his *Lincoln Mills* dissent,⁹⁶ his *Tidewater* dissent,⁹⁷ and the fact that the first edition of Hart and Wechsler was dedicated to him).⁹⁸ And his position in *Monroe* has an intuitive appeal: Many things that are unconstitutional are also illegal as a matter of state law. The Constitution doesn’t let officers break into your house and harass you for no reason, but neither does battery law, or the code for the use of force. So when an officer acts contrary to the law of both Illinois and the Constitution, does he really act “under color” of the law of Illinois?

This position makes sense, and one can see why Justices Scalia and Frankfurter might have held it as a hypothesis; it was my initial hypothesis as well. The problem is that there is historical reason to doubt it. Section 1983 provides liability for all those who act “under color of” state law, not merely “under” it or “consistent with” it. And it turns out that “under color of” is a longstanding legal term that encompasses false claims of legal authority.

As Steven Winter has recounted, the usage goes back more than 500 years, when an English bail bond statute voided obligations taken by sheriffs “by colour of their offices” without complying with a statutory procedure. The English court subsequently concluded that to act “by colour of” one’s office (or “colore officii sui”) included an illegal act. It “signifies an act badly done under countenance of an office, and it bears a dissembling visage of duty, and is properly called extortion.”⁹⁹ Subsequent decisions from American courts in the 19th Century similarly agreed that “under color of law referred to official action without proper authority.”¹⁰⁰ So “under color of” seems to perfectly include po-

⁹² 365 U.S. 167 (1961).

⁹³ 42 U.S.C. § 1983.

⁹⁴ *Crawford-El*, 523 U.S. at 611-612 (Scalia, J., dissenting).

⁹⁵ *Id.* (citing *Monroe*, 365 U.S. at 183 (Frankfurter, J., dissenting)).

⁹⁶ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 475-77 (1957) (Frankfurter, J., dissenting).

⁹⁷ *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 652 n.3 (1949) (Frankfurter, J., dissenting).

⁹⁸ Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Court and the Federal System*, at ix (1st ed. 1953).

⁹⁹ Steven L. Winter, *The Meaning of “Under Color of” Law*, 91 Mich. L. Rev. 323, 344 (1992).

¹⁰⁰ *Id.* at 359 (emphasis omitted).

lice officers and others who abuse or exceed their state-granted authority.

And indeed there is evidence that the original framers of the Ku Klux Act understood the phrase in its traditional sense.¹⁰¹ Moreover, David Achtenberg has argued that there is circumstantial confirmation from the way the statute was drafted: Representative Shellabarger oversaw the insertion of the “under color of” phrase in Section 1983 to replace the phrase “under pretense of.” Yet Shellabarger was more radical than the previous drafter and his changes consistently broadened the availability of relief, so it seems unlikely that “under color of” was supposed to be more limited than the phrase “under pretense of,” that it replaced.¹⁰² (To be sure, Justice Scalia would have been unlikely to care about drafting history that is inconsistent with the apparent meaning of the text, but he did give weight to an established meaning of legal terms of art.)¹⁰³

In his *Crawford-El* dissent, Justice Scalia implied that his skepticism was bolstered by a practical sense that *Monroe v. Pape* had been a radical change to the meaning of Section 1983. *Monroe*, he said: “changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours in the federal courts tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law.”¹⁰⁴

Some commentary by *Monroe*’s supporters supports the impression that the case was revolutionary.¹⁰⁵ But there are other explanations for the small number of early Section 1983 suits. (Let us put aside the point that Justice Scalia did not normalize for the different number of cases of all types.)¹⁰⁶ There were not that many judicially-

¹⁰¹ David Achtenberg, *A “Milder Measure of Villainy”: The Unknown History of 42 U.S.C. § 1983 and the Meaning of “Under Color of” Law*, 1999 Utah L. Rev. 1, 59-60 (1999).

¹⁰² *Id.* at 56-60.

¹⁰³ Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation* 29-37 (Amy Gutmann ed. 1997).

¹⁰⁴ *Crawford-El*, 523 U.S. at 611 (Scalia, J., dissenting) (relying on 93 F.3d 813, 829 (D.C. Cir. 1996) (Silberman, J., concurring)).

¹⁰⁵ See, e.g., Karen M. Blum, *Section 1983 Litigation: The Maze, The Mud, and the Madness*, 23 Wm. & Mary Bill of Rights Journal 913, 913 (2015) (“Some of us were there at the ‘founding,’ and I don’t mean in 1871 when 42 U.S.C. § 1983 was originally enacted as the Ku Klux Klan Act, but in 1961, when the Court decided *Monroe v. Pape*”) (footnotes omitted); Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 Harv. L. Rev. 1, 25 (2012) (“The innovation in Justice Douglas’s opinion . . .”).

¹⁰⁶ See Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 662-668 (1987).

recognized constitutional rights for decades after Reconstruction at the time. It was not until 1925 that the Supreme Court incorporated First Amendment protections against the states,¹⁰⁷ and not until 1949 that the Court confirmed that “the core of the Fourth Amendment” was so incorporated.¹⁰⁸ Even if one thinks (as I do) that incorporation was commanded by the original meaning of the Fourteenth Amendment,¹⁰⁹ it’s still true that incorporation was not well-received in the courts, and so it is little surprise that there weren’t as many suits.¹¹⁰

3. The Mismatch Problem

And once again there is a second and more important problem with Justice Scalia’s position. *Even if* we accept its premise as true, the results ought to be nothing like the modern regime of qualified immunity. That is, if Justice Frankfurter was right about *Monroe v. Pape*, the resulting immunity ought to be nearly the opposite of the immunity regime we now have.

To see why, we must first reconstruct Justice Frankfurter’s position.¹¹¹ As a first approximation Justice Frankfurter thought that an official acts “under color of” state law when his conduct is authorized by that law, and not when it is illegal.¹¹² But the position had some additional subtleties. In many cases it will be unclear exactly whether a given course of conduct is legal under state law. In other cases it is possible that conduct will be unauthorized as a matter of the written statutes, but nonetheless permitted as a practical matter. And Section

¹⁰⁷ *Gitlow v. New York*, 268 U.S. 652 (1925).

¹⁰⁸ *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). The Court thought that core was “[t]he security of one’s privacy against arbitrary intrusion by the police,” but not the exclusionary rule.

¹⁰⁹ See generally Akhil Reed Amar, *The Bill of Rights* (1996); Christopher R. Green, *Equal Citizenship, Civil Rights, and the Constitution* (2015).

¹¹⁰ Louise Weinberg, *The Monroe Mystery Solved: Beyond the “Unhappy History” Theory of Civil Rights Litigation*, 1991 B.Y.U. L. Rev. 737, 745-748 (1991) provides a similar explanation. See also 1 Nahmod, *supra* note 1, at § 2:2 (“Restrictive application of the state action doctrine, a narrow reading of the Fourteenth Amendment’s privileges or immunities clause, a similarly narrow reading of § 1983’s jurisdictional counterpart, and the Supreme Court’s refusal to incorporate completely the provisions of the Bill of Rights were jointly responsible for the dormancy of § 1983 from the time of its enactment to the year 1961”) (footnotes omitted).

¹¹¹ Justice Frankfurter did not rely on much historical evidence for his views, Winter, *supra* note 99, at 325, but Judge Silberman relied on a subsequently published defense of the Frankfurter position by Eric H. Zagrans, “*Under Color of*” *What Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499 (1985) (cited in *Crawford-El*, 93 F.3d 813, 830 (D.C. Cir. 1996) (Silberman, J., concurring)).

