

BETRAYING THE CONSTITUTION

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INTRODUCTION

On the night of November 11, 1983, Sarisse and Robert Creighton and their three young daughters were spending a quiet evening at their home when a spotlight suddenly flashed through their front window. Mr. Creighton opened the door and was confronted by several uniformed and plain clothes officers, many of them brandishing shotguns. All of the officers were white; the Creightons are black. Mr. Creighton claims that none of the officers responded when he asked what they wanted. Instead, by his account (as verified by a St. Paul police report), one of the officers told him to “keep his hands in sight,” while the other officers rushed through the door. When Mr. Creighton asked if they had a search warrant, one of the officers told him, “We don’t have a search warrant [and] don’t need [one]; you watch too much TV.”

Mr. Creighton asked the officers to put their guns away because his children were frightened, but the officers refused. Mrs. Creighton awoke to the shrieking of her children and was confronted by an officer who pointed a shotgun at her. She allegedly observed the officers yelling at her three daughters to “sit their damn asses down and stop screaming.” She asked the officer, “What the hell is going on?” The officer allegedly did not explain the situation and simply said to her, “Why don’t you make your damn kids sit on the couch and make them shut up.”

One of the officers asked Mr. Creighton if he had a red and silver car. As Mr. Creighton led the officers downstairs to his garage, where his maroon Oldsmobile was parked, one of the officers punched him in the face, knocking him to the ground, and causing him to bleed from the mouth and the forehead. Mr. Creighton alleges that he was attempting to move past the officer to open the garage door when the officer panicked and hit him. The officer claims that Mr. Creighton attempted to grab his shotgun,^a even though

^a[AUTHOR’S NOTE] It is more than difficult to believe that if Mr. Creighton had attempted to seize the officer’s weapon the police would have released him without charging him. Yet, as the last sentence of the quotation notes, the police never filed any charge against Mr. Creighton. *See infra* text accompanying note 1.

Mr. Creighton was not a suspect in any crime and had no contraband in his home or on his person. Shaunda, the Creightons' ten-year-old daughter, witnessed the assault and screamed for her mother to come help. She claims that one of the officers then hit her.

Mrs. Creighton phoned her mother, but an officer allegedly kicked and grabbed the phone and told her to "hang up that damn phone." She told her children to run to their neighbor's house for safety. The children ran out and a plain clothes officer chased them. The Creightons' neighbor allegedly told Mrs. Creighton that the officer ran into her house and grabbed Shaunda by the shoulders and shook her. The neighbor allegedly told the officer, "Can't you see she's in shock; leave her alone and get out of my house." Mrs. Creighton's mother later brought Shaunda to the emergency room at Children's Hospital for an arm injury caused by the officer's rough handling.

During the melee, family members and friends began arriving at the Creightons' home. Mrs. Creighton claims that she was embarrassed in front of her family and friends by the invasion of their home and their rough treatment as if they were suspects in a major crime. At this time, she again asked Anderson for a search warrant. He allegedly replied, "I don't need a damn search warrant when I'm looking for a fugitive."^b The officers did not discover the allegedly unspecified "fugitive" at the Creightons' home or any evidence whatsoever that he had been there or that the Creightons were involved in any type of criminal activity. Nonetheless, the officers then arrested and handcuffed Mr. Creighton for obstruction of justice and brought him to the police station where he was jailed overnight, then released without being charged.¹

Those are the facts of *Anderson v. Creighton*.²

Warrantless entries to a home are unconstitutional unless (1) the officials have probable cause to search the home, and (2) exigent circumstances exist,

^b[AUTHOR'S NOTE] This assertion was wrong. *Steagald v. United States* clearly established that absent exigent circumstances or consent, a warrantless search of a third party's home for a fugitive violates the Fourth Amendment. 451 U.S. 204 (1981).

¹*Creighton v. City of St. Paul*, 766 F.2d 1269, 1270-71 (8th Cir. 1985), *rev'd sub nom. Anderson v. Creighton*, 483 U.S. 635 (1987).

²483 U.S. 635 (1987). This is the Eighth Circuit's summary of the allegations of the Creightons' complaint following the incident. As the Circuit explained, "Because this case was dismissed on Anderson's motion for summary judgment, we set out the facts in the light most favorable to the Creightons and draw all inferences from the underlying facts in their favor." *Creighton*, 766 F.2d at 1270.

rendering speed essential to a degree that prevents securing a warrant.³ No court found either of those; there was no inquiry. Even if probable cause and exigent circumstances existed, there is strong reason to think that some of the officials' conduct nonetheless violated the Fourth Amendment.⁴

The Creightons sued Russell Anderson, an FBI agent, and the municipal police officers who accompanied him, asserting claims under the Fourth Amendment against Anderson and under 42 U.S.C. § 1983 against the police officers.⁵ The Creightons lost.⁶

They did not lose because any court found that the officials' conduct was consistent with the Fourth Amendment. They did not lose because they failed to prove at trial the facts they alleged; they never got to trial and, in the procedural posture of the case, every court had assumed the truth of the complaint's factual allegations. They lost because the Supreme Court held that, even assuming the officers acted exactly as the plaintiffs said, and even assuming some of their actions violated the Constitution, the Court's common-law qualified-immunity doctrine might excuse them from being

³Payton v. New York, 445 U.S. 573, 588–90 (1980). Before going to the Creightons' house, the officials had made warrantless searches of two other homes. *Creighton*, 766 F.2d at 1271. Agent Anderson asserted "that it would have been too difficult to get a search warrant because it was nighttime on Veteran's Day, and that he believed that exigent circumstances justified the searches without a search warrant." *Id.* It is clear that no one sought a warrant. It is less clear why no one could have sought a warrant to search the Creightons' home while the team was conducting the other two warrantless searches.

The district court's opinion on remand detailed the time sequence. *Creighton v. Anderson*, 724 F. Supp. 654, 656–57 (D. Minn. 1989). Following the robbery, Anderson was at the bank until 6:30 p.m. *Id.* at 656. He suspected Vadaain Dixon already. *Id.* At 8:00 p.m., Anderson conducted a photo lineup, and two witnesses identified Dixon. *Id.* Anderson and several other officers went looking for Dixon. *Id.* "Anderson does not claim that he attempted to contact any state or federal court to obtain a search warrant for any of the homes searched." *Id.* at 656 n.5. The officers then searched two other houses, leaving the second house "shortly after 8:30 p.m." *Id.* at 657. The officers arrived at the Creightons' home at about 8:40 p.m. *Id.*

⁴See *infra* notes 155–159 and accompanying text.

⁵*Creighton*, 766 F.2d at 1271.

⁶*Creighton v. Anderson*, 922 F.2d 443, 447, 451 (8th Cir. 1990).

accountable for their actions.⁷ The district court granted summary judgment to the defendants.⁸

Examining the Court's qualified-immunity jurisprudence reveals that many constitutional injuries inflicted by state or federal officials are without remedies⁹ and that the Court has created that situation. Those constitutional rights are unenforceable. Those who study the law learn that the Constitution "shall be the supreme Law of the Land,"¹⁰ and many laypeople have heard and believe the same thing. Thus, the Constitution declares itself to be superior to statutes and common law, and in the event of conflict, it used to be elementary that the inferior law should give way.¹¹

Those are lofty concepts, suffering only the defect that they are not true. They may once have been, but the Supreme Court, particularly in the past half century, has eroded many of the Constitution's protections against government overreaching. The Court has done so by constructing an elaborate doctrine of official immunity that often prevents civil suits against government agents who violate constitutional provisions, giving them a free pass for their unconstitutional conduct. Those constitutional "rights" no longer deserve that description¹² and, in the Supreme Court's own words,

⁷ *Id.* at 449, 451; *Creighton*, 483 U.S. at 641. *Creighton* vacated the Eighth Circuit's judgment and remanded for further proceedings with respect to qualified immunity. *Id.* at 646 n.6. On remand, the district court found that Anderson was entitled to qualified immunity based on the hearsay information he had from his quarry's probation officer. *See Creighton*, 724 F. Supp. at 659, 661. That may have justified the entry; it in no way justified all the officers' actions after the entry. *See supra* note 3 and accompanying text. *See also infra* notes 155–159 and accompanying text.

⁸ *Creighton*, 724 F. Supp. at 661.

⁹ *See, e.g.*, Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1515 (1999). Professor Zeigler noted this phenomenon more than thirty years ago: "[R]ights are not always enforced in the United States. It has become increasingly difficult to enforce legal rights in federal court. In fact, the chief legacy of the Burger Court may be the creation of impediments to the enforcement of rights." Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 665 (1987).

¹⁰ U.S. CONST. art. VI, cl. 2.

¹¹ *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78, 180 (1803). *But see infra* text accompanying notes 349–350.

¹² *See Right*, BLACK'S LAW DICTIONARY (8th ed. 2004), defining "right":

2. Something that is due to a person by just claim, legal guarantee, or moral principle . . .
3. A power, privilege, or immunity secured to a person by law . . . 4. A legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong

“might as well be stricken from the Constitution.”¹³ For many purposes, that is what the Court has done.¹⁴

How the United States arrived at the point where significant provisions of the Constitution—particularly of the Bill of Rights¹⁵—have become unenforceable and fail to protect individuals who have suffered constitutional harm¹⁶ is worth some study.¹⁷ There is considerable literature examining this question¹⁸—first-rate, granular analyses of the development actions against government officials in the nineteenth century and of the Court’s current doctrine and some of the problems with it. Professor Baude has argued that

¹³Weeks v. United States, 232 U.S. 383, 393 (1914). *Accord*, Mapp v. Ohio, 367 U.S. 643, 648, 670 (1961) (opinion of the Court and concurring opinion of Douglas, J.); Elkins v. United States, 364 U.S. 206, 209 (1960). *See also* Davis v. United States, 564 U.S. 229, 257 (2011) (Breyer, J., dissenting); Hudson v. Michigan, 547 U.S. 586, 607 (2006) (Breyer, J., dissenting); United States v. Leon, 468 U.S. 897, 936 (1984) (Brennan, J., dissenting); California v. Minjares, 443 U.S. 916, 923 (1979) (Rehnquist, J., dissenting from denial of stay); Abel v. United States, 362 U.S. 217, 240 (1960); Irvine v. California, 347 U.S. 128, 151–52 (1954) (Douglas, J., dissenting); Wolf v. Colorado, 338 U.S. 25, 42, 47 (1949) (Douglas, J., and Rutledge, J., respectively, dissenting); Upshaw v. United States, 335 U.S. 410, 426 n.17 (1948) (Reed, J., dissenting).

¹⁴The situation has become so extreme that the New York Times has taken notice of it. Shaila Dewan, *If the Police Lie, Should They Be Held Liable? Often the Answer Is No.*, N.Y. TIMES, Sept. 12, 2021, at A25.

¹⁵Different groups—although overlapping to some extent—gave rise to the Constitution and the Bill of Rights. In this article, the term “Framers” refers to the delegates to the 1787 Constitutional Convention that produced the Constitution. The term “Founders” is broader, referring both to the convention’s delegates and to those who wrote and took part in the ratification of the Bill of Rights. Thus, it includes the first Congress.

¹⁶This article refers to such people as “constitutional victims.” *See infra* text accompanying notes 26 and 67.

¹⁷As Professor Sisk has pointed out, “It didn’t start out this way. When the American constitutional republic began more than two centuries ago, a remedy in damages for misconduct by federal officers was generally accepted and did not encounter obstacles of governmental immunity.” Gregory Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 NOTRE DAME L. REV. 1789, 1790 (2021) (footnotes omitted).

¹⁸*See, e.g.*, Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 309 (2020); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1405 (2019); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 45 (2018); John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854 (2010); 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, 1862 (2010); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1733 (1991); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963).

qualified immunity is unlawful.¹⁹ To borrow from the language of poker, I see Professor Baude’s “unlawful” and raise it: qualified immunity is unconstitutional; it violates the Supremacy Clause. Almost a century ago, then-Professor Frankfurter declared the federal courts “the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.”²⁰ Today, the Court has become “the primary and powerful [roadblock to] vindicating every right given by the Constitution, the laws, and treaties of the United States.”

This Article focuses on the Court’s unarticulated but inevitable corollaries of its qualified immunity doctrine—corollaries that might arouse serious concern were the Court to articulate them—because they upend the constitutional structure within which the government, including the Supreme Court, should function. The Article also suggests returning to an alternate way to address the concerns that the Supreme Court has recognized, but without doing violence to the once fundamental constitutional supremacy. There is much to learn from the nation’s early history, but the Court’s current approach effectively reads it out of the record.