¹¹² 365 U.S. at 241-242 (Frankfurter, J., dissenting)

1983 cares about the law on the ground just as much as the law on the books, since it treats “customs” or “usages” the same as “statutes.”¹¹³

Justice Frankfurter admitted all this.¹¹⁴ But he also had the insight that state remedial regimes and state courts can help us sort out authorized from unauthorized conduct. When a plaintiff seeks relief in state court under state law, we learn something about the legal status of the official’s conduct. Consider the following four possibilities under Frankfurter’s view:

1. If the state holds the conduct lawful, then we now know that a federal suit can be brought.
2. If the state holds the conduct illegal and provides a remedy then the plaintiff will be compensated. A section 1983 suit will be unavailable but it will also be unneeded.
3. If the state holds the conduct illegal but nonetheless refuses to provide a remedy because of some official immunity, that establishes that the official did indeed act under color of state law.¹¹⁵ A federal suit can be brought here as well.
4. Finally, it is also possible that the state will simply hold that there is no remedy for generally-applicable procedural reasons.¹¹⁶ In that case we have learned nothing new about the official’s legal status.

Despite the importance of a possible state suit, Justice Frankfurter did not think that the statute contained an exhaustion requirement, stressing that “Prosecution to adverse judgment of a state-court damage claim cannot be made prerequisite to [Section 1983] relief.”¹¹⁷ If an official’s legal status is clear enough from the text of state statutes or municipal ordinances, a federal court can consider the case straightaway.¹¹⁸ But in the “admittedly more difficult ones” that lay “[b]eyond these cases,”¹¹⁹ one could presumably take guidance from the state’s remedial regime – either in previous cases or in the particular case.

¹¹³ 42 U.S.C. § 1983.

¹¹⁴ 365 U.S. at 245-246 (Frankfurter, J., dissenting).

¹¹⁵ *Id.* at 211.

¹¹⁶ *Id.* at 245 (“Section [1983] was not designed to cure and level all the possible imperfections of local common-law doctrines, but to provide for the case of the defendant who can claim that some particular dispensation of state authority immunizes him from the ordinary processes of the law.”)

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 246.

¹¹⁹ *Id.*

The Frankfurter regime thus has an internal logic.¹²⁰ When the state remedies its officials' own wrongs, there is no need for federal liability. When the state legalizes or immunizes an official's conduct, federal law kicks in by supplying a forum for constitutional adjudication. On this view Section 1983 creates a federal forum when states refuse to do so for self-interested reasons, and thus moves closer to the oft-recited (though sometimes breached) principle that "every right, when withheld, must have a remedy, and every injury its proper redress."¹²¹ The "under color of" state law requirement then withholds that forum where it would be redundant with state tort law.

Now that we have the Frankfurter position, notice that it does not yield modern qualified immunity doctrine. Frankfurter's account does not require any kind of federal immunities. Indeed, immunities in state law are used as a *trigger* for liability.

Rather, under Frankfurter's view, Section 1983 fills in a remedial gap – it provides a federal forum for conduct made lawful or immunized by the state. Yet qualified immunity entirely ignores both state liability and state immunity. A devotee of the Frankfurter position ought to analyze qualified immunity (if at all) by reference to state law, to see where *Monroe v. Pape* has resulted in double tort coverage. That would mean denying immunity in cases where states *grant* immunity, while granting immunity only in cases where states *deny* it. Yet modern qualified immunity doctrine looks nothing like this.

Indeed, as we've seen in Part I.A., the modern doctrine of qualified immunity comes closer to *tracking* state common law in some cases, so it will not do a good job at filling in state law's gaps. In those areas, an official who acts egregiously and in bad faith is potentially liable under both state tort law and constitutional doctrine; an official who acts mistakenly but in good faith will be liable under neither one.

To be sure, the power of this criticism depends a lot on how brutally compensatory a "second-best" change may be.¹²² If one looks with a wide enough lens, one might say that it's enough that the first decision erroneously expanded the number of lawsuits and the second decision will decrease the number of lawsuits.

¹²⁰ The Court has since incorporated this insight in some of its procedural due process cases, even if not into Section 1983 itself. See *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009); *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

¹²¹ *Marbury v. Madison*, 5 U.S. 137, 147 (1803). This view still leaves a gap when the state has no remedy for illegal conduct for non-officer-related reasons, such as a statute of limitations. Of course, one might hope that by tying together the rules for officials and regular people strongly limits a state incentive to manipulate those procedural rules in nefarious ways. Cf. William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821 (2016).

¹²² I owe this objection to Richard Re.

But this isn't and shouldn't be a well-accepted theory of the second-best. First, there are many different ways one could decrease the number of lawsuits, so the selection of any particular one requires justification. And to the extent that the original scheme had some kind of animating purpose or logic, one would expect the justification to be consistent with that purpose. For instance, it would be a far closer approximation to the Frankfurterian scheme to create a requirement that Section 1983 claims be exhausted,¹²³ or even to substantively alter the doctrine for certain kinds of constitutional claims (like excessive force claims, perhaps).¹²⁴ For sophisticated proponents of "second-best" interpretations there are plenty of hard questions about how to choose among possible compensating adjustments.¹²⁵ But for present purposes it is enough to say that only an extremely crude theory could justify the Court's current qualified immunity jurisprudence.¹²⁶

C. The Lenity Theory

1. The Court's Account

The lenity theory has the oldest roots. It derives from cases that read a related enforcement provision in light of the need for fair notice, and later extended similar principles to Section 1983.

Section 1983 is not the only Reconstruction-era statute that enforces constitutional rights against state officials. In addition to the civil rights suits authorized by Section 1983, the Congress passed a criminal prohibition too – beginning with the 1866 Civil Rights Act and

¹²³ Cf. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 533 (1982) (Powell, J., dissenting) (proposing exhaustion requirement in part to handle consequences of *Monroe v. Pape*).

¹²⁴ Cf. Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 *Seattle U. L. Rev.* 939 (2014) (proposing overhaul of qualified immunity and excessive force doctrine).

¹²⁵ Vermeule, *supra* note 86, at 433-434 ("A standard conceptual objection is that the policy of adjustment is indeterminate, as the interpreter may choose the margin on which the adjustment is made. If sweeping delegations produce excessive presidential power, why adjust by upholding the legislative veto, as opposed to, say, granting Congress the commander-in-chief power?").

¹²⁶ *Id.* ("Here as elsewhere in constitutional interpretation, however, the indeterminacy point is only partly persuasive; there are easy cases for second-best constitutionalism as well as for first-best interpretive theories. If the growth of omnibus legislation has undermined the veto power, we need no elaborate theoretical apparatus to appreciate that permitting the (otherwise suspect) line-item veto is a more fitting compensating adjustment than, say, making the veto immune from congressional override.").

then modified to include the language of the Ku Klux Act.¹²⁷ It is now codified at 18 U.S.C. § 242, and provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned¹²⁸

That provision also does not contain any written defenses (aside from what can be read into the requirement of a “willful” mens rea). But once again that does not mean that none exist, and the Court soon held that established principles of narrow construction applied to the statute.

Criminal prosecution under this statute can raise a genuine problem of fair notice. The statute criminalizes a violation of constitutional rights, and everybody can easily read the Constitution for themselves. But as John Marshall reminded us, the Constitution does not “partake of the prolixity of a legal code.”¹²⁹ So simply reading the Constitution does not always tell an official much about what the law forbids.

Our accommodation to this problem has been to let judges expound and clarify the legal meaning of the Constitution’s terms. Yet since the interpretations can change and are the subject of contestation, a rule of narrow construction provides some leeway to those who could not fairly anticipate a change.

These principles animated the Court’s early decision in *United States v. Screws*. There, the Court reviewed the conviction of three Georgia officials who had beaten a handcuffed man to death and been prosecuted under the contemporary version of Section 242. Two of the Justices would have been inclined to affirm the convictions.¹³⁰ Three others thought a federal conviction was not legally possible.¹³¹ That left

¹²⁷ See *Screws v. United States*, 325 U.S. 91, 99-100 (1945) and *United States v. Lanier*, 520 U.S. 259, 264 n.1 (1997) for the statutory history.

¹²⁸ 18 U.S.C. § 242.