As Professor Amar observed decades ago, “[T]he Constitution draws its life from postulates that limit and control lawless governments The legal rights against governments enshrined in the Constitution strongly imply corresponding governmental obligations to ensure full redress whenever those rights are violated.”²¹ This was not, at least during the constitutional period, a revolutionary idea, finding expression in the axiomatic *ubi jus, ibi remedium*,²² which Madison paraphrased in *The Federalist*,²³ which underlays Hamilton’s defense of judicial review in *The Federalist*,²⁴ and to which Chief Justice Marshall gave emphatic recognition in *Marbury v. Madison*:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws,

¹⁹ See Baude, *supra* note 18, at 48–49.

²⁰ FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 65 (Transaction Publishers 2007) (1928).

²¹ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1485 (1987).

²² *Ubi jus ibi remedium*, COLLINS DICTIONARY OF LAW (3d ed. 2006) (“Where there is a right, there is a remedy.”).

²³ *THE FEDERALIST* NO. 43, at 312 (J. Madison) (J. Cooke ed. 1961).

²⁴ See *generally*, *THE FEDERALIST* NO. 78 (A. Hamilton) (J. Cooke ed. 1961).

whenever he receives an injury. One of the first duties of government is to afford that protection

. . . “[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded[.]” . . . “[E]very right, when withheld, must have a remedy, and every injury its proper redress.”

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.²⁵

Today’s Supreme Court has systematically charted a course away from all three of those principles.

There has been no formal amendment of the Bill of Rights; it reads just as it did when the nation ratified it in 1791. Upon reading it one would have no hint that many of its provisions have become hortatory only. One may trace these developments directly to the Court. They manifest themselves in two areas.

First, today’s Court views the Bill of Rights as largely unenforceable because it contains no references to individuals’ entitlements to seek redress for government violations of its provisions. The Court’s position is essentially that those rights are not inherently enforceable by constitutional victims. Query whether Madison, Hamilton, Marshall, or any of the other Founders would have subscribed to that idea. Almost a century ago, the Court recognized that an individual could sue the government directly under the Fifth Amendment, asserting that “[s]tatutory recognition was not necessary” when he alleged that the government had taken his property without just compensation.²⁶ Half a century ago, the Court recognized an individual’s right to seek redress for federal officials’ blatant violation of his Fourth Amendment rights.²⁷ The Court followed that by again recognizing

²⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES, at *23, *109).

²⁶ *Jacobs v. United States*, 290 U.S. 13, 16 (1933).

²⁷ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). See also *infra* notes 66–66 and accompanying text.

the enforceability of the Fifth Amendment's Due Process Clause²⁸ and the Eighth Amendment's proscription of cruel and unusual punishment.²⁹ And there, in 1980, it stopped. The Court began to articulate reasons not to allow actions resting on the Bill of Rights.³⁰ Often the reasons were that the facts of the later cases were not close enough to the facts of the three cases the Court acknowledges.³¹ The Court has effectively limited those cases to their facts, allowing actions only when a succeeding case is so indistinguishable from its predecessors that the Court would have to overrule them to deny recovery.³²

Second, the Court has created a qualified-immunity doctrine that acts as a backstop, protecting officials who violate the individuals' constitutional rights in the few circumstances in which the Court even acknowledges an entitlement to sue.³³ The Court does not phrase it that way, of course; it purports to find antecedents for qualified immunity in the common law as received from England.³⁴ There indeed were immunities in eighteenth century England—but only two. At common law, judges and other participants in court proceedings were immune from suits based on those proceedings.³⁵ Parliament also “enacted the English Bill of Rights of 1689 . . . permanently shield[ing] members of Parliament from royal

²⁸ See *Davis v. Passman*, 442 U.S. 228, 243–44 (1979). See also *infra* notes 71–71 and accompanying text.

²⁹ See *Carlson v. Green*, 446 U.S. 14, 16, 25 (1980). See also *infra* notes 75–76 and accompanying text.

³⁰ This history supports some disturbing inferences, chief among which is the implicit idea that those who wrote and ratified the Bill of Rights understood and intended that it would not be enforceable. See *infra* notes 318–341 and accompanying text.

³¹ See *infra* notes 120–137 and accompanying text.

³² The Court has not (yet) required absolute identity. See *infra* notes 115, 139–144 and accompanying text.

³³ Immunity comes in two flavors. Some officials receive absolute immunity; as long as their actions were in the exercise of the powers of their offices, no cause of action lies against them. See *infra* notes 90–95 and accompanying text. Qualified immunity is the more difficult aspect. This article focuses primarily on that doctrine and how the Court has used it to make constitutional rights unenforceable.

Justice O'Connor's opinion for the Court in *Forrester v. White* asserted that “this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court.” 484 U.S. 219, 223–24 (1988). Part I of this Article examines the results of that caution.

³⁴ It is a mistake to assume that the former colonies received English common law in gross. See *infra* notes 279–285 and accompanying text.

³⁵ See *infra* notes 234–235 and accompanying text.

molestation for legislative acts.”³⁶ The latter is the only immunity that the Framers included in the Constitution.³⁷ Thus, for the one immunity with a common-law antecedent, English common law trumps the Bill of Rights. For the immunities that have no antecedents, it is the Court’s own common law that makes the Bill of Rights illusory. So much for supremacy.

The Court’s qualified-immunity doctrine forbids recovery unless the law “clearly established” that the defendant-official’s conduct was unlawful.³⁸ As the Court has applied that criterion, to the extent that the facts of the case it is deciding differ from the facts of the three cases where the Court did allow private damages actions, the Court is inclined to declare that the factual differences mean that the law was not clearly established with respect to the official’s conduct.³⁹ Qualified-immunity cases present two basic questions for decision: (1) whether the defendant’s conduct violated a constitutional right, and (2) if so, whether qualified immunity attaches. That the Court has been remarkably inconsistent about which of the two questions a court should first consider⁴⁰ simply adds to the confusion.

This Article has five parts. Part I traces the history of actions directly under constitutional provisions against state and federal officials and the Court’s explanations for its current refusal to enforce the Constitution. Part II canvasses the Supreme Court’s common-law immunities that now dominate the constitutional landscape. Those include absolute immunities for judges,⁴¹ prosecutors,⁴² and legislators⁴³ in many situations⁴⁴ and witnesses.⁴⁵ The Court has also created “qualified immunity,” which extends to prosecutors⁴⁶ and judges⁴⁷ (when not entitled to absolute immunity), law-

³⁶ John D. Friel, “*Members Only!*” *United States v. Rayburn House Office Building, Room 2113*, 53 VILL. L. REV. 561, 566–67 (2008) (footnotes omitted) (citing *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)).

³⁷ See U.S. CONST. art. I, § 6, cl. 1. If the Court were correct about the breadth of common-law immunities, the fact that none but legislative immunity appears in the Constitution would be quite telling. See *infra* note 266 and accompanying text.

³⁸ See *infra* notes 101–105, 113–124, 146 and accompanying text.

³⁹ See *infra* note 112 and accompanying text.

⁴⁰ See *infra* notes 103–105 and accompanying text.

⁴¹ See, e.g., *Pierson v. Ray*, 386 U.S. 547, 553–55 (1967).

⁴² See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 420–24 (1976).

⁴³ See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

⁴⁴ See *infra* note 90 for when absolute immunity does not attach.

⁴⁵ See, e.g., *Briscoe v. LaHue*, 460 U.S. 325, 345–46 (1983).

⁴⁶ See, e.g., *Kalina v. Fletcher*, 522 U.S. 118, 127, 129 (1997).

⁴⁷ See, e.g., *Forrester v. White*, 484 U.S. 219, 229–30 (1988).

enforcement officers,⁴⁸ public-school officials,⁴⁹ federal and state executive officials,⁵⁰ prison guards⁵¹ and prison discipline committees,⁵² municipalities,⁵³ and private attorneys that a municipality retains.⁵⁴ Part III reviews the Court's rationales for those immunities, the authorities upon which it relies, and, more importantly, the remarkable dearth of authority it has been able to marshal in support of its doctrine. That requires considering English immunities extant in the late eighteenth century, when the American constitutional project began. Part IV discusses historical and structural difficulties with the Court's immunity jurisprudence, concluding that the Court's doctrine is irreconcilable with history and constitutional structure. Part V urges resurrecting an alternate way to accommodate the interests that the Court asserts justify the immunities it has created, but without condemning the constitutional victim to bear the costs of the violation alone. The alternate way is not new. Quite the contrary; it was the standard mode of dealing with officials' violations of fundamental rights during the nation's founding period.⁵⁵

I. ACTIONS DIRECTLY UNDER THE CONSTITUTION

The Court considered actions directly under constitutional provisions only once prior to World War II.⁵⁶ The United States constructed a dam across the Tennessee River that caused periodic flooding of privately owned

⁴⁸ See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 638, 646 (1987).

⁴⁹ See, e.g., *Wood v. Strickland*, 420 U.S. 308, 321 (1975), *abrogated in part by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

⁵⁰ See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974).

⁵¹ See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 588, 591 (1998).

⁵² See *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985).

⁵³ See, e.g., *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 400 (1997); *City of Okla. City v. Tuttle*, 471 U.S. 808, 823–24 (1985); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 701 (1978).

⁵⁴ See *Filarsky v. Delia*, 566 U.S. 377, 393–94 (2012).

⁵⁵ See *infra* notes 344–346 and accompanying text.

⁵⁶ *Jacobs v. United States*, 290 U.S. 13 (1933). *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), is not to the contrary. *Barron* asserted a takings claim against the city under the Fifth Amendment. *Id.* at 247. The Court did not rule on whether the Fifth Amendment supported a private right of action, instead finding that the Bill of Rights *in toto* did not apply to the states. *Id.* at 250–51. Many (but not all) of the provisions of the Bill of Rights now do apply to the states through the Fourteenth Amendment's Due Process Clause. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, §§ 10.1, 10.2(a), at 415–18 (8th ed. 2010).

farm land.⁵⁷ The owners sued the government under the Tucker Act,⁵⁸ seeking damages for the loss of utility of the property.⁵⁹ The Court allowed the plaintiffs to proceed directly under the Fifth Amendment, firmly rejecting the Fifth Circuit's reasoning that plaintiffs' case could proceed only on a theory of implied contract.⁶⁰

A decade later, *Bell v. Hood* was an action by individuals against FBI agents for violations of the plaintiffs' Fourth and Fifth Amendment rights.⁶¹ The majority noted that although it was "established practice" for the Court to grant injunctive relief to protect constitutional rights, the Court "had never specifically decided" whether a damages action against federal officials would lie.⁶² The majority stressed that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."⁶³ The Court reversed the lower court's judgment dismissing the case for lack of subject-matter jurisdiction and remanded.⁶⁴ The district court then ruled that absence of a constitutional provision or statute creating a right to sue individual officers meant that the plaintiffs had failed to assert a claim upon which the court could grant relief,⁶⁵ and there the case died.

⁵⁷ See *Jacobs*, 290 U.S. at 16.

⁵⁸ Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (current version at 28 U.S.C. § 1491 (2018)). The text of the original statute connotes that Congress in 1887 thought that actions directly under the Constitution did not require congressional authorization. "That the Court of Claims shall have jurisdiction to hear and determine the following matters: First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions . . ." 24 Stat. at 505. The current version of the Tucker Act continues that approach. 28 U.S.C. § 1491. Thus, neither the Congress of 1887 nor the Congress of 2011 appears to have shared the current Supreme Court's position that actions directly under the Constitution are not possible without either an authorizing statute or the Court's *imprimatur*. See *infra* notes 78–89, 318–326, 330 and accompanying text.

⁵⁹ See *Jacobs*, 290 U.S. at 15.

⁶⁰ *Id.* at 16, 18.

⁶¹ 327 U.S. 678, 679 (1946).

⁶² *Id.* at 684 (footnote omitted).

⁶³ *Id.* (footnotes omitted). Justice Black continued, "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* Thus, the Court divided rights into two groups, those that were "federally protected" and others that presumably were not. The Constitution appears to protect all the rights under discussion in this Article.

⁶⁴ *Id.* at 680, 685.