¹²⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

¹³⁰ *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, concurring in judgment); *id.* at 138 (Murphy, J., dissenting).

¹³¹ *Screws v. United States*, 325 U.S. 91, 139 (1945) (Roberts, J., dissenting, with Frankfurter and Jackson) (putting forward a different interpretation of “under color

Justice Douglas writing the plurality, and likely controlling, opinion. The statute *might* be unconstitutional, the plurality conceded, if it were read to broadly criminalize any violation of “a large body of changing and uncertain law,” especially under the Due Process Clause.¹³² But the statute could be “confined more narrowly” and therefore upheld against the charge of vagueness.¹³³

That narrower interpretation had two parts. First the statute required a “willful” act, which could be interpreted “as connoting a purpose to deprive a person of a specific constitutional right.”¹³⁴ But that alone did not solve the problem if “neither a law enforcement official nor a trial judge can know with sufficient definiteness the range of rights that are constitutional.”¹³⁵ So the specific intent had to be still more specific – to refer not just to constitutional rights but to one that had been made “definite by decision or other rule of law.”¹³⁶ The opinion repeated the formulation in various ways and said it would target one who “acts in defiance of announced rules of law” and “knows exactly what he is doing.”¹³⁷

Because that new construction was not consistent with the jury instructions, the plurality voted to remand for a new trial. That meant a three-way split on the proper disposition (affirm, reverse with no new trial, remand with a new trial). To avoid a “stalemate,” Justice Rutledge agreed to vote for a remand for a new trial under the plurality’s opinion, rather than sticking with his first choice to affirm.¹³⁸ This likely turned the plurality’s opinion into the controlling opinion, and it has since been adopted by the full Court.¹³⁹

The exact character of the “fair warning”¹⁴⁰ limiting construction was a little ambiguous. One might describe it as the rule of lenity favoring narrow construction of criminal statutes. One might describe it as a distinct rule that broad constructions of the criminal law cannot be retroactively applied. Or one might describe it as a rule that vague criminal statutes are unconstitutional, which the statute should be construed not to be. Indeed, the Court has since said that all three of

of” state law, cf. *supra* I.B, and arguing that a contrary view was potentially unconstitutional).

¹³² *Id.* at 96.

¹³³ *Id.* at 100.

¹³⁴ *Id.* at 101.

¹³⁵ *Id.* at 104.

¹³⁶ *Id.* at 103.

¹³⁷ *Id.* at 104.

¹³⁸ *Id.* at 134 (Rutledge, J., concurring).

¹³⁹ *Williams v. United States*, 341 U.S. 97, 100-102 (1951); see also *United States v. Guest*, 383 U.S. 745, 760 (1966); *United States v. Price*, 383 U.S. 787 (1966); *United States v. Lanier*, 520 U.S. 259, 267 (1997).

¹⁴⁰ *Screws*, 325 U.S. at 104.

those descriptions are “related manifestations of the fair warning requirement” applied to Section 242.¹⁴¹

These cases provide the first potential grounding for the doctrine of qualified immunity. The lenity interpretation thinks of the state official as akin to a criminal defendant in need of special solicitude before he is punished.

Modern qualified immunity doctrine does not usually mention the criminal rule of lenity, and one might have expected it to be limited to criminal cases. But in some opinions the Court has equated the two. It has explicitly said that “Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242.”¹⁴² And in its most recent decision about the scope of criminal liability under Section 242, the Court has confirmed the connection, stating that “in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials ... the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.”¹⁴³

To be sure, there is something counterintuitive about supposing that constitutional law itself can be unconstitutionally vague, or that government officials, of all people, need not know it.¹⁴⁴ But once one is looking for it, the lenity connection may also explain some of the Court’s elaborations of the qualified immunity standard.

For instance, when the Court says that only “the plainly incompetent or those who knowingly violate the law” can be held liable,¹⁴⁵ it seems to be adverting to criminal recklessness or deliberate wrongdoing. When the Court says that the Fourth Amendment is not enough to clearly establish the unreasonableness of most violations of the Fourth Amendment,¹⁴⁶ it seems to be adverting to the problem of criminal vagueness in light of the fact that the Constitution is not written out as a legal code. Qualified immunity seems to rest on an intuition that officials are not to blame for reasonable mistakes.

But does this justification actually support modern immunity doctrine? Some of its premises are legally sound. Criminal prohibitions should indeed be read in light of longstanding legal and interpretive

¹⁴¹ *Lanier*, 520 U.S. at 266.

¹⁴² *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

¹⁴³ *Lanier*, 520 U.S. at 270-71.

¹⁴⁴ But cf. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274, 1323 (2006) (“many background norms are too vague to permit application until they have been further specified”).

¹⁴⁵ *Malley v. Briggs*, 475 U.S. 335, 341 (1986), invoked most recently in *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014).

¹⁴⁶ *Anderson v. Creighton*, 483 U.S. 635, 643-644 (1987); *Saucier v. Katz*, 533 U.S. 194, 201-202 (2001).

principles; constitutional avoidance and lenity are such principles. And yet . . .

2. The Civil/Criminal Problem

One could fairly have more misgivings, however, about importing the limited construction of the *criminal* statute to the *civil* one.

To be sure, there are a range of cases in which the Court has applied the canonically criminal “rule of lenity” to some civil cases – so long as the same language has parallel application in a criminal case. For instance in *U.S. v. Thompson/Center Arms Co.* confronted “a tax statute that we construe now in a civil setting,” but applied the rule of lenity because the statute also had “criminal applications.”¹⁴⁷ This rule tracked some language in previous tax cases.¹⁴⁸

It has since done the same thing when defining “aggravated felony” for purposes of the immigration laws, reasoning:

Although here we deal with [18 U.S.C.] § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.¹⁴⁹

However, this “civil” rule of lenity might not carry over to Section 1983. Unlike the statutes at issue in *Leocal* and *Thompson Arms*, Section 1983 does not *itself* have criminal applications, it simply parallels the language of another statute that does, 18 U.S.C. § 242. So it does not quite implicate the “unitary principle” that “a term occurring a single time in a single statutory provision should have a single meaning.”¹⁵⁰

Moreover, there is also an important *difference* between the two civil rights provisions. Section 242 applies only to those who “willfully” violate constitutional rights, while Section 1983 contains no such limitation. In *Thompson Center*, the plurality hinted that this was a relevant distinction, since it pointed out that the tax statute at issue there

¹⁴⁷ *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-518 (1992) (plurality); see also *id.* at 519 (Scalia, J., concurring in the judgment) (agreeing that rule of lenity applied).

¹⁴⁸ *Crandon v. United States*, 494 U.S. 152, 158 (1990).

¹⁴⁹ *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004).

¹⁵⁰ Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 *Tex. L. Rev.* 339, 343 (2005) (describing, though not fully endorsing, this principle).

“has criminal applications that carry no additional requirement of willfulness.”¹⁵¹

And indeed, the Court made a similar point about the two statutes itself in *Monroe v. Pape*, specifically noting:

In the *Screws* case we dealt with a statute that imposed criminal penalties for acts “willfully” done. We construed that word in its setting to mean the doing of an act with ‘a specific intent to deprive a person of a federal right.’ We do not think that gloss should be placed on [§ 1983] which we have here. The word “willfully” does not appear in [§ 1983.] Moreover, [§ 1983] provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.¹⁵²

While this passage is somewhat opaque, it and *Thompson/Center* countenance against the application of the criminal rule of lenity to Section 1983.

There is also the slightly distinct (or perhaps it is slightly broader) doctrine of constitutional fair notice. To the extent that the fair notice principle derives from the Constitution’s due process clause, due process is required both for deprivations of liberty (as in many criminal cases) and for deprivations of property (as in civil actions for damages).

However, criminal prosecutions have generally been thought to present distinct fair-warning concerns that do not apply to civil statutes. As the Court has put it: “[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.”¹⁵³ A more recent case, however, *FCC v. Fox*, may have blurred that line, since it applied criminal vagueness precedents in a civil case.¹⁵⁴

So it is possible that some kind of qualified immunity doctrine under Section 1983 could be justified on a mix of fair notice and lenity principles, though that would require some extension of the current version of these principles.

¹⁵¹ 504 U.S. at 517.

¹⁵² *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

¹⁵³ *Winters v. New York*, 333 U.S. 507, 515 (1948); *Hoffman Estates v. Flipside*, 455 U.S. 489, 498-499 (1982).

¹⁵⁴ *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317-2318 (2012) (applying criminal vagueness precedents in a civil case); see also Theodore J. Boutrous, Jr. & Blaine H. Evanson, *The Enduring and Universal Principle of “Fair Notice,”* 86 S. Cal. L. Rev. 193, 198 (2013) (asserting that *Fox* equated the two standards).

3. The Mismatch Problem

But even if we do grant that Section 1983 falls within the domain of a lenity principle, there is a less lofty reason that the principle cannot justify qualified immunity doctrine: Qualified immunity doctrine bears little practical resemblance to the rule of lenity.

Just look at how the Court treats judicial disagreement under the two inquires. Many cases in the Supreme Court have been subject to a “circuit split,” meaning that the lower courts have disagreed. When judges disagree, that might be a clue that the legal question is hard and the materials are ambiguous.¹⁵⁵ If the materials are ambiguous, perhaps the ambiguity should be resolved in favor of the criminal defendant or official. But the Court treats qualified immunity and the ordinary rule of lenity in almost opposite fashion.¹⁵⁶

Indeed, the Court has explicitly *rejected* the relevance of circuit splits to the lenity inquiry, stating that “we [have not] deemed a division of judicial authority automatically sufficient to trigger lenity.”¹⁵⁷ When faced with a defendant who asked for a fair notice defense because his circuit had established precedent construing a criminal statute more narrowly, the Court has said no: This reliance is “unavailing since the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable.”¹⁵⁸

And people regularly go to jail over this issue. In the past few years, for instance, the Court has ruled for the government in at least seven substantive criminal law cases where a lower court had adopted the defendant’s position.¹⁵⁹ In none of them did it apply the rule of lenity or suggest that the division was relevant.¹⁶⁰

¹⁵⁵ See generally Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 *Geo. L.J.* 159 (2016); but see William Baude & Ryan D. Doerfler, *Arguing with Friends* (draft) (arguing for a different version of Posner and Vermeule’s framework).

¹⁵⁶ For similar observations, see Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 *Vand. L. Rev.* 583, 585 (1998); David B. Owens, *Fourth Amendment Remedial Equilibration: A Comment on Herring v. United States and Pearson v. Callahan*, 62 *Stan. L. Rev.* 563, 589 (2010).

¹⁵⁷ *Moskal v. United States*, 498 U.S. 103, 108 (1990).

¹⁵⁸ *United States v. Rodgers*, 466 U.S. 475, 484 (1984). For criticism of the rule, see Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 *S. Cal. L. Rev.* 455, 461 (2001).

¹⁵⁹ See *Voisine v. United States*, 136 S. Ct. 2272 (2016) (rejecting view of *United States v. Nobrigo*, 474 F.3d 561 (9th Cir. 2006)); *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (rejecting view of *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007)); *Lockhart v. United States*, 136 S. Ct. 958 (2016) (rejecting view of *United States v. Trogdon*, 339 F.3d 620 (8th Cir. 2003), and also expressly rejecting application of lenity); *Whitfield v. United States*, 135 S. Ct. 785 (2015) (rejecting view of *United States v. Marx*, 485 F.2d 1179 (10th Cir. 1973)); *Loughrin v. United States*, 134 S. Ct. 2384, 2388 (2014) (rejecting view of *United States v. Thomas*, 315 F.3d 190, 197 (3rd Cir.

In Section 1983 cases, by contrast, the existence of a circuit split is considered a strong point in favor of the official. Indeed, those cases come close to establishing that a circuit split is a per se defense of the official's conduct in circuits where the issue was unsettled. In *Wilson v. Layne*, for instance, the Court concluded that police officers had violated the Fourth Amendment by inviting members of the press to tag along during a home search.¹⁶¹ But the Court also concluded that the officers were entitled to qualified immunity, noting that the question was “not open and shut,” and the officers had reasonably relied on established policy. It closed with an invocation of the fair notice principle in light of judicial disagreement:

Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed on the question whether media ride-alongs that enter homes subject the police to money damages. If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.¹⁶²

That passage turned out to be an important part of *Wilson*, which provided a shield for law enforcement officers to claim that judicial disagreement should give them immunity from constitutional tort.¹⁶³

In *Safford v. Redding*, the Court again held that officials had committed a Fourth Amendment violation, albeit in the very different context of a strip search of a 13-year-old girl suspected of possessing

2002); *United States v. Kenrick*, 221 F.3d 19, 29 (1st Cir. 2000); *United States v. Jacobs*, 117 F.3d 82, 92–93 (2d Cir. 1997)); *United States v. Castleman*, 134 S. Ct. 1405, 1409 (2014) (rejecting decision below, 695 F.3d 582 (6th Cir. 2012)). *United States v. Apel*, 134 S. Ct. 1144, 1146 (2014) (rejecting decision below, 676 F.3d 1202 (9th Cir. 2012)).

¹⁶⁰ *Johnson v. United States*, which invalidated the residual clause of the Armed Career Criminal Act as vague, is a rare case that does mention “numerous splits among the lower federal courts,” as a point in the defendant's favor. 135 S. Ct. 2551, 2560 (2015). But it is still a far cry from the kind of near-dispositive relevance they get in qualified immunity cases. Indeed, the Court wrote that “the most telling feature of the lower courts' decisions is *not* division about whether the residual clause covers this or that crime (even clear laws produce close cases); it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider.” *Id.*

¹⁶¹ *Wilson v. Layne*, 526 U.S. 603, 609–614 (1999).

¹⁶² *Id.* at 618 (internal citations omitted).

¹⁶³ Cf. John P. Elwood, *What Were They Thinking? The Supreme Court in Revue, October Term 2008*, 12 Green Bag 2d 429, 441 (2009) (noting that passage was “much beloved by the SG's Office”).

Ibuprofen at school.¹⁶⁴ And it again held (albeit guardedly) that qualified immunity nonetheless attached because of the state of judicial disagreement:

We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law.¹⁶⁵

The Court has since continued to find immunity on the basis of judicial disagreement. For instance, it quoted *Wilson* again in *Reichle v. Howards*,¹⁶⁶ and it held in *Lane v. Franks* that a defendant was entitled to qualified immunity even though other circuits had (correctly) held his conduct unconstitutional, because the defendant was allowed to ignore them and rely on his own circuit's (erroneous) precedent.¹⁶⁷

In some cases, the Court has hinted at going farther, suggesting that even where a circuit decision in the relevant circuit had clearly established that an action was *unlawful*, officials might still be justified in treating that opinion with skepticism until the Supreme Court has weighed in.¹⁶⁸ While the Court has not (yet?) treated judicial disagreement as the source of a per se immunity, the difference between the immunity analysis and ordinary criminal cases is stark. Criminal defendants never get such solicitude.

¹⁶⁴ *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 376-377 (2009). There was surprisingly pointed debate at the Ninth Circuit about whether the search was technically a "strip search," compare 531 F.3d 1071, 1080-1081 (en banc) with *id.* at 1090 n.1 (Hawkins, J., dissenting), and the Court commented: "The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it." 557 U.S. 364, 374.

¹⁶⁵ *Id.* at 378-379.

¹⁶⁶ *Reichle v. Howards*, 132 S. Ct. 2088, 2096 (2012); see also *Pearson v. Callahan*, 555 U.S. 223, 245, 129 S. Ct. 808, 823 (2009).