⁶⁵ *Bell v. Hood*, 71 F. Supp. 813, 821 (S.D. Cal. 1947). Although the district court never cited FED. R. CIV. P. 12(b)(6), it obviously relied on that provision. See *id.* The district court's unspoken assumption that none of the Bill of Rights' provisions could support an action in the absence of an

A quarter-century later, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* held that an individual whose Fourth Amendment rights federal officials violated stated a federal claim for damages despite the fact that no statute authorized such an action.⁶⁶ Thus, the Court implicitly found that the plaintiff's right of action inhered in the Fourth Amendment. This was certainly a good result for constitutional victims, but *Bivens* also contained two warning signs. First, the majority noted that there were no "special factors counseling hesitation in the absence of affirmative action by Congress."⁶⁷ Dictum hinted such special factors might be questions of federal fiscal policy or actions against government employees alleged to have acted *ultra vires* (though not unconstitutionally).⁶⁸ Second, the Court obliquely suggested that a situation might arise in which a constitutional victim "must

explicit right-of-action provision appears to fly in the face of the Court's solicitude for federally protected rights. Nonetheless, the modern Court appears to have adopted the district court's stance. See *infra* notes 304–330 and accompanying text.

The district court failed to consider *Ex parte Young*, 209 U.S. 123 (1908), where the Court upheld a federal contempt citation against a state's attorney-general, rejecting an Eleventh Amendment, U.S. CONST. amend. XI, challenge. The Court reasoned that, for Eleventh Amendment purposes, an unconstitutional act by an official is not properly attributable to the government the official represents, though it remains state action for purposes of the Fourteenth Amendment. *Id.* at 159–60. See *infra* text accompanying notes 245–246.

The *Bell* district court paralleled *Young*'s reasoning—to a point:

Whenever a federal officer or agent exceeds his authority, in so doing he no longer represents the Government and hence loses the protection of sovereign immunity from suit.

That is the theory upon which the complaint at bar proceeds. The defendants are sought to be held as individuals, not as federal officers. But inasmuch as the prohibitions of the Fourth and Fifth Amendments do not apply to individual conduct, the Amendments themselves, when violated, cannot be the basis of any cause of action against individuals.

71 F. Supp. at 817. Thus, whereas in *Young* the official's attempt to enforce an unconstitutional statute exposed him to the federal court's jurisdiction and constitutional responsibility by stripping him of the state's immunity, in *Bell* the stripping had the effect of *insulating* the defendants from the Constitution.

⁶⁶403 U.S. 388, 397 (1971).

⁶⁷*Id.* at 396.

⁶⁸*Id.* at 396–97.

instead be remitted to another remedy, equally effective in the view of Congress.”⁶⁹ Each of those ideas is problematic.⁷⁰

Two cases that followed *Bivens* recognized claims for violations of the Fifth and Eighth Amendments. *Davis v. Passman* involved as brazen an incident of sex discrimination as one is likely to find.⁷¹ Justice Brennan’s opinion for a five-Justice majority insisted on the sanctity of constitutional rights and the necessity of enforcing them, relying on *Bell v. Hood*,⁷² *Bivens*,⁷³ and *Marbury*.⁷⁴

In *Carlson v. Green*, the estate of a deceased federal prisoner sought damages for the prison’s violations of the decedent’s Fifth and Eighth Amendment rights.⁷⁵ The Court found no “special factors” and “no explicit congressional declaration that persons injured by federal officers’ violations of the Eighth Amendment may not recover money damages from the agents

⁶⁹ *Id.* at 397. *Davis v. Passman*, 442 U.S. 228 (1979), was more explicit about this factor, noting the absence of an “explicit congressional declaration that persons in petitioner’s position injured by unconstitutional federal employment discrimination ‘may not recover money damages from’ those responsible for the injury.” *Id.* at 246–47 (quoting *Bivens*, 403 U.S. at 397). See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988). The Court has never explained how Congress has the power to decide whether constitutional principles shall be enforceable.

⁷⁰ See *infra* notes 76, 304–316 and accompanying text.

⁷¹ 442 U.S. at 228. Congressman Otto Passman hired Shirley Davis as his deputy administrative assistant in February 1974. *Id.* at 230. Within six months, Passman dismissed Davis. *Id.* In the dismissal letter, he praised her as “able, energetic and a very hard worker,” but added “that it was essential that the understudy to my Administrative Assistant be a man.” *Id.* The Congressman explained why she could not even have a job in one of his Louisiana offices:

It would be unfair to you for me to ask you to waste your talent and experience in my Monroe office because of the low salary that is available because of a junior position. Therefore, and so that your experience and talent may be used to advantage in some organization in need of an extremely capable secretary

He fired her. *Id.* at 230 n.3.

⁷² 327 U.S. 678, 684 (1946). “[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the state to do.” *Davis*, 442 U.S. at 242 (quoting *Bell*, 327 U.S. at 684).

⁷³ *Bivens*, 403 U.S. 388.

⁷⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162–63 (1803). *Davis*, 442 U.S. at 242, quoted the first paragraph of the words from *Marbury* accompanying *supra* note 25.

⁷⁵ 446 U.S. 14, 16, (1980).

but must be remitted to another remedy, equally effective in the view of Congress.”⁷⁶

In the past four decades, however, the Court has refused to recognize that the reasoning of those cases applies equally to violations of other Bill of Rights provisions. For that matter, a plaintiff’s reliance on the Fourth, Fifth, or Eighth Amendment is now often unavailing. As the Court candidly stated, “These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.”⁷⁷ More directly, the Court characterized judicial recognition of actions directly under the Constitution as “‘disfavored’ judicial activity,”⁷⁸ and the current Court rues the three cases where it did allow actions.⁷⁹ Thus, the Court refused to enforce the Fifth Amendment’s Due Process Clause when benefit recipients harmed by federal violations of due process sought damages,⁸⁰ and it refused to allow a remedy for First Amendment violations by federal officials,⁸¹ substantive due process violations by military officers,⁸² and Eighth Amendment suits against a private prison operator⁸³ and prison guards at a private prison.⁸⁴ As Justice Stevens observed, “The practical consequences of a holding that no remedy has been authorized against a public official are essentially the same as those

⁷⁶*Id.* at 19. Query whether the Constitution’s structure does or should permit Congress to declare that parts of the Constitution shall not be enforceable. See *infra* notes 303–316 and accompanying text. The Court’s language confirmed the hint in *Bivens* about Congress’s ability to substitute a statutory remedy for a constitutional one. See *supra* note 69. One might question, however, whether it is appropriate for Congress to decide that its own remedy is equally effective. See *infra* notes 308–316 and accompanying text.

⁷⁷*Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). That statement is inaccurate; the Court had done exactly that in 1933. See *supra* note 26 and accompanying text.

⁷⁸*Id.* at 1857.

⁷⁹ “[I]n light of the changes to the Court’s general approach to recognizing implied damages remedies, it is possible that the analysis in the Court’s three *Bivens* cases might have been different if they were decided today.” *Id.* at 1856. Three years later, the Court was more direct. “[I]f ‘the Court’s three *Bivens* cases [had] been . . . decided today,’ it is doubtful that we would have reached the same result.” *Hernandez v. Mesa*, 140 S. Ct. 735, 742–43 (2020) (quoting *Ziglar*, 137 S.Ct. at 1856).

⁸⁰*Schweiker v. Chilicky*, 487 U.S. 412, 418, 428–29 (1988).

⁸¹*Bush v. Lucas*, 462 U.S. 367, 390 (1983).

⁸²*Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

⁸³*Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001).

⁸⁴*Minnecci v. Pollard*, 565 U.S. 118, 131 (2012).

flowing from a conclusion that the official has absolute immunity.”⁸⁵ More to the point, the practical consequences are effectively the same as if the constitutional right did not appear in that document at all. Refusal to recognize actions under constitutional provisions ostensibly protecting individuals’ rights erases them from the Constitution.

None of the cases refusing enforcement found that there were no constitutional violations;⁸⁶ they instead involved the Court deciding either for its own reasons or for reasons that it attributed to Congress that it should not give effect to the Constitution.⁸⁷ *Ziglar v. Abbasi* further elaborated *Bivens*’s special-factors consideration: “This Court has not defined the phrase ‘special factors counselling hesitation.’ The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.”⁸⁸ This is a remarkable statement for a court that purportedly does not consider issues of policy or wisdom when interpreting legislative—and perhaps especially constitutional—materials.⁸⁹ Certainly, there is nothing explicit in the

⁸⁵ *Mitchell v. Forsyth*, 472 U.S. 511, 538 (1985) (Stevens, J., concurring in the judgment). *See also* *Anderson v. Creighton*, 483 U.S. 635, 651 (1987) (Stevens, J., dissenting).

⁸⁶ In *Bush*, the First Amendment case, the Civil Service Commission’s Appeals Review Board did find that the plaintiff’s demotion at NASA was retaliation for his statements critical of his workplace and thus violated the First Amendment. 462 U.S. at 370–71. The Supreme Court did not review that determination. *Id.* at 372.

The Eighth Amendment cases are perhaps even more revealing. *Carlson v. Green*, 446 U.S. 14, 16 n. 1, allowed an action where the plaintiff alleged that seriously deficient and indifferent attention to her decedent caused his death from asthma. Both *Malesko* and *Minnecci* alleged serious deficiencies in medical treatment (though not resulting in death) that would have been sufficient under *Carlson* to state a claim for relief (whether or not the claims would have succeeded on the merits). 565 U.S. at 121, 126; 534 U.S. at 64, 68, 74. But the Court declined to allow *Carlson* actions to proceed. *Carlson*, 446 U.S. at 16 n. 1.

⁸⁷ *See supra* notes 66–67 and accompanying text.

⁸⁸ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857–58 (2017).

⁸⁹ *See, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (holding that statutes are not unconstitutional because “they may be unwise, improvident, or out of harmony with a particular school of thought”); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (holding it improper for courts to substitute their beliefs for legislative judgments); *Olsen v. State of Neb. ex rel. W. Reference & Bond Ass’n*, 313 U.S. 236, 246 (1941) (The Court was “not concerned . . . with the wisdom, need, or appropriateness of the legislation.”). *See infra* notes 325–326 and accompanying text. *But see* *Nixon v. Fitzgerald*, 457 U.S. 731, 748 (1982) (The Court considered immunity of presidents for official acts: “Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional

Constitution allowing any branch of government to decide whether constitutional principles are enforceable. With that in mind, let us briefly consider the immunity landscape.

II. TODAY'S IMMUNITIES

A. *Absolute Immunities*

The Supreme Court has recognized five immunities it characterizes as absolute:⁹⁰ judges,⁹¹ prosecutors,⁹² legislators,⁹³ witnesses,⁹⁴ and presidents.⁹⁵ When the Founders wrote and ratified the Constitution and the Bill of Rights, English common law recognized judicial immunity and immunity for other participants in proceedings before courts.⁹⁶ Legislative immunity in England dated only from adoption of the English Bill of Rights of 1689 following William and Mary's ascent to the throne as a result of the Glorious

heritage and structure. Historical inquiry thus merges almost at its inception with the kind of 'public policy' analysis appropriately undertaken by a federal court.'").

⁹⁰"Absolute" immunities have limits. *See* Forrester v. White, 484 U.S. 219, 227 (1998); Pulliam v. Allen, 466 U.S. 522, 544 (1984) (allowing prospective relief against judge's unconstitutional practice and allowing attorney's fees award pursuant to 42 U.S.C. § 1988). Judges, prosecutors, and legislators must be acting in those capacities for absolute immunity to attach. *See* Forrester v. White, 484 U.S. at 227. If a judge acts as an administrative officer, only qualified immunity is available. *See id.* Prosecutors' absolute immunity depends on them acting in a prosecutorial, not administrative, advisory, or investigative capacity. *See* Burns v. Reed, 500 U.S. 478, 492, 496 (1991) (acknowledging absolute immunity for conduct of probable cause hearing, but not for advice to police on how to question suspect). Legislators and their aides acting in a legislative capacity are immune, but not when acting outside of it. *See, e.g.,* Hutchinson v. Proxmire, 443 U.S. 111, 127–28 (1979) (not protecting defamatory statements in media publication that would have been protected if made during legislative debate); Gravel v. United States, 408 U.S. 606, 622 (1972) (introducing Pentagon Papers into the public record at a committee hearing protected; arranging for private publication not protected).