¹⁶⁷ *Lane v. Franks*, 134 S. Ct. 2369, 2383 (2014).

¹⁶⁸ See *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014); see also Richard M. Re, *Should Circuit Precedent Deprive Officers of Qualified Immunity?*, Re's Judicata (Nov. 17, 2014, 6:49 AM), <http://richardresjudicata.wordpress.com/2014/11/17/should-circuit-precedent-deprive-officers-of-qualified-immunity/>.

If the only legal basis for qualified immunity is as an extension of the rule of lenity, then the doctrine needs to be radically overhauled. The Justices regularly empathize with officials subject to suit, asking if the official can really be expected to anticipate constitutional rulings that even federal appellate judges did not. But one rarely sees a similar empathy for regular criminal defendants, and indeed the Court's decisions do not bear it out.¹⁶⁹

Thus the lenity theory, while in some respects the most obscure, might be the best path to *some* kind of immunity. But it seems to justify a much more modest immunity doctrine than the one we have, one that at most, tracks the modest defenses available to real criminal defendants.

D. What Immunity Can Be Justified?

1. Justifying Qualified Immunity?

Close inspection suggests that something has gone wrong, as a legal matter, in the Court's immunity doctrine. But it is not, as more extreme accounts have sometimes suggested,¹⁷⁰ that Section 1983 permits absolutely no immunities at all because the text is categorical on its face. Unwritten defenses are not unknown to the law. The real problem with qualified immunity is that it is so far removed from ordinary principles of legal interpretation.

To be sure, even this conclusion rests on a judgment about doctrinal fidelity. One could decide that one of the Court's theories provides an adequate seed for *some* kind of immunity, and that the kind of immunity can then be reshaped at the Court's will, even in very dramatic ways. I am still inclined to disagree, given the principles of judicial role that are otherwise (mostly) observed by our legal system.¹⁷¹

But even if this is the way to justify qualified immunity, it is important because it emphasizes how much immunity doctrine is a product of the Court's own choices, and not ordinary posited law. Exposing the Court's choices let us have a clearer and more responsible decision about whether those choices are the right ones or whether, instead, having given us such a categorical immunity doctrine the Court should now take some of it back.

¹⁶⁹ To be sure, one could instead solve the mismatch by giving all criminal defendants the equivalent of qualified immunity, as suggested by Posner & Vermeule, *supra* note 155, at 172-173.

¹⁷⁰ See, e.g., *Pierson v. Ray*, 386 U.S. 547, 558-559 (1967) (Douglas, J., dissenting); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (Douglas, J., dissenting); *Briscoe v. LaHue*, 460 U.S. 325, 356-63 (1983) (Marshall, J., dissenting).

¹⁷¹ Cf. Baude & Sachs, *supra* note 5, at 71-74.

Similarly, it is possible that the Court could put forward some entirely new legal argument for qualified immunity. For instance, maybe Section 1983 could be reconceived as a “common law” statute analogous to the Sherman Antitrust Act.¹⁷² Of that statute, the Court has concluded that “Congress . . . expected the courts to give shape to the statute’s broad mandate”¹⁷³ and by “recognizing and adapting to changed circumstances and the lessons of accumulated experience.”¹⁷⁴ The Court has so far denied a similar kind of adapting role in creating immunities under Section 1983.¹⁷⁵

An ambitious interpreter might also try to justify qualified immunity as an application of the absurdity doctrine, which rejects interpretations that “would produce an absurd and unjust result which Congress could not have intended.”¹⁷⁶ Even accepting the validity of the absurdity doctrine,¹⁷⁷ it seems counter-intuitive at best to say that Congress *could not* have intended a regime without qualified immunity, given the historical periods in which we got by without it.¹⁷⁸ But in any event, the Court has not attempted this path either.

Finally, the Court might attempt to justify immunity on purely functional grounds. Its cases already put forward some functional justifications for immunity, noting that it “free[s] officials from the concerns of litigation, including ‘avoidance of disruptive discovery,’”¹⁷⁹ and responds to “the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’”¹⁸⁰ So far, though, the

¹⁷² Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 Vand. L. Rev. 363, 370-371, 379-380 (2010); Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. 657, 762-763 (2013).

¹⁷³ Nat’l Soc. of Prof’l Engineers v. United States, 435 U.S. 679, 688 (1978).

¹⁷⁴ State Oil Co. v. Khan, 522 U.S. 3, 20 (1997). See also William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1225-1226, 1231-37 (2001) (describing the Sherman Act as a “super statute” and arguing that Section 1983 has become one as well). The relationship of “super statutes” to “common law statutes” is beyond this paper.

¹⁷⁵ Tower v. Glover, 467 U.S. 914, 922-23 (1984); Malley v. Briggs, 475 U.S. 335, 342 (1986), both quoted *supra* notes 37-38.

¹⁷⁶ Clinton v. City of New York, 524 U.S. 417, 429 (1998) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 574 (1982)); see also Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427, 2442-2444 (2014).

¹⁷⁷ Compare Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 234-239 (2012) with John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387 (2003).

¹⁷⁸ See *supra* notes 43-61 and accompanying text.

¹⁷⁹ Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

¹⁸⁰ Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

Court has used more traditional legal arguments as the opening wedge for these policy arguments. If the statute and its background principles do not authorize this immunity, the Court would have to assert a more freestanding justification.

What all of these hypothetical interpretive approaches have in common is that they would more explicitly foreground the live policy debates about whether qualified immunity is wise or useful, and how it interacts with other aspects of our legal regime such as indemnification, sovereign immunity, and doctrinal change.¹⁸¹ It is far from clear that qualified immunity would survive those debates unscathed. So perhaps qualified immunity doctrine can be *made* lawful, but I rather doubt it, and in any event that question ought to preoccupy us far more than it does.

2. Justifying Other Immunities

Finally, it may well be that some of the *other* immunities recognized by the Court's cases stand on substantially firmer footing. For instance, I have already written about sovereign immunity, suggesting that the Court's cases recognizing this immunity are basically correct.¹⁸²

It is possible that some official immunities could also be justified, such as the absolute immunity given to judges for their judicial acts.¹⁸³ Judicial immunity is supported by cases nearly contemporaneous with Section 1983's enactment. In 1869 the Court affirmed judicial immunity from suit over a state disbarment, opining that "it is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction."¹⁸⁴ And the Court reaffirmed the rule again in 1872, the year after § 1983 was enacted.¹⁸⁵ The rule evidenced by these cases might well support something like the doctrine of judicial immunity. To be sure, these immunity cases do require some extrapolation, and it has been argued that the legislative history of Section 1983 rejects absolute judicial immunity.¹⁸⁶ But my analysis of qualified immunity does not neces-

¹⁸¹ See sources cited *supra* notes 1-6.

¹⁸² See generally Baude, *supra* note 18.

¹⁸³ *Pierson*, 386 U.S. at 554; *Stump v. Sparkman*, 435 U.S. 349, 364 (1978).

¹⁸⁴ *Randall v. Brigham*, 74 U.S. 523, 535 (1869).

¹⁸⁵ *Bradley v. Fisher*, 80 U.S. 335, 355 (1872). (*Randall* and *Bradley* are two of the many nineteenth-century cases whose decision date is not accurately reflected in the U.S. Reports. See Anne Ashmore, *Dates of Supreme Court Decisions and Arguments*, 93, 105, available at <http://www.supremecourt.gov/opinions/datesofdecisions.pdf>).

¹⁸⁶ Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L. J. 322, 327-328 (1969); see also *Pierson*, 386 U.S. at 559 (Douglas, J., dissenting) ("The congressional purpose seems to me to be clear.").

sarily imperil these other immunities, which might have their own firmer historical and legal bases.

II. Implications

A. Qualified Immunity Doctrine

Suppose it is true that the Court's proffered justifications for qualified immunity are shaky and that it does not hold up under ordinary principles of statutory interpretation. What should actually happen to modern doctrine?