⁹¹Pierson v. Ray, 386 U.S. 547, 554 (1967); Randall v. Brigham, 74 U.S. (7 Wall.) 523, 532 (1868).

⁹²Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

⁹³Tenney v. Brandhove, 341 U.S. 367, 375–76 (1951) (state legislators). The Constitution recognizes federal legislators' immunity. *See* U.S. CONST. art. I, § 6, cl. 1.

⁹⁴Briscoe v. LaHue, 460 U.S. 325, 326 (1983).

⁹⁵Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

⁹⁶*See, e.g.,* Floyd v. Barker (1607) 77 Eng. Rep. 305 (Star Chamber).

Revolution that deposed the Stuart dynasty.⁹⁷ Immunity for Crown officials acting in executive capacities was unknown.⁹⁸

B. *Qualified Immunity*

I. The Test

Harlow v. Fitzgerald quoted, before modifying, the qualified-immunity standard that the Court had articulated seven years earlier:

[W]e have held that qualified immunity would be defeated if an official “*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury” ([E]mphasis added).⁹⁹

The Court recited the difficulties the subjective part of the test caused¹⁰⁰ and rejected that part of the test. It then reformulated: “We therefore hold that

⁹⁷ See *supra* text accompanying note 36.

⁹⁸ Indeed, in a famous case with which the Founders were familiar, English law had emphatically rejected executive immunity. See *infra* note 125–128 and accompanying text.

⁹⁹ 457 U.S. 800, 800–01, 815 (1982) (footnote omitted) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

¹⁰⁰ *Id.* at 815–17 (footnotes omitted):

The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz v. Economou*, 438 U.S. 478 (1978) that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official’s subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

In the context of *Butz*’ attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to “subjective” inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying “ministerial” tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker’s experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary

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.”¹⁰¹ The Court did not say that the official’s state of mind was irrelevant. Rather, that criterion had to go because including it interfered with the Court’s prime directive: ending cases against officials early.¹⁰²

Harlow did not offer guidance about how a court should proceed in a case where qualified immunity is an issue—where the plaintiff alleges one or more constitutional violations and the defendant raises qualified immunity as a defense.¹⁰³ Sequence of inquiry is important for exactly the reason that

judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

¹⁰¹ *Id.* at 818 (footnotes and citations omitted). Since *Harlow*, the Court has regularly considered what it means to be clearly established and which assertions of constitutional rights by plaintiffs come within that description. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017); *Mullenix v. Luna*, 577 U.S. 7, 11–12 (2015); *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011); *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Those issues, however, are matters of detail not relevant to this Article, which examines the stated standard itself and whence it came rather than individual instances of the Court applying it.

¹⁰² *See infra* note 206–210 and accompanying text.

¹⁰³ The Supreme Court has addressed that problem four times. *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001); *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014). Each time the Court discussed the proper sequence of immunity, the Justices were unanimous about how to proceed, but there uniformity ends. *Wilson* and *Saucier* mandated answering the constitutional question before considering qualified immunity. Eight years later, the still-unanimous Court backtracked. *Pearson* made the sequence of inquiry optional. This allowed the lower courts to avoid definitive constitutional rulings by finding that the rights plaintiffs asserted, even if they existed, were not clearly established within *Harlow*’s meaning. The *Pearson* Court’s explanation of the need for a retreat from *Saucier* was less than pellucid. Although it noted that the *Saucier* sequence “is often appropriate,” and “often beneficial,” it stated no method for determining when deciding the constitutional question first is appropriate or beneficial. *Id.*

One wonders at the Court’s continued unanimity. Ten years after *Saucier*, Justice Kennedy sharply criticized sequence (that his *Saucier* majority opinion had prescribed). *Camreta v. Greene*, 563 U.S. 692, 722–23 (2011) (Kennedy, J., dissenting). Justice Thomas joined Justice Kennedy’s dissent. *Id.* at 716. Seven years before that, Justice Breyer, joined by Justices Scalia and Ginsburg, had also expressed dismay at the *Saucier* sequence. *See Brosseau v. Haugen*, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring in the judgment). Nonetheless, in *Plumhoff*, 572 U.S. at 774, the Court

Saucier v. Katz pointed out: if courts examine qualified immunity first and decide that the asserted constitutional right is not “clearly established,” there are far fewer opportunities for it ever to become clearly established.¹⁰⁴ *Pearson v. Callahan* seemed to make light of this possibility, arguing that most issues would arise in non-immunity contexts, but it cited nothing for that assertion.¹⁰⁵

Qualified-immunity cases began some years before *Harlow*, and although *Harlow* changed the standard, the Court has not retreated from qualified immunity, which now extends to virtually any official not entitled to absolute immunity who exercises discretionary power.¹⁰⁶ *Ziglar v. Abbasi*, the Court’s most recent extended discussion of qualified immunity, did not alter the test.¹⁰⁷ It balanced “two competing interests,”¹⁰⁸ acknowledging that “damages suits ‘may offer the only realistic avenue for vindication of constitutional guarantees,’”¹⁰⁹ while cautioning that “permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.”¹¹⁰ There is no question that constitutional guarantees “can entail substantial social costs”¹¹¹ Surely the Founders were well aware of that, yet they struck a balance and embedded

unanimously decided that beginning with the constitutional issue would be beneficial, though it did not explain why. Finally, *Caniglia v. Strom* decided the constitutional issue first without discussing the sequence of inquiry. 141 S. Ct. 1596, 1599–1600 (2021). What the lower courts should make of this twenty-two-year development remains a mystery.

¹⁰⁴ 533 U.S. at 201. See also *Plumhoff*, 572 U.S. at 774.

¹⁰⁵ 555 U.S. at 227, 242–43.

¹⁰⁶ See *supra* text accompanying notes 46–54.

¹⁰⁷ 137 S. Ct. 1843 (2017).

¹⁰⁸ *Id.* at 1866.

¹⁰⁹ *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). The statement echoes Justice Harlan’s *Bivens* concurrence. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (“For people in *Bivens*’ shoes, it is damages or nothing.”) (Harlan, J., concurring in the judgment).

¹¹⁰ *Ziglar*, 137 S. Ct. at 1866 (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

¹¹¹ *Id.* Two brief examples suffice. The Fourth Amendment, U.S. CONST. amend. IV, imposes limitations on government searches and seizures. To the extent that scrupulous adherence to the Amendment’s terms causes some relevant evidence to go undiscovered (or if discovered improperly, to be inadmissible), that is a social cost. Similarly, the Fifth Amendment, U.S. CONST. amend. V, entitles the defendant in a criminal case to decline to testify, despite the fact that the defendant may have highly relevant evidence based on first-hand knowledge.

it in the Constitution. There is no evidence that they intended to leave it to the Supreme Court to modify that balance.¹¹²

¹¹²For constitutional claims, the Court has established two paths to terminating cases before discovery. First, a court may decline to allow a *Bivens* cause of action to proceed at all; that leads to dismissal for failure to state a claim. *See* FED. R. CIV. P. 12(b)(6). Second, even if the complaint states a cognizable claim, qualified immunity may prevent any recovery; that often leads to summary judgment for the defendants. *See* FED. R. CIV. P. 56(a). The practical result is the same, but in the first group, there is no ruling on qualified immunity—meaning no inquiry about whether the reasonable official would have known the contemplated action was unconstitutional—although the Court sounds as if it is saying that the right the plaintiff asserts, in light of the facts pleaded, is not “clearly established.”

In *Hernandez v. Mesa*, parents of a Mexican boy that a United States border agent shot and killed across the international border after the child had run back to Mexico after being over the border sued. 140 S. Ct. 735, 740 (2020). The Court treated the case as a *Bivens*-extension case rather than a qualified-immunity case. *Id.* at 740–41. Had the agent killed the boy while he was still on United States soil, the case would have been indistinguishable from *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (finding deadly force against fleeing suspect permissible only if “necessary to prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others”) (emphasis added). The *Hernandez* Court found that the plaintiff had no cause of action, relying on the foreign-relations implications of allowing the claim to proceed in the cross-border situation. 140 S. Ct. at 739. In *Ziglar v. Abbasi*, the Court ruled that whether plaintiffs had causes of action for allegedly constitutionally improper conditions of confinement was a decision for Congress rather than the Court:

If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

137 S. Ct. at 1859–60. Thus, while not explicitly limiting *Bivens* to its facts, the Court’s criteria did a rather complete job of it, as a recent Fifth Circuit decision exemplifies. The defendant, an agent in the Department of Homeland Security, accosted the plaintiff in the parking lot of a bar after the plaintiff attempted to investigate a car accident that injured a friend. *Byrd v. Lamb*, 990 F.3d 879, 880 (5th Cir. 2021), *petition for cert. filed*, (U.S. Aug. 10, 2021) (No. 21-184). The defendant’s son had also been in the car. *Id.* The armed defendant allegedly threatened the plaintiff physically and verbally and attempted to break plaintiff’s car window. *Id.* The plaintiff summoned the police, who initially handcuffed and detained the plaintiff for four hours when the agent identified himself. *Id.* The police subsequently released the plaintiff without charging him and arrested the agent for aggravated assault and criminal mischief. *Id.* at 880–81. The Court of Appeals distinguished *Bivens*:

II. “Clearly Established” *Versus* “Void for Vagueness”

a. Specificity

The meaning of “clearly established” is anything but clearly established. The trail begins with *Harlow*’s statement.¹¹³ One question that has vexed the Court concerns what Justice Scalia called the “level of generality” at which one approaches the inquiry, and he made clear in *Anderson v. Creighton* that the inquiry is heavily fact dependent, ending by asserting that “in the light of pre-existing law the unlawfulness must be apparent.”¹¹⁴ He might more accurately have said that “in the light of pre-existing [fact patterns] the unlawfulness must be apparent.”¹¹⁵

Here, although Byrd alleges violations of the Fourth Amendment, as did the plaintiff in *Bivens*, Byrd’s lawsuit differs from *Bivens* in several meaningful ways. This case arose in a parking lot, not a private home as was the case in *Bivens*. Agent Lamb prevented Byrd from leaving the parking lot; he was not making a warrantless search for narcotics in Byrd’s home, as was the case in *Bivens*. The incident between the two parties involved Agent Lamb’s suspicion of Byrd harassing and stalking his son, not a narcotics investigation as was the case in *Bivens*. Agent Lamb did not manacle Byrd in front of his family, nor strip-search him, as was the case in *Bivens*.

Id. at 882 (citations omitted).

¹¹³ See *supra* text accompanying note 101. That standard came from Justice Powell’s opinion for the Court, the Justice who had, only seven years earlier, despaired of finding constitutional clarity:

The Court states the standard of required knowledge in two cryptic phrases: “settled, indisputable law” and “unquestioned constitutional rights.” Presumably these are intended to mean the same thing, although the meaning of neither phrase is likely to be self-evident to constitutional law scholars—much less the average school board member. One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are “unquestioned constitutional rights.”

Wood v. Strickland, 420 U.S. 308, 329 (1975).

¹¹⁴ 483 U.S. at 639–40 (citations omitted).

¹¹⁵ *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), appeared to establish that complete congruence of facts is not necessary for the Court to hold that a constitutional right is clearly established for *Harlow* purposes. Hope was an Alabama prisoner. *Id.* at 733. In June 1995, he had an altercation with a guard. *Id.* at 734. The result was that he was shackled, shirtless, to an outdoor hitching post in the sun. *Id.* at 734–35. The Court noted that at that time, “Alabama was . . . the only State that handcuffed prisoners to ‘hitching posts’ if they either refused to work or otherwise disrupted work squads.” *Id.* at 733 (footnote omitted). The Court continued:

One of the ironic things about *Creighton* is that Justice Scalia's opinion, though cautioning against asking the constitutional question at a high level of generality, approached the facts at a very high level of generality:

Petitioner Russell Anderson is an agent of the Federal Bureau of Investigation. On November 11, 1983, Anderson and other state and federal law enforcement officers conducted a warrantless search of the home of respondents, the Creighton family. The search was conducted because Anderson believed that Vadaain Dixon, a man suspected of

The guards made him take off his shirt, and he remained shirtless all day while the sun burned his skin. He remained attached to the post for approximately seven hours. During this 7-hour period, he was given water only once or twice and was given no bathroom breaks. At one point, a guard taunted Hope about his thirst. According to Hope's affidavit: "[The guard] first gave water to some dogs, then brought the water cooler closer to me, removed its lid, and kicked the cooler over, spilling the water onto the ground."

Id. at 734-35 (footnote omitted). The Court (characterizing the matter as "obvious") agreed with the Court of Appeals' finding that Hope's treatment violated the Eighth Amendment but reversed on the qualified-immunity issue. *Id.* at 741, 746. The Court disagreed with the Circuit Court's interpretation of the qualified-immunity standard as requiring precedents with facts "materially similar to Hope's situation." *Id.* at 739 (quoting *Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002)) (internal quotation marks omitted). The Court found that standard too rigid, and given the background not only of the Court's Eighth Amendment cases but also binding Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a report from the federal Department of Justice "informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the respondents' conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 742 (quoting *Harlow*, 457 U.S. at 818).

It is important, however, not to overread the Court's apparent generosity. *Hope* appears to say that a right can be clearly established in circumstances not on all fours with binding precedent. *But see* *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam) (requiring factually similar precedents). *Creighton*, without finding that the police had probable cause (or even reasonable suspicion) that the suspect was at the Creightons' house, nonetheless shielded the officers from constitutional accountability. 483 U.S. at 646. *But see* *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam) (holding that imprisoning an inmate in a pair of "shockingly unsanitary" cells violated the Eighth Amendment and that no reasonable corrections officer could have believed otherwise).

Apart from factual overlap, there remains unaddressed the question of what sort of vote in the Supreme Court (or other courts) makes something clearly established. If a plaintiff shows significant congruence between the facts of her case and the facts of another case where a 5-to-4 Court found liability, is the right in such circumstances clearly established? Should a lower court consider the vote? Should it consider whether the majority reached the result over "spirited dissents"? *See* *Payne v. Tennessee*, 501 U.S. 808, 829-30 (1991) (suggesting that *stare decisis* has (and should have) less force then).

a bank robbery committed earlier that day, might be found there. He was not.¹¹⁶

To read Justice Scalia's opinion, nothing else happened. All of the facts that the Court was required to accept as true¹¹⁷ simply vanished. Justice Stevens's dissent paid closer attention to the facts, quoting the Court of Appeals' statement of them.¹¹⁸ The facts at least give rise to a suspicion that there were several parts of the officers' actions that violated the Fourth Amendment even if exigent circumstances justifying the warrantless entry existed.¹¹⁹ To mention only three examples, the allegations of officers (1) having punched Mr. Creighton in the face, (2) having struck ten-year-old Shaunda, and (3) having chased her to the neighbor's house and shaken her very likely make out excessive use of force if the plaintiffs could prove them.

In the Supreme Court, Anderson objected to the Eighth Circuit's "refusing to consider his argument that he was entitled to summary judgment on qualified immunity grounds if he could establish as a matter of law that a reasonable officer could have believed the search to be lawful."¹²⁰ One is apt to read that argument too rapidly; it rests on an unspoken premise: that assuming the officers' entry into the home did not violate the Fourth Amendment, nothing else that happened in and around the home similarly could have violated the Fourth Amendment. But the mere fact that the entry may have been lawful cannot mean that all bets are off for Fourth Amendment purposes, and the Restatement (Second) of Torts, Justice Scalia's chosen authority for the common-law rule on which he relied,

¹¹⁶ *Creighton*, 483 U.S. at 637.

This abbreviated recitation masks issues involving excessive use of force against the Creightons. See *supra* text accompanying note 4; see *infra* notes 156–161 and accompanying text. But Justice Scalia's opinion for the Court did state that the district court had found "that Anderson had had probable cause to search the Creightons' home and that his failure to obtain a warrant was justified by the presence of exigent circumstances." *Creighton*, 483 U.S. at 637.

¹¹⁷ See *supra* notes 1–2 and accompanying text.

¹¹⁸ *Creighton*, 483 U.S. at 664 n.21 (Stevens, J., dissenting).

¹¹⁹ *Creighton* came to the Court after the district court, in advance of discovery, granted summary judgment to Anderson on the ground that the search was lawful. *Id.* at 637. Anderson had not filed an answer in the case, instead moving for summary judgment under FED. R. CIV. P. 56. *Id.* Thus, all that the district judge had in the record was the complaint and the affidavits submitted on the summary judgment motion. At that stage, all reasonable inferences had to be in favor of the non-moving party—the plaintiffs. See *Adickes v. Kress & Co.*, 398 U.S. 144, 158–59 (1970). The Court of Appeals for the Eighth Circuit reversed because it perceived factual disputes not resolvable on summary judgment that made summary judgment improper. *Creighton*, 483 U.S. at 637–38.

¹²⁰ *Creighton*, 483 U.S. at 638.

“clearly establishe[s] that.”¹²¹ The officers’ actions are not indivisible. Suppose, for example, instead of officers acting as they did toward Shaunda, one had shot her as she ran to the neighbor’s house.¹²² Anderson’s argument attempts to sweep every event that evening under the rug of a hypothetically lawful entry.¹²³ That seems to look at things from a much too lofty level of generality.

What the Court said is remarkable. The Creightons argued “that officers conducting such searches were strictly liable at English common law if the fugitive was not present,”¹²⁴ relying on *Entick v. Carrington*,¹²⁵ a case well-known to the Constitution’s Framers and to the Congress that drafted what became the Fourth Amendment, as the Supreme Court recognized in *Boyd v.*

¹²¹ RESTATEMENT (SECOND) OF TORTS § 204 cmt. g (AM. L. INST. 1965):

[T]he fact that the actor while upon the land for the purpose of making a privileged arrest, intentionally or negligently does unnecessary harm to the occupants of the land or to the land or to chattels there, while it subjects him to liability for such conduct, does not make the arrest unlawful or terminate the actor’s privilege to continue his efforts to make the arrest or to maintain his custody of the prisoner.

Another section is even more explicit. *Id.* § 214:

(1) An actor who has in an unreasonable manner exercised any privilege to enter land is subject to liability for any harm to a legally protected interest of another caused by such unreasonable conduct.

(2) One who properly enters land in the exercise of any privilege to do so, and thereafter commits an act which is tortious, is subject to liability only for such tortious act, and does not become liable for his original lawful entry, or for his lawful acts on the land prior to the tortious conduct.

¹²² Had they done so, they might have been subject to criminal prosecution, but Anderson’s argument would nonetheless exempt them from civil liability. *See Creighton*, 483 U.S. at 640–41. This hypothetical is obviously an extreme case, but differs only in degree, not in kind, from what actually happened. *See Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

¹²³ Perhaps the argument is a grotesque reversal of the fruit-of-the-poisonous-tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 485 (1963). That doctrine says that if the search violates the Fourth Amendment, the evidence the search turns up is inadmissible unless the government can establish (1) an independent source for the evidence, or (2) that it would inevitably have discovered the evidence without the violation, or (3) that passage of time and surrounding circumstances have purged the original taint. *See id.* at 485–88. Anderson’s argument seems to say that if the search does *not* violate the Fourth Amendment, everything that happens in the wake of the search cannot violate the Fourth Amendment either.

¹²⁴ *Creighton*, 483 U.S. at 644 (citing *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (KB)).

¹²⁵ (1765) 95 Eng. Rep. 807 (KB).

United States.¹²⁶ Lord Carrington had issued a general warrant.¹²⁷ The King's officers executed the warrant, and the victim of the warrant sued the four officers and prevailed.¹²⁸ In the same court four years later, *Wilkes v. Halifax* awarded £4,000 to the plaintiff against the Secretary of State.¹²⁹ Nowhere in the English court's opinions is there any mention of immunity.¹³⁰ The United States Supreme Court lauded both cases in *Boyd v. United States*¹³¹ and cited *Wilkes* approvingly twenty-one years after *Anderson v. Creighton*.¹³²

In *Creighton*, the Supreme Court would have none of it. Justice Scalia responded by disavowing the common law, noting that *Harlow* had replaced common-law principles with its own approach.¹³³ *Anderson* referred to

¹²⁶*Boyd v. United States*, 116 U.S. 616, 626–27 (1886) (footnote omitted), noted *Entick's* importance in the United States:

Lord Camden pronounced the judgment of the court in Michaelmas term, 1765, and the law, as expounded by him, has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British constitution, and is quoted as such by the English authorities on that subject down to the present time.

As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

¹²⁷*Entick*, (1765) 95 Eng. Rep. at 808.

¹²⁸*Id.* at 808.

¹²⁹*Wilkes*, though supposedly well-known at the time, apparently has no case report. See Thomas Y. Daves, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 630 n.2 (1999).

¹³⁰See generally *id.*

¹³¹*Boyd v. United States*, 116 U.S. 616, 626 (1886).

¹³²See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 490–91 (2008).

¹³³*Anderson v. Creighton*, 483 U.S. 635, 644–45 (1987) (citation and footnote omitted). That may be, but only a decade earlier the Court denied that its immunity doctrines were “products of judicial fiat Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.” *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976).

In the omitted footnote, the Court pointed out that “[o]f course, it is the American rather than the English common-law tradition that is relevant, and the American rule appears to have been considerably less draconian than the English.” *Creighton*, 483 U.S. at 644 n.5 (citation omitted).

English common law, but only to reject it. In the course of discarding *Entick*, the Court shone a spotlight on its own jurisprudence, asserting its entitlement to craft its own common law.¹³⁴ In the end, the Supreme Court reversed and remanded to the Court of Appeals so it could consider Anderson’s argument, and the district court subsequently accepted the defendants’ approach to the case from the preceding paragraph; because the reasonable officer could have thought that the warrantless entry was lawful, qualified immunity protected the officers’ actions throughout.¹³⁵

But the reference is anachronistic. The American common law of which the Court spoke arose in state cases as defenses to state-created causes of action, long after adoption of the Amendments on which the Creightons relied, and the Court’s reference to such common law implies that the Court recognized that state common law may make parts of the Constitution unenforceable. *See infra* notes 251–271 and accompanying text.

The Court also rejected what it characterized as plaintiffs’ argument that the qualified-immunity decision rested in part on the agent’s state of mind. *Anderson*, 483 U.S. at 641 (restating the wholly objective test of *Harlow*: whether the reasonable officer, possessing the information that the officers on the scene had, could have believed the officers’ actions to have been lawful). Thus, the Court advanced the idea that a search that was unreasonable for Fourth-Amendment purposes could nonetheless have been reasonable for qualified-immunity purposes. *But see infra* text accompanying notes 292–299.

¹³⁴ *Anderson*, 483 U.S. at 644–45 (citation and footnote omitted):

Although it is true that we have observed that our determinations as to the scope of official immunity are made in the light of the “common-law tradition,” we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.

¹³⁵ *Creighton v. Anderson*, 724 F. Supp. 654, 661 (D. Minn. 1989), *aff’d*, 922 F.2d 443 (8th Cir. 1990). The district court’s description of the complaint was less than accurate: “Plaintiffs allege that defendant [Anderson] violated their constitutional rights by entering their home without their consent or a search warrant.” *Id.* at 655. “[A]ll parties agree that [Anderson] conducted a warrantless nighttime entry into the Creighton home in search of Vadaain Dixon. *No other of defendant’s actions are challenged here.*” *Id.* at 658 (emphasis added). The complaint tells a considerably different story: In addition to alleging the unlawful entry, the fifteenth paragraph, concerning the count under 42 U.S.C. § 1983, goes on to say:

[P]laintiff Robert E. Creighton, Jr. was assaulted and beaten and plaintiff Sarisse Creighton, Shaunda Creighton and Tiffany Creighton were subjected to fear, intimidation, and verbal and physical abuse and were otherwise held prisoner in their

Perhaps the Court is due some credit for admitting that after *Harlow*, qualified immunity has no English-common-law basis. Nonetheless, in the years since deciding *Anderson*, the Court has continued to try to connect its qualified-immunity jurisprudence to common law.¹³⁶ That may be

house by defendants herein acting in concert without probable cause and under color of law.

XVI.

[D]efendants herein arrested plaintiff Robert E. Creighton, Jr. and otherwise restricted his liberty and acted in concert without probable cause and under color of law.

XVII.

[S]ubsequent to his arrest, plaintiff Robert E. Creighton, Jr. was transported to, and was incarcerated in, the Ramsey County Jail; . . . plaintiff was ultimately released without being charged.

XVIII.