The most obvious possibility is that the Court could overrule or modify the doctrine. This possibility is obvious in the sense that it is straightforward, not in the sense that the Court is likely to do it. A doctrine's lack of a legal basis is a necessary condition for overturning it, but it is not a sufficient one.

Under orthodox rules of stare decisis, the Court might be extremely reluctant to overturn qualified immunity, even if it is wrong. The Court is generally extremely reluctant to overturn statutory precedents,¹⁸⁷ and qualified immunity seems to be a largely statutory precedent. In statutory cases, the argument goes, Congress is fully capable of overruling precedent is the better agent to do so.¹⁸⁸ So because qualified immunity has been on the books for years and Congress has declined to revisit it, it may have obtained a belated Congressional imprimatur.¹⁸⁹

But qualified immunity doctrine seems unorthodox in several respects. First of all, it is not entirely clear that the Court views qualified immunity as a purely statutory rule, as opposed to a constitutionally protected one.¹⁹⁰ The lenity rationale for qualified immunity, plainly has some constitutional overtones. And the early arguments rejected in *Myers v. Anderson* invoked constitutional considerations.¹⁹¹ To be sure, apart from the lenity rationale, qualified immunity and

¹⁸⁷ E.g., *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 280-281 (2009).

¹⁸⁸ Nelson, *supra* note 12, at 426-429 (analyzing and questioning this rationale).

¹⁸⁹ Additionally, during this time Congress has amended Section 1983 in one other, albeit minor, respect dealing with injunctive relief against judges. Federal Courts Improvements Act, Pub. L. No. 104-217, § 309, 110 Stat. 3846 (1996).

¹⁹⁰ Compare Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2209 (2003) ("It bears emphasizing that qualified immunity does not appear to be constitutionally required.") with Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1041 (7th ed. 2015) ("Could Congress narrow or abolish immunities in all § 1983 actions?").

¹⁹¹ Supplemental Brief for Plaintiffs in Error, *Myers v. Anderson*, quoted *supra* note 48.

other official immunities do generally appear to be common-law rules, and Congress normally can change the common law.¹⁹² But one might have anticipated the same thing about *sovereign* immunity, which Congress was later held largely powerless to abrogate.¹⁹³ And when the Court held that legislative immunity survived Section 1983 it said that while it was willing to “assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption.”¹⁹⁴

Despite these constitutional shadows, one can and probably should distinguish qualified immunity from these other immunities. But they are enough to show a path by which the Court might say that qualified immunity is not a purely statutory doctrine left to the pleasure of Congress. Indeed, Felix Frankfurter argued that reconsidering interpretations of Section 1983 was “the Court’s responsibility” because it was not “merely a minerun statutory question” but rather one that “has significance approximating constitutional dimension.”¹⁹⁵

Second, even while qualified immunity has remained in place, the Court has openly tinkered with it to an unusual degree. It explicitly eliminated the subjective component of immunity in *Harlow v. Fitzgerald*, focusing the inquiry instead on “clearly established law.”¹⁹⁶ It created a special sequencing requirement in *Saucier v. Katz*¹⁹⁷ and then replaced it with a new set of principles in *Pearson v. Callahan*.¹⁹⁸ These points may not show that qualified immunity is fundamentally unstable, but they do suggest that the Court takes more ownership of it than more orthodox statutory doctrines.

Even if the Court refuses to overrule qualified immunity, it might tinker with the doctrine more incrementally. Indeed, some sug-

¹⁹² Once again, *supra* note 89, I bracket the possibility that there are distinct limits on Congress’s power to regulate the qualified immunity of federal officials. See William Baude, *Sharing the Necessary and Proper Clause*, 128 Harv. L. Rev. F. 39, 46-47 (2014).

¹⁹³ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 88 (1996) (Souter, J., dissenting) (“There is no reason why Congress’ undoubted power to displace those common-law immunities [such as qualified immunity] should be either greater or lesser than its power to displace the common-law sovereign immunity defense.”). On Congress’s power to abrogate sovereign immunity, see Baude, *supra* note 18, at 13-23.

¹⁹⁴ *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

¹⁹⁵ *Monroe v. Pape*, 365 U.S. 167, 221-22 (1961) (Frankfurter, J., dissenting). Cf. *Monnell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 695 (1978) (overruling prior precedent interpreting Section 1983 notwithstanding statutory *stare decisis* principle). This conclusion would be amplified if one were to conclude that Section 1983 is a “common law statute,” because “the Supreme Court has indicated that the traditionally ‘super strong’ *stare decisis* applied to statutory decisions will be relaxed—and perhaps even abandoned” for such statutes. Lemos, *supra* note 172, at 379-380.

¹⁹⁶ 457 U.S. 800, 819 (1982).

¹⁹⁷ 533 U.S. 194 (2001).

¹⁹⁸ 555 U.S. 223 (2009).

gest that this has already happened: that after *Harlow* the Court reformulated the qualified immunity to subtly strengthen it,¹⁹⁹ or that the Roberts Court is now doing the same thing.²⁰⁰ The Court could cut back on some of the excesses of qualified immunity in similar fashion. As Richard Re has pointed out, when a line of doctrine is pointing in a problematic direction it is highly traditional to “narrow” it,²⁰¹ leaving the offending roots intact, while refusing to allow new branches to take their natural course. Justice Kennedy has suggested such an approach in the qualified immunity context.²⁰²

B. The Qualified Immunity Docket

But suppose that we put aside formal or informal tinkering with the doctrinal “formula” of qualified immunity.²⁰³ Even so, there is another important aspect of qualified immunity that might call for reconsideration: the Supreme Court’s special treatment of qualified immunity issues on its certiorari docket. There are two aspects to that special treatment, both of which seem to be getting more special in recent years.

First, nearly all of the qualified immunity cases come out the same way – by finding immunity for the officials. Indeed, in the 35 years since it announced the objective-reasonableness standard in *Harlow v. Fitzgerald*, the Supreme Court has applied it in 27 qualified immunity cases.²⁰⁴ The officials have won all but three—maybe two and a half. The two more recent victories for plaintiffs, *Groh v. Ramirez* and *Hope v. Pelzer* were both more than a decade ago. The former relied on glaring mistake in a search warrant,²⁰⁵ the latter involved the use of a hitching post for prison discipline, in apparent vio-

¹⁹⁹ Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for A Police Officer’s Use of Excessive Force*, 62 Temp. L. Rev. 61, 81 (1989) (discussing *Malley v. Briggs*, 475 U.S. 335 (1986) and *Anderson v. Creighton*, 107 S. Ct. 3034 (1987).)

²⁰⁰ Karlan, *supra* note 105, at 61-62; Stephen R. Reinhardt, *The Demise of Habeas Corpus and The Rise of Qualified Immunity*, 113 Mich. L. Rev. 1219, 1248 (2015) (discussing *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011)).

²⁰¹ Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 Colum. L. Rev. 1861 (2014).

²⁰² *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (“We need not decide whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy, reshaping immunity doctrines in light of those policy considerations. But I would not extend that approach to other contexts.”).

²⁰³ Cf. Fallon, *supra* note 6, at 494 (claiming “that formula has remained relatively untouched in recent decades”).

²⁰⁴ See Appendix A.

²⁰⁵ *Groh v. Ramirez*, 540 U.S. 551, 564 (2004).

lation of longstanding circuit precedent.²⁰⁶ The third case is *Malley v. Briggs*, decided in 1986, which ordered a remand after rejecting (inter alia) an officer’s argument that so long as he does not lie, “the act of applying for a warrant is per se objectively reasonable.”²⁰⁷

This asymmetry may have an important effect on how qualified immunity actually operates. The Court regularly reminds lower courts that “clearly established law” has to be understood concretely. It is not enough to say that the Fourth Amendment is clearly established and therefore all Fourth Amendment violations are contrary to clearly established law.²⁰⁸ Nor is it enough to say, more specifically, that case law clearly establishes that the excessive use of force in making an arrest is unconstitutional and therefore all excessive force violations are clearly-established-law violations.²⁰⁹ The more general the relevant precedents, the more obvious the violation needs to be.²¹⁰

This framework makes it hard to find a roadmap to the denial of immunity that could give a lower court confidence in its conclusion. Because the Court’s maps have nearly all been leading in the other direction, it becomes harder for lower court to know for sure what a violation of clearly established law is supposed to look like.