[D]efendants . . . acted with intent to deprive plaintiffs of their constitutional rights guaranteed under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and 42 USC § 1983, including but not limited to:

- 1.The rights of plaintiffs to be free from unlawful interference and to be secure in their persons and homes from unlawful and unreasonable searches and seizures;
- 2.The rights of plaintiffs to be free from unlawful arrest, detention and incarceration.
- 3.The rights of plaintiffs to be free from excessive force and physical brutality

The next count, concerning the deprivation of rights by federal officials, echoes the § 1983 count. Complaint at 5–8, *Creighton v. City of St. Paul*, 766 F.2d 1269 (8th Cir. 1985), *rev'd sub nom. Anderson v. Creighton*, 483 U.S. 635 (1987). A copy of the complaint is on file with the author.

¹³⁶See, e.g., *Burns v. Reed*, 500 U.S. 478, 493 (1991) (referring to American rather than English common law); *Wyatt v. Cole*, 504 U.S. 158, 163–65 (1992) (referring to common law, but recognizing *Harlow's* abandonment of common-law correlation); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993) (recognizing Court's reliance on common law for absolute immunity); *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (same). *Fitzsimmons* cited *Flint v. Pike*, which denied immunity of any sort to an attorney for statements made outside the courtroom. *Id.* at 277 (citing (1825) 107 Eng. Rep. 1136; 4 Barnewall and Cresswell 473 (UK)). *Flint* discussed the policy underlying counsel's absolute immunity for in-court statements but found no policy justifying immunity for out-of-court statements. See 107 Eng. Rep. at 1138. Justice Scalia, concurring in *Fitzsimmons*, noted with approval the Court's reaffirmation that defendant officials have the burden of demonstrating a common-law privilege as of 1871. 509 U.S. at 281 (Scalia, J.,

understandable, given the Court's insistence that the Founders were aware of the immunities the Court espoused because the immunities stemmed from English common law.¹³⁷

b. The Doctrine of Void for Vagueness

Compare the Court's qualified-immunity approach to its approach when a litigant challenges a criminal statute as being so vague that it violates due process. The void-for-vagueness doctrine serves two essential purposes: (1) providing warning that affords to people "of ordinary intelligence a reasonable opportunity to know what is prohibited," and (2) preventing "arbitrary and discriminatory enforcement" by "provid[ing] explicit standards for those who apply [the laws]."¹³⁸ This raises the question of how specific a warning must be to pass muster. It also invites consideration of whether the doctrine's fair-warning requirement should inform the immunity doctrine's clearly-established standard.

Fortunately, one need not speculate about whether the two doctrines intersect; the Court has linked them. *United States v. Lanier* was a prosecution of a state judge for repeated violations of a criminal statute proscribing violations of civil rights.¹³⁹ The jury convicted Lanier for having seven times violated several women's right to liberty by sexually assaulting them.¹⁴⁰ Lanier defended on the ground that the statute was void for vagueness because "lack of any notice to the public that this ambiguous criminal statute [i.e., 18 U.S.C. § 242] includes simple or sexual assault crimes within its coverage."¹⁴¹ The unanimous Supreme Court announced its

concurring). With respect to constitutional rights, the relevant date is the effective date of the constitutional right involved. *See infra* notes 251251–263 and accompanying text.

Justice Thomas, with whom Justice Scalia joined, dissented from the Court's denial of review in *Hoffman v. Harris*, 511 U.S. 1060 (1994). In *Hoffman*, the lower courts had accorded absolute immunity to state social workers. *Id.* at 1632 (Thomas, J., dissenting). Justice Thomas's dissent focused strongly on the necessity of seeking a common-law counterpart to the asserted immunity. *Id.*

¹³⁷ *See infra* notes 172–183, 188–191, 323–324 and accompanying text.

¹³⁸ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

¹³⁹ 520 U.S. 259, 261 (1997). The statute is hardly an example of the draftsman's art, and it is not clear why the defendant refrained from arguing that the statute did not apply to him by its terms, since there is no indication in the record that he acted "on account of such person being an alien, or by reason of his color, or race . . ." *See* 18 U.S.C. § 242.

¹⁴⁰ *Lanier*, 520 U.S. at 262.

¹⁴¹ *United States v. Lanier*, 73 F.3d 1380, 1384 (6th Cir. 1996) (en banc), *rev'd*, 520 U.S. 259 (1997).

holding at the outset,¹⁴² criticizing the lower court for its uncalled-for quest for factual identity.

The Court acknowledged that the neither the statute nor “a good many of [its] constitutional referents delineate the range of forbidden conduct with particularity.”¹⁴³ Nonetheless, the Court upheld Lanier’s convictions and twenty-five-year sentence, specifically disapproving the Sixth Circuit’s “extreme level of factual specificity”¹⁴⁴ The opinion observed that the Court had upheld convictions with “notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.”¹⁴⁵ Most significantly, the Court explicitly equated the “fair warning” that the void-for-vagueness doctrine requires with the immunity doctrine’s demand that the constitutional principle be “clearly established.”¹⁴⁶ Finally, it cited *Creighton* for the proposition that “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though ‘the very action in question has [not] previously been held unlawful.’”¹⁴⁷ This strongly suggests that civil suits should proceed in qualified-immunity cases unless the Court is prepared to declare its own expositions of constitutional law void for vagueness—not affording people of reasonable intelligence fair warning.

That does not appear, however, to be what has happened. In case after case, the Court has refused to permit civil suits to proceed, finding that the constitutional violation that the plaintiff asserted on the facts was not clearly established. Often the Court is explicit that the facts of the precedents upon which the plaintiff relies are not close enough to the facts of the plaintiff’s case, an argument reminiscent of the unsuccessful defense in *Lanier*.¹⁴⁸ One

¹⁴² *Lanier*, 520 U.S. at 261:

The Sixth Circuit reversed his convictions on the ground that the constitutional right in issue had not previously been identified by this Court in a case with fundamentally similar facts. The question is whether this standard of notice is higher than the Constitution requires, and we hold that it is.

¹⁴³ *Id.* at 265.

¹⁴⁴ *Id.* at 268.

¹⁴⁵ *Id.* at 269.

¹⁴⁶ *Id.* at 270.

¹⁴⁷ *Id.* at 271 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The irony, of course, is that *Creighton* did nothing to protect constitutional rights. See *Creighton*, 483 U.S. at 646–47.

¹⁴⁸ See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam) (holding that Fourth Amendment prohibition against unreasonable use of deadly force not clearly enough established in

case granted qualified immunity, noting that the “purported right, however, was not clearly established . . . in a way that placed beyond debate the unconstitutionality of the Institution’s procedures, as implemented by the medical contractor.”¹⁴⁹

Yet the Court has never suggested either that a statute’s applicability to a litigant’s facts be “beyond debate” either to support or avoid a finding of unconstitutional vagueness. The Court’s decisions invalidating statutes on vagueness grounds are often not unanimous.¹⁵⁰ Equally important, cases denying vagueness challenges are also often not unanimous.¹⁵¹ In *United*

the circumstance where plaintiff, who had been described to police as acting erratically by hacking at a tree with a large knife, stood non-threateningly six feet away from another woman and did not respond to police instruction to drop knife); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam) (holding Fourth Amendment prohibition against unreasonable use of deadly force not clearly enough established with respect to “an officer who—having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other officers—shoots and kills an armed occupant of the house without first giving a warning”); *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam) (holding Fourth Amendment prohibition against unreasonable use of deadly force not clearly enough established with respect to an officer who, awaiting authorization to shoot at fleeing suspect’s car to disable it, fired four shots into decedent’s upper body, which killed the decedent as car approached “spike strips” intended to disable it). This is not to say that the plaintiffs in these cases should have prevailed, but given the factual intensity of each case, they should have proceeded beyond the summary-judgment stage. See *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

¹⁴⁹*Taylor v. Barkes*, 575 U.S. 822, 825 (2015) (per curiam) (holding that Eighth Amendment right of “a troubled [incarcerated] man with a long history of mental health and substance abuse problems,” to adequate suicide prevention measures not clearly established).

¹⁵⁰See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (5-4 majority); *City of Chicago v. Morales*, 527 U.S. 41 (1999) (6-3 majority); *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) (5-4 majority on vagueness issue); *Kolender v. Lawson*, 461 U.S. 352 (1983) (7-2 majority); *Colautti v. Franklin*, 439 U.S. 379 (1979) (6-3 majority); *Smith v. Goguen*, 415 U.S. 566 (1974) (6-3 majority); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (5-3 majority). *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), had no dissents. Justice Ginsburg concurred in the judgment; Justice Sotomayor did not participate. *Id.* at 241. *United States v. Lanier*, 520 U.S. 259 (1997), and *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), were unanimous, the former finding the statute not vague and the latter finding it vague. Justices Powell and Rehnquist did not participate in *Papachristou*. *Id.*

¹⁵¹See, e.g., *United States v. Williams*, 553 U.S. 285 (2008) (7-2 majority); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (5-4 majority); *NEA v. Finley*, 524 U.S. 569 (1998) (6-1 majority on vagueness issue) (Justices Scalia and Thomas thought the vagueness doctrine was inapplicable.); *United States v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29 (1963) (6-3 majority); *United States v. Spector*, 343 U.S. 169 (1952) (6-1 majority). Sometimes the Court is unanimous in finding no vagueness. See, e.g., *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513 (1994); *Village of*

States v. Williams, Justice Scalia's opinion for the Court cautioned against "the belief that the mere fact that close cases can be envisioned renders a statute vague Close cases can be imagined under virtually any statute."¹⁵² Perhaps ironically, the Court's emphasis that the qualified-immunity standard is wholly objective suggests that "clearly established" should more closely track the constitutional vagueness cases.

Comparing *Lanier* and *Creighton* is very revealing. *Lanier* argued that the absence of prior cases under 18 U.S.C. § 242 involving sexual assault demonstrated that the statute was void for vagueness.¹⁵³ In other words, he argued that since the facts of his case were different from all other § 242 cases, the statute gave him insufficient warning that it prohibited his conduct. The unanimous Court affirmed his conviction.¹⁵⁴

In *Creighton*, the courts focused on only one question: whether a reasonable officer could have thought the warrantless entry was permissible.¹⁵⁵ But that focus acted as a smokescreen, because the entry was far from the only thing that happened. There were still three other aspects of the confrontation between the police and the Creightons that deserve attention.

First, as Mr. Creighton was attempting to move past an officer to show him his car, the officer punched him in the face, causing him to bleed from the mouth and forehead.¹⁵⁶ The Eighth Circuit was obviously skeptical about the officer's claim that "Mr. Creighton attempted to grab his shotgun,"¹⁵⁷ but because there was no trial, no court ever evaluated Mr. Creighton's or the officer's credibility. Second, Shaunda "witnessed the assault and screamed for her mother to come help. . . . [O]ne of the officers then hit her."¹⁵⁸ Third, when Shaunda obeyed her mother's direction to go to a neighbor's house, one of the officers pursued her, ran into the neighbor's house, caught her, and

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Ginsburg v. New York*, 390 U.S. 629 (1968) (6-0 majority).

¹⁵² 553 U.S. at 305–06.

¹⁵³ *Lanier*, 520 U.S. at 262.

¹⁵⁴ *Id.* at 260–61.

¹⁵⁵ *Anderson v. Creighton*, 483 U.S. 635, 636–37 (1987).

¹⁵⁶ *Creighton v. City of Saint Paul*, 766 F.2d 1269, 1271 (8th Cir. 1985), *rev'd sub nom. Anderson v. Creighton*, 483 U.S. 635 (1987).

¹⁵⁷ *See supra* notes a, 1 and accompanying text.

¹⁵⁸ *Id.* at 1271. I have omitted the beginning of the second sentence: "She claims that . . ." That is because, given the case's procedural posture, the courts were required to take all of the facts and make all of the inferences in the plaintiffs' favor. *See supra* note 2.

shook her.¹⁵⁹ The questions the Supreme Court should have asked but avoided are whether any reasonable police officer could have thought that the officers who interacted with Mr. Creighton and Shaunda were using reasonable force under the Fourth Amendment.¹⁶⁰ To borrow from Justice Scalia, was the unlawfulness of those actions not at least as apparent as Lanier's actions in the criminal case?¹⁶¹

The Court has constructed a clearly-established standard for *civil* cases against officials that is far more demanding than its standard for finding an arguably unclear statute nonetheless sufficient to support a *criminal* conviction.¹⁶² As Professor Baude noted, circuit splits that the Court says support applying qualified immunity in civil suits are unavailing in appeals from convictions.¹⁶³ It is anomalous to devise a doctrine to protect officials from civil judgments with greater zeal than the void-for-vagueness doctrine protects criminal defendants, even when those defendants are officials, as in *Lanier*.¹⁶⁴ Nonetheless, the modern Court has been unwavering in its support for a muscular qualified-immunity doctrine.

¹⁵⁹ *Creighton*, 766 F.2d at 1271.

¹⁶⁰ *See* *Graham v. Connor*, 490 U.S. 386, 396 (1989) (listing three factors relevant to officers' use of force: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"). Neither Mr. Creighton nor Shaunda were suspected of any crime, posed any threat, or was either "resisting or attempting to evade arrest by flight." Shaunda did obey her mother's direction to flee, but she was not facing arrest. *See Creighton*, 766 F.2d at 1271.

¹⁶¹ *See supra* notes 101, 113–115, 145 and accompanying text.

¹⁶² *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (citation omitted), recognized the importance of difference:

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 § 1979 [which, upon recodification, became 42 U.S.C. § 1983] which we have here. The word "willfully" does not appear in § 1979. Moreover, § 1979 provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

¹⁶³ *See* Baude, *supra* note 18, at 74–75.

¹⁶⁴ *See supra* notes 139–154 and accompanying text.

III. EVALUATING QUALIFIED IMMUNITY

A. *Qualified Immunity: The Court's Explanations*

Pierson v. Ray was the first Supreme Court case to discuss executive officials' possible defenses to liability under § 1983.¹⁶⁵ The police arrested plaintiffs, members of an integrated group of clergymen, when they entered segregated facilities at an interstate bus terminal.¹⁶⁶ The Court, citing its cases on judicial and legislative immunity, noted first that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities, . . ."¹⁶⁷ but also observed that "[t]he common law has never granted police officers an absolute and unqualified immunity . . ."¹⁶⁸ The statements are correct, but their implication is not,

¹⁶⁵ 386 U.S. 547 (1967).

¹⁶⁶ *Id.* at 549. The charge was under § 2087.5 of the Mississippi Code, "which makes guilty of a misdemeanor anyone who congregates with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refuses to move on when ordered to do so by a police officer." *Pierson*, 386 U.S. at 549. The Supreme Court subsequently held the statute under which the police arrested the plaintiffs to be unconstitutional. *See Thomas v. Mississippi*, 380 U.S. 524 (1965).

¹⁶⁷ *Pierson*, 386 U.S. at 554. There is considerably more to this assertion than meets the eye, not least the Court's assumption that there *were* common-law immunities for executive officials who violated individuals' rights. *See infra* notes 264–265 and accompanying text.

¹⁶⁸ *Pierson*, 386 U.S. at 555. England in the late eighteenth century had nothing like the professional police forces of today. Local constables and night watchmen, or private individuals, made arrests when necessary. *See* CHARLES REITH, A SHORT HISTORY OF THE BRITISH POLICE 2–5 (1948) [hereinafter SHORT HISTORY]. As London grew, the ancient forms of law enforcement suffered "rapid and progressive deterioration in the law-enforcement machinery . . . enhanced by the fact that its growing trade and industry had made it a magnet to the drifting and unstable elements of the country's population." *Id.* at 6. In London, uncontrollable crime led to riots in which people banded together in mobs, which often resulted in troops being called to control the riots. *Id.* at 10. "What are known as the Corn Law Riots in London in 1815 provide astonishingly clear evidence of authority's amazing helplessness and suffering from lack of police." *Id.* at 19.

Law enforcement's impotence in the late eighteenth and early nineteenth centuries spawned a series of committees to study the situation and recommend solutions. *See id.* at 22–25 (describing the committees' work and the failure of their suggestions for change). In 1785, the government of William Pitt (the Younger) introduced a bill to establish a London police force, but it went nowhere. *See* CHARLES REITH, THE POLICE IDEA 90–98 (1938). As late as 1822, Parliament retained "intense dislike . . . for the police idea . . ." *Id.* at 223. The formal police force did not begin until 1829 at the instance of Robert Peel, then Home Secretary. *Id.* at 251.

By that time, Parliament's opposition had waned so much that "The Bill passed through both Houses without recorded opposition of the slightest seriousness." *Id.* at 250. That was the beginning of Scotland Yard. *Id.* at 251. But even then, Reith notes, press and public were hardly receptive. *Id.*

because of the unspoken implication that common law provided *some* measure of immunity.¹⁶⁹ The Court should have said that the legislative record gives no indication that Congress meant to *establish* immunities that did not exist at common law.

Pierson, at least having conceded that common law did not provide absolute immunity to police officers, added that probable cause to arrest prevented a successful civil action for false arrest though the suspect was acquitted.¹⁷⁰ That is correct, but there the parallel to the Court's qualified-immunity doctrine ends. Probable cause was a *defense* in a false-arrest action, rather than an immunity from having to defend the action at all, and that makes all the difference. For the *Pierson* Court, probable cause on the conflicting testimony of the plaintiffs and the police officers was a jury matter, heavily dependent on credibility and hence not appropriate for summary judgment.¹⁷¹

The critical point is that there could not have been a common-law immunity for police in the late eighteenth century, when the United States was adopting the Constitution. English common-law history in the late eighteenth century offers no support for the idea of police immunity—qualified or otherwise—because there were no recognizable police.

When Peel did secure passage of a police-organization bill through Parliament, it provoked “a storm of opposition from the City . . . succeeded by a hurricane of angry protest from the public. . . .” REITH, *SHORT HISTORY*, at 25. Subsequently, however, despite the difficulties experienced by English police in getting started, they became accepted and even admired. For a description of those difficulties and how the police managed to overcome them, see Charles Reith, *Preventive Principle of Police*, 34 J. CRIM. L. & CRIMINOLOGY 206, 207 (1943).

¹⁶⁹ See *supra* notes 125–132 and accompanying text.

¹⁷⁰ *Pierson*, 386 U.S. at 555, 557. The issue with respect to the arresting officers in *Pierson* was whether they were liable for arresting someone under a statute that the Court subsequently declared unconstitutional. See *supra* note 166. The Court expressed sympathy for the officer's lot and held “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 § 1983.” *Pierson*, 386 U.S. at 555, 557. That is understandable, but it is less understandable why the government entity that imposed the unconstitutional policy through a statute should not then be liable; the officers were obviously acting pursuant to government policy, precisely what the Court has since required for imposing liability on a municipality. See, e.g., *Board of County Commissioners v. Brown*, 520 U.S. 397, 400 (1997) (quoting *Monell v. N.Y. City Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978) (“[I]n enacting § 1983, Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the ‘moving force’ behind the plaintiff's deprivation of federal rights.”) Enacting a statute is deliberate action.

¹⁷¹ *Pierson*, 386 U.S. at 557–58.

Like *Pierson*, *Scheuer v. Rhodes* discussed qualified immunity, beginning with equating qualified immunity with sovereign immunity.¹⁷² Its statement conceals several things. First, it obliquely suggests that executive officials' immunity was an outgrowth of English sovereign immunity.¹⁷³ That is inaccurate; it would have been far more accurate to say that executive officials' *liability* was an outgrowth of English sovereign immunity.¹⁷⁴ The *Scheuer* Court's footnote to the preceding quotation traced the development of Crown-official immunity and its rapid contraction after *Ashby v. White*,¹⁷⁵ where the House of Lords upheld an action against a Crown official who rejected a subject's vote in an election for Parliament.¹⁷⁶ *Scheuer* recognized that immunity for Crown officials *eroded* after the Glorious Revolution.¹⁷⁷ Albert Venn Dicey, the great English constitutional scholar, was more general, noting the unlimited scope of English-official liability.¹⁷⁸

¹⁷² 416 U.S. 232, 239 (1974).

¹⁷³ *Id.* at 239–41.

¹⁷⁴ See *infra* notes 221, 249 and accompanying text.

¹⁷⁵ (1703), 92 Eng. Rep. 126 (KB) (holding that the common law allowed damages for violation of any legal right). The Court in *Scheuer* noted:

The immunity of the Crown has traditionally been of a more limited nature. Officers of the Crown were at first insulated from responsibility since the King could claim the act as his own. This absolute insulation was gradually eroded. . . . The development of liability, especially during the times of the Tudors and Stuarts, was slow. . . . With the accession of William and Mary, the liability of officers saw what Jaffe has termed "a most remarkable and significant extension" in *Ashby v. White*.

416 U.S. at 239 n.4 (citing Jaffe, *supra* note 18, at 14). As Professor Jaffe noted, this was an action against a Crown official that did not involve trespass, and established the right to vote as a political right. Jaffe, *supra* note 18, at 14.

¹⁷⁶ *Ashby* (1703), 92 Eng. Rep. at 136.

¹⁷⁷ *Scheuer*, 416 U.S. at 239 n.4.

¹⁷⁸ A. V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (8th ed. 1915) (footnotes and citations omitted):

With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts and made in their personal capacity liable to punishment or to the payment of damages for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.

Second, after the Glorious Revolution, the well-known expression that the King can do no wrong did not protect *any* Crown officers from personal liability in tort or for constitutional wrongs.¹⁷⁹ Third, the last two lines of the *Scheuer* quotation are overbroad, because they connote that the common law recognized any immunities relevant to the Court's qualified-immunity doctrine, whereas the Court's reference to English law is to the coming of *legislative*, not executive, immunity. In a footnote, Chief Justice Burger's opinion for a unanimous eight-member Court¹⁸⁰ recounted England's long struggle for legislative immunity and noted that "[t]he English experience, of course, guided the drafters of our 'Speech or Debate' Clause."¹⁸¹ That is quite right. The footnote went on to recite the development of judicial immunity in England.¹⁸² That is also quite right. But the implication that there were parallel immunities for English executive officials in the seventeenth and eighteenth centuries is quite wrong.¹⁸³

Scheuer expressed the Court's rationales for qualified immunity:

(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.¹⁸⁴

These themes echo throughout the Court's subsequent qualified-immunity decisions.¹⁸⁵ But *Scheuer* did not set out a specific qualified-immunity doctrine. Instead, it stated desirability of enforcing laws to protect the public. It is hard to dispute that assertion, particularly if one does not know that from *Scheuer* onward, in ever increasing degrees, the Court seems

¹⁷⁹ *See id.*

¹⁸⁰ Justice Douglas did not participate. *Scheuer*, 416 U.S. at 232.

¹⁸¹ *Id.* at 239 n.4. The Chief Justice did not comment on the fact that only legislative immunity—not even the well-established English judicial immunity—made it into the Constitution. That difference has drawn some commentary. "Legislators present the most pressing case for immunity since an unfettered legislature has long been considered a requisite of a representative system. Whether the immunity extends to high state officials in the performance of judicial and executive functions is as yet unresolved." *The Supreme Court, Term 1950*, 65 HARV. L. REV. 114, 141 (1951).

¹⁸² *Scheuer*, 416 U.S. at 239 n.4.

¹⁸³ *See infra* notes 188–194 and accompanying text.

¹⁸⁴ *Scheuer*, 416 U.S. at 240. *But see infra* notes 325–327 and accompanying text.

¹⁸⁵ *See infra* notes 274–301 and accompanying text.

not to have regarded individual constitutional rights as “laws for the protection of the public”¹⁸⁶ from government overreaching.¹⁸⁷

B. *Whence Qualified Immunity? Authorities*

1. The Court’s Method and Authorities for Qualified Immunity

Two things stand out when one seeks authority for qualified immunity for executive-branch officials. First, the Court most often cites itself, not English common law, and even when it does cite English law, it cites only cases involving judicial or legislative, not executive, immunity. Second, the reason is that English common law offers no support for qualified immunity; it is contrary to the Court’s position. One must pay careful attention to the Court’s method.

¹⁸⁶ *Scheuer*, 416 U.S. at 241.