On top of that, because lower courts are somewhat regularly reversed for erring on the side of liability, but almost never reversed for erring on the side of immunity, the current docket sends them a signal that they should drift toward immunity. And if anything, my tally of immunity cases understates the strength of that signal: It omits the many other Supreme Court cases where the lower court found a violation of clearly established law and the Court reversed even more forcefully – by concluding that the conduct was affirmatively lawful, and therefore mooting the need to reach immunity.²¹¹

What is more, the signal sent by these results is not accidental. The Court’s decision to grant certiorari in these cases almost always previews the merits: all but two of the Court’s awards of qualified immunity were reversing the lower court’s denial of immunity below.²¹²

²⁰⁶ *Hope v. Pelzer*, 536 U.S. 730, 741-746 (2002).

²⁰⁷ *Malley v. Briggs*, 475 U.S. 355, 345 (1986). It is not even clear that this case should count, since the Court stressed that “The question is not presented to us, nor do we decide, whether petitioner’s conduct in this case was in fact objectively reasonable.” *Id.* at 345 n.8. The case was never appealed again after remand.

²⁰⁸ *Anderson v. Creighton*, 483 U.S. 635, 643 (1987).

²⁰⁹ *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

²¹⁰ *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). See also *White v. Pauly*, 2017 WL 69170, at *4-5 (Jan. 9, 2017).

²¹¹ See, e.g., *Los Angeles v. Rettele*, 550 U.S. 609 (2007).

²¹² The two are *Lane v. Franks*, 134 S. Ct. 2369 (2014), which affirmed the Eleventh Circuit’s grant of qualified immunity, 523 Fed. Appx. 709 (2013), and *Wilson v. Layne*, 526 U.S. 603 (1999), which affirmed the en banc Fourth Circuit, 141 F.3d 111 (1999).

In other words, lower courts that follow Supreme Court doctrine should get the message: think twice before allowing a government official to be sued for unconstitutional conduct.

Second, this brings us to another special feature of the qualified immunity docket, which is the special privilege given to qualified immunity cases in the certiorari process.

The Supreme Court decides 5-6 cases every year in a special fashion called summary reversal. Unlike the 60-80 “merits cases” that are decided after extensive briefing and oral argument, the summary reversal cases are decided solely on the basis of the lower court proceeding and the certiorari papers. In essence, this requires the lower court decision to be so obviously wrong that the Court can rush to judgment, and sufficiently important that it is worth the Court’s scarce attention despite the usual rule against “error correction.”²¹³

In a 2015 article on what I called the Court’s “shadow docket,” I attempted to count which categories of errors had been targeted for repeated attention by the Court’s summary reversal docket. The five seemingly special categories were: (1) refusals to uphold arbitration agreements, (2) failures to give district courts sentencing discretion under *Booker*, (3) grants of habeas corpus relief despite AEDPA, (4) grants of habeas relief where AEDPA was irrelevant, and (5) liability under Section 1983.²¹⁴

The ad hoc threshold for those “special” categories was at least three cases, approximating five percent of the summary reversal docket.²¹⁵ At the time, it was not clear if qualified immunity qualified, because only two of the three summary reversals of Section 1983 liability involved immunity. In the short time since publication, however, it has now become clear that qualified immunity qualifies on its own. The Court has since added *four* more qualified-immunity summary reversals, bringing the total above any non-habeas category.²¹⁶

This is unusual. The Court’s normal criteria for certiorari favor cases on which there is a split between lower courts or an important legal error. And the Court has specifically noted that factbound applications of existing law are generally unlikely to qualify as important enough for certiorari.²¹⁷ But most of the Court’s qualified immunity de-

²¹³ See generally William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 NYU J.L. & Liberty 1, 25-30, 53-54 (2015). See also Sup. Ct. Rule 10.

²¹⁴ Baude, *supra* note 213, at 44-45.

²¹⁵ *Id.* at 44.

²¹⁶ *White v. Pauly*, 2017 WL 69170 (Jan. 9, 2017); *Mullenix v. Luna*, 136 S. Ct. 305 (Nov. 9, 2015); *Taylor v. Barkes*, 135 S. Ct. 2042 (June 1, 2015); *Carroll v. Carman*, 135 S. Ct. 348 (2014).

²¹⁷ Sup. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”); see also *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips*

cisions are just that – “factbound” applications of the already-established principle that liability requires clearly established law. So only a special dispensation from the normal principles of certiorari explains the Court’s qualified immunity docket.

Indeed, the Court has now explicitly acknowledged that qualified immunity has such a privileged status. In the 2015 case of *San Francisco v. Sheehan*, police officers successfully petitioned for certiorari after the Ninth Circuit held that their conduct during an arrest violated both the Americans with Disabilities Act and clearly established law under the Fourth Amendment. It was the former question that had split the circuits, but the officers backtracked and refused to challenge the most controversial part of the Ninth Circuit’s holding.²¹⁸ The Court therefore dismissed that part of the case as improvidently granted. Curiously, however, it did not dismiss the other question, about qualified immunity, even though there was no more of a circuit split implicated by that question. This prompted Justices Scalia and Kagan to dissent, arguing that the qualified immunity question would not have merited certiorari on its own and there was therefore no reason to keep it around.²¹⁹

This dissent in turn provoked a footnote from the majority, which said that “[b]ecause of the importance of qualified immunity ‘to society as a whole,’ the Court often corrects lower courts when they wrongly subject individual officers to liability.”²²⁰ This justification for certiorari in these cases was new and might suggest an even bigger rise in the Court’s immunity-protection docket.

Indeed, the Court’s enthusiasm for qualified immunity does not seem to be flagging. Two weeks after *Sheehan*, the Court granted and summarily reversed another qualified immunity case, with no dissent noted.²²¹ It summarily reversed another in the fall (over Justice Sotomayor’s dissent).²²² And in January 2017, the Court summarily reversed yet another grant of qualified immunity, noting that it had “issued a number of opinions reversing federal courts in qualified immun-

Corp., 510 U.S. 27, 34 (1993); *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320-1321 (1994) (Chambers of Rehnquist, C.J.); *Cash v. Maxwell*, 132 S. Ct. 611, 613 (2012) (Sotomayor, J., respecting the denial of certiorari).

²¹⁸ *San Francisco v. Sheehan*, 135 S. Ct. 1765, 1772-1774 (2015).

²¹⁹ *Id.* at 1779 (Scalia, J. dissenting).

²²⁰ *Id.* at 1774 n.3 (quoting *Harlow v. Fitzgerald*, 457 U. S. 800, 814 (1982) and citing *Carroll v. Carman*, 135 S. Ct. 348 (2014); *Wood v. Moss*, 134 S. Ct. 2056 (2014); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Stanton v. Sims*, 134 S. Ct. 3 (2013); *Reichle v. Howards*, 132 S. Ct. 2088 (2012)).

²²¹ *Taylor v. Barkes*, 135 S. Ct. 2042 (June 1, 2015). It is not clear whether the vote was in fact unanimous, or whether the dissenters simply chose not to publish their views. See Baude, *supra* note 213, at 18-19.

²²² *Mullenix v. Luna*, 136 S. Ct. 305 (Nov. 9, 2015).

ity cases”²²³ and that it had done so “both because qualified immunity is important to society as a whole,”²²⁴ and “because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial.”²²⁵ Justice Ginsburg wrote a concurring opinion.²²⁶ It is not clear that there is *any* consistent dissenter from the immunity-protection program.²²⁷

These developments can be criticized on their own terms. For instance, when *Harlow* said that qualified immunity doctrine was important “to society as a whole,” it was simply making the point that there are global benefits as well as costs to the doctrine. But that is probably true of *any* doctrine, and it hardly follows that the factbound application of those doctrines deserves a special place on the Supreme Court’s agenda.²²⁸

The legal flaws in the doctrine of qualified immunity cast an even more troubling light on this doctrinal activity. The Court is not just maintaining the doctrine of qualified immunity as a matter of precedent, but doubling down on it, enforcing it aggressively against lower courts. Indeed, its campaign to enforce qualified immunity in recent years has come to rival its campaign to enforce the restrictions on habeas relief, about which the Justices have been unusually explicit.²²⁹

But the restrictions on habeas relief come from a federal statute that is extremely clear about the limitations on relief, such as the requirement that the erroneous decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”²³⁰ The Court’s cru-

²²³ *White v. Pauly*, 2017 WL 69170, (Jan. 9, 2017) at *4.

²²⁴ *Id.* (quoting *San Francisco v. Sheehan*, 135 S. Ct. 1774 n.3 (2015)).

²²⁵ *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Not to nitpick, but I observe that this latter point is true of every defense appealable under the collateral order doctrine, such as sovereign immunity, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 13 (1993), and criminal double jeopardy, *Abney v. United States*, 431 U.S. 651 (1977). But one does not see those cases given the same pride of place on the Court’s docket.

²²⁶ *Id.* at *6 (Ginsburg, J., concurring) (noting that “the Court, as I comprehend its opinion, leaves open the propriety of denying summary judgment based on fact disputes over when Officer White arrived at the scene, what he may have witnessed, and whether he had adequate time to identify himself and order Samuel Pauly to drop his weapon before Officer White shot Pauly.”).

²²⁷ See Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 Mich. L. Rev. 893, 909 (2016) (“Although the Court is not always unanimous on these issues, it is fair to say that qualified immunity has been as much a liberal as a conservative project on the Supreme Court.”).

²²⁸ For the general point that the Court’s agenda doesn’t and needn’t track society’s, see Frederick Schauer, *Foreword: The Court’s Agenda – and the Nation’s*, 120 Harv. L. Rev. 4 (2006).

²²⁹ Baude, *supra* note 213, at 26-27, 32.

²³⁰ 28 U.S.C. § 2254(d)(1).

sade to enforce those limits can be justified as service to the rule of law – to ensure that federal courts do not disregard a federal statute simply because they find its implications troubling.

The opposite is true of Section 1983. There are no explicit restrictions on monetary relief, and the implicit restrictions have been devised by the Court, not implied by the statute or the common law. The Court’s crusade to enforce the doctrine of qualified immunity does not serve congressional intent or the rule of law. Instead, it exacerbates the very kind of legal mistake that its habeas agenda is designed to correct.

Conclusion

In suggesting that the doctrine of qualified immunity is “unlawful,” I do not mean to raise foundational questions about the American legal order or the basic notion of government under law.²³¹ Rather, I mean the more modest point that the doctrine lacks legal justification, and the Court’s justifications are unpersuasive.

Given the high stakes of government misconduct and the cynical cast of modern remedies scholarship, there may seem to be something almost naive about such an inquiry. But I submit that it is nonetheless of urgent importance. If qualified immunity leads to bad consequences, it can be fixed; but to fix it requires us to know who created it in the first place. If qualified immunity is unlawful it can be overruled. And even if the Court does not overrule it, it can stop expanding the legal error.

²³¹ Cf. Phillip Hamburger, *Is Administrative Law Unlawful?* (2014); Adrian Vermeule, *No*, 93 *Tex. L. Rev.* 1547 (2015).

Appendix: Supreme Court Qualified Immunity Cases Since 1982

Case	Official	Claim	Lower Court
White v. Pauly, 2017 WL 69170**	State Law Enforcement	4th Amdt. (Excessive Force)	10th Cir.
Mullenix v. Luna, 136 S. Ct. 305 (2015)	State Law Enforcement	4th Amdt. (Excessive Force)	5th Cir.
Taylor v. Barkes, 135 S. Ct. 2042 (2015)	State Corrections Officials	8th Amdt.	3d Cir.
City & Cnty. Of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765 (2015)	Local Law Enforcement	4th Amdt. (Excessive Force)	9th Cir.
Carroll v. Carman, 135 S. Ct. 348 (2014)	State Law Enforcement	4th Amdt. (Illegal Entry)	3d Cir.
Lane v. Franks, 134 S. Ct. 2369 (2014)	Community College President	1st Amdt. (Employment)	11th Cir. *
Plumhoff v. Rickard, 134 S. Ct. 2012 (2014)	Local Law Enforcement	4th Amdt. (Excessive Force)	6th Cir.
Wood v. Moss, 134 S. Ct. 2056 (2014)	Secret Service	1st Amdt. (Assembly)	9th Cir.
Stanton v. Sims, 134 S. Ct. 3 (2013)	Local Law Enforcement	4th Amdt. (Illegal Entry)	9th Cir.
Reiche v. Howards, 132 S. Ct. 2088 (2012)	Secret Service	4th Amdt. (Search/Arrest)	10th Cir.
Filarsky v. Delia, 132 S. Ct. 1657 (2012)	City Outside Counsel	Due Process	9th Cir.
Messerschmidt v. Millender, 132 S. Ct. 1235 (2012)	County Law Enforcement	4th Amdt. (Search/Seizure)	9th Cir.
Ryburn v. Huff, 132 S. Ct. 987 (2012)	Local Law Enforcement	4th Amdt. (Search/Seizure)	9th Cir.
Ashcroft v. Al-Kidd, 131 S. Ct. 2074 (2011)	U.S. Attorney General	4th Amdt. (Arrest)	9th Cir.
Safford v. Redding, 557 U.S. 364 (2009)	School Officials	4th Amdt. (Search/Seizure)	9th Cir.
Pearson v. Callahan, 555 U.S. 223 (2009)	Local Law Enforcement	4th Amdt. (Illegal Entry)	10th Cir.
Brosseau v. Haugen, 543 U.S. 194 (2004)	Local Law Enforcement	4th Amdt. (Excessive Force)	9th Cir.
Groh v. Ramirez, 540 U.S. 551 (2004)*	Federal Law Enforcement	4th Amdt. (Search/Seizure)	9th Cir.
Hope v. Pelzer, 536 U.S. 730 (2002)*	State Corrections Officials	8th Amdt.	11th Cir.
Saucier v. Katz, 533 U.S. 194 (1999)	Military Police	4th Amdt. (Excessive Force)	9th Cir.
Hanlon v. Berger, 526 U.S. 808 (1999)	Local Law Enforcement	4th Amdt. (Search)	9th Cir.
Wilson v. Layne, 526 U.S. 603 (1999)	Fed. & State Law Enforcement	4th Amdt. (Search)	4th Cir.
Hunter v. Bryant, 502 U.S. 224 (1991)	Secret Service	4th Amdt. (Arrest)	9th Cir.
Anderson v. Creighton, 483 U.S. 635 (1987)	Federal Law Enforcement	4th Amdt. (Search/Seizure)	8th Cir.
Malley v. Briggs, 475 U.S. 335 (1986)**	State Law Enforcement	4th Amdt. (Arrest)	1st Cir.
Davis v. Scherer, 468 U.S. 183 (1984)	State Law Enforcement	Employment (Due Process)	11th Cir.
Mitchell v. Forsyth, 472 U.S. 511 (1985)	U.S. Attorney General	4th Amdt. (Search/Seizure)	3d Cir.
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	Presidential Aides	1st Amdt. (Employment)	DC Cir.

* Supreme Court found no immunity

** Case was remanded for further determination of immunity.