¹⁸⁷ *Scheuer* arose when national guard troops on the campus of Kent State University in Ohio, fired upon and killed four students during a condition of unrest arising from the broadening of the war in Vietnam to include invasion of Cambodia by United States troops. *See* *CBS Inc. v. Young*, 522 F.2d 234, 236 (6th Cir. 1975). The Court overturned the Sixth Circuit’s ruling that executive officials have absolute immunity from civil actions arising from official actions, embarking instead on a disquisition about qualified immunity. “Through the Civil Rights statutes, Congress intended ‘to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.’” *Scheuer*, 416 U.S. at 243 (quoting *Monroe v. Pape*, 365 U.S. 167, 171–72). Having ruled out absolute immunity, the Court then described a qualified immunity that varied according to the level of discretion with which the law endowed the official. *See* Donald L. Doernberg, *Sovereign Immunity in the Age of Twitter*, 55 VILL. L. REV. 833, 840 n.41 (2010). As the Court might have put it, the higher the office, the more forgiving the immunity. *See Scheuer*, 416 U.S. at 246–47. Here the Court relied on *Spalding v. Vilas*, 161 U.S. 483, 497–98 (1896), which extended absolute immunity to a military officer alleged to have defamed a subordinate officer during a judicial proceeding in the military. The *Spalding* court relied in turn on English cases extending immunity to participants in judicial proceedings, including witnesses. *Id.* The conduct in *Scheuer* of which the plaintiff complained was not part of any judicial proceeding. *See Scheuer*, 416 U.S. at 235. *Wood v. Strickland* was explicit about the qualified-immunity test having both objective and subjective components. 420 U.S. 308, 321 (1975); *see supra* text accompanying note 99. *Harlow* echoed that declaration in the process of discarding its subjective element. *See supra* text accompanying notes 99–101.

a. *The Court's Method*

Pierson v. Ray is troubling.¹⁸⁸ *Pierson's* discussion of *qualified* immunity cited only an English case on judicial, not executive, immunity.¹⁸⁹ *Pierson* recognized limited immunity for the police officers by analogy to the common-law action for false arrest and imprisonment, characterizing it as a “defense of good faith and probable cause”¹⁹⁰ That implicitly raises the question of whether constitutional violations do or should stand on the same footing as common-law torts. There is an important difference; no structural impediment prevents a court from modifying tort law with new common law. There is a structural impediment to a court—even the Supreme Court—using common law to modify constitutional law (as distinguished from interpreting it). We call it the Supremacy Clause.¹⁹¹

More troubling is *Scheuer's glissando* from *Pierson's* citation of English judicial immunity to the Court's own creation of executive immunity not known at common law. The Court later noted that subsequent to *Pierson* it had “found immunities of varying scope appropriate for different state and local officials sued under § 1983,”¹⁹² and it quoted itself that each holding “was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.”¹⁹³ And therein lies the problem. Not a single one of the cases upon which the Court relied cited English common law for anything other than judicial immunity.¹⁹⁴ If there was English authority for executive immunity when the

¹⁸⁸ 386 U.S. 547 (1967).

¹⁸⁹ *Id.* at 553–54.

¹⁹⁰ *Id.* at 557. *But see supra* text accompanying notes 170–171. In addition, one should not overlook the irony in the Court's complete rejection of the good-faith component of the original qualified-immunity test. *See infra* notes 206–210.

¹⁹¹ *See* U.S. CONST. art. VI, cl. 2.

¹⁹² *Owen v. City of Independence*, 445 U.S. 622, 637–38 (1980) (citing the Court's previous immunity cases: *Procunier v. Navarette*, 434 U.S. 555 (1978)) (qualified immunity for prison officials and officers); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity for prosecutors in initiating and presenting the State's case); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (qualified immunity for superintendent of state hospital); *Wood v. Strickland*, 420 U.S. 308 (1975) (qualified immunity for local school board members); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (qualified “good-faith” immunity for state Governor and other executive officers for discretionary acts performed in the course of official conduct).

¹⁹³ *Owen*, 445 U.S. at 638 (quoting *Imbler*, 424 U.S. at 421).

¹⁹⁴ The Court traced legislative immunity to the English Bill of Rights of 1689. *Scheuer v. Rhodes*, 416 U.S. 232, 239 n.4 (1974) (“In England legislative immunity was secured after a long

Founders drafted the Constitution and the Bill of Rights—or, for that matter, when the nation adopted the Fourteenth Amendment in 1868—the Court has yet to cite it. The Court’s repeated citation of English law for judicial immunity precedents contrasts sharply with its failure—really its inability—to cite English law for executive-branch immunity. The Court has tried to cast English judicial immunity as an ancestor for American executive immunity.¹⁹⁵

*Harlow v. Fitzgerald*¹⁹⁶ explained the Court’s own policy goals with respect to qualified immunity, adopting the defendant officials’ argument “that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial.”¹⁹⁷ This was an important shift for two reasons. First, it changed the common-law recognition of a *defense* to a false-arrest civil action to an *immunity* from even having to defend at trial.¹⁹⁸ Second, it entirely eliminated the common law’s mental element. The common-law defense required that

struggle, by the Bill of Rights of 1689: ‘That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.’”).

¹⁹⁵ *Scheuer* made no direct reference to English law. The only hint that English common law affected the case lies in the Court’s citation of *Spalding v. Vilas*, 161 U.S. 483, 497–98 (1896), which did rely explicitly on English law, but the only English law to which *Spalding* referred concerned the absolute immunity of participants in judicial proceedings for their conduct before the court. None of those sources contain any hint of immunity arising from executive conduct divorced from litigation. Later cases followed that pattern. *See, e.g., Gomez v. Toledo*, 446 U.S. 635 (1980); *Wood v. Strickland*, 420 U.S. 308 (1975).

¹⁹⁶ 457 U.S. 800 (1982). *Harlow* did reject the officials’ argument that they should have what the Court called absolute “derivative” immunity stemming from the President’s absolute immunity. *Id.* at 811.

¹⁹⁷ *Id.* at 813. *Butz v. Economou*, 438 U.S. 478, 507 (1978), had clearly articulated a goal of qualified immunity as early termination of “insubstantial lawsuits.” *Butz* was quite explicit about the Court’s rationale in the immunity cases: immunity was good policy. *Id.* at 506. It weakly suggested that its position was “essentially a matter of statutory construction” of § 1983. *Id.* at 497. It was most explicit, however, about its consideration of policy. It noted that “*Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official,” and noted the *Bivens* Court “put aside the immunity question.” *Id.* at 504–05. Justice Brennan’s *Bivens* opinion declined to rule on the defendants’ argument for immunity because the Court of Appeals had not ruled on it. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397–98. Throughout *Butz*, however, the Court discussed immunity as a policy question. *See Butz*, 438 U.S. at 480–517. It did not cite any of the extensive legislative history of § 1983 and did not otherwise purport to lay its policy conclusions at the feet of Congress. *See id.*

¹⁹⁸ *See supra* text accompanying notes 170–171.

the defendant had acted in good faith, and *Pierson v. Ray* recognized that.¹⁹⁹ By shearing off that element, the Court eliminated a question of fact that a jury ordinarily would decide. By doing so, it converted questions of credibility in factual disputes, so important to the *Pierson*²⁰⁰ Court, from jury matters to a decision for judges to make on records as they stand at the summary-judgment stage.

Harlow was explicitly an untethered policy discussion by the Court;²⁰¹ Justice Powell characterized the Court's decisions as having established the entitlement of public officials to "some form of immunity."²⁰² He asserted that common law had recognized the protection *Harlow* extended to executive officials.²⁰³ He cited nothing for this assertion, and later relied upon only the Court's own cases in this respect. Some of those cases also referred to common law, without citing any British authority other than those supporting absolute judicial immunity²⁰⁴ and legislative immunity.²⁰⁵ *Harlow* acknowledged that the Court was striking "a balance between the evils inevitable in any available alternative,"²⁰⁶ and how the subjective prong of *Wood's* test frustrated the Court's desire to deal with insubstantial claims summarily.²⁰⁷ And it explained why it was abrogating any subjective consideration in evaluating an official's action: it prevented early dismissals.²⁰⁸ The Court did *not* say that the substantive prong of the *Wood* test was irrelevant. On the contrary, the Court acknowledged its relevance

¹⁹⁹ 386 U.S. 547, 557 (1967) ("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 § 1983.")

²⁰⁰ See *id.* at 557–58; *supra* note 171 and accompanying text.

²⁰¹ There is no discussion of § 1983 because the plaintiffs were suing federal officials; § 1983 by its terms applies only to action under color of state law. See 42 U.S.C. § 1983 (2018).

²⁰² *Harlow*, 457 U.S. at 806.

²⁰³ See *id.* ("As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability").

²⁰⁴ See *id.* at 807 (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Butz v. Economou*, 438 U.S. 478 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975); *Schuer v. Rhodes*, 416 U.S. 232 (1974); *Spalding v. Vilas*, 161 U.S. 483 (1896)).

²⁰⁵ *Scheuer*, 416 U.S. at 239 n.4.

²⁰⁶ *Id.* at 813.

²⁰⁷ *Id.* at 815–17.

²⁰⁸ *Id.*

but declared that trying the issue was too expensive as a policy matter.²⁰⁹ The objective part of the test remained.²¹⁰

Ziglar v. Abbasi, the Court's most recent exegesis on qualified immunity, challenged the federal government's handling of alien detainees whom the government held on suspicion of immigration violations in the aftermath of the September 11 attacks.²¹¹ There are two significant parts to the case. First, because the defendants were federal officials, no action lay under § 1983, so the plaintiffs relied directly on the Fourth and Fifth Amendments and on *Bivens*.²¹² The Court, declaring the case a new *Bivens* situation requiring a special-factors analysis, remanded the case so the lower courts could perform that analysis.²¹³ Second, before remanding, the Court considered qualified immunity, tracing its development from *Harlow* forward.²¹⁴ It did not purport

²⁰⁹ *Id.* at 816–17.

²¹⁰ *Id.* at 819 (“Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.”).

Justice Brennan's brief concurrence focused on an earlier phrase the Court used: “I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant ‘knew or should have known’ of the constitutionally violative effect of his actions.” *Id.* at 820–21 (Brennan, J., concurring) (quoting *id.* at 815).

The qualified-immunity cases that followed *Harlow* and *Butz* largely echoed their approach both to policy and to the common-law grounding of the document. *See, e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 393–94 (2012) (extending immunity to private attorney conducting an investigation for a municipality); *Crawford-El v. Britton*, 523 U.S. 574, 594–95 (1998) (criticizing the Court of Appeals' creation of a heightened burden of proof in § 1983 actions as “lack[ing] any common-law pedigree”); *Kalina v. Fletcher*, 522 U.S. 118, 124 (1997) (referring to common-law bases for Court-recognized immunities, notwithstanding *Anderson v. Creighton*, 483 U.S. 635, 644–45 (1987), which explicitly rejected reliance on common law, *see supra* notes 133–136 and accompanying text); *Clevinger v. Saxner*, 474 U.S. 193, 200 (1985) (extending qualified, not absolute, immunity to members of a prison discipline committee for “perform[ing] functions closely associated with the judicial process” and relying on its own (not English) decisions on executive immunity).

Kalina is worth special mention. The majority characterized *Imbler v. Pachtman*, 424 U.S. 409 (1976), as having expanded the immunity available to prosecutors beyond what “had been available in malicious prosecution actions against private persons who brought prosecutions at early common law,” justifying its expansion of the common-law immunity because it stemmed from “before the office of public prosecutor in its modern form was common.” *Kalina*, 522 U.S. at 124 n.11. Thus, the majority implicitly conceded the absence of common-law precedent for the mix of absolute and qualified prosecutorial immunity that the Court created.

²¹¹ 137 S. Ct. 1843, 1852–53 (2017).

²¹² *Id.* at 1853–54.

²¹³ *Id.* at 1869.

²¹⁴ *Id.* at 1866–67.

to add anything to the existing doctrine; neither did it attempt to trace the doctrine to anything in English common law. It reiterated that it was striking a balance “between two competing interests.”²¹⁵ The upshot of all this is that although the Court has often asserted that its qualified-immunity jurisprudence stems from the English common law well known to the Founders, the roots of the forest of immunity the Court has created are nowhere to be found.

b. A Historical Problem

The Court’s insistence that the immunities it has recognized ultimately trace their roots to English common law creates another problem for the Court, one that it has never acknowledged. The Court often tells us that the Framers were well aware of the immunities that existed at common law.²¹⁶ To accept the Court’s assertion requires confronting why, of all the immunities to which the Court seeks to attach English roots, only one—legislative immunity—found its way into the Constitution.²¹⁷ No other immunity—not even the long-established judicial immunity—finds expression in the constitutional text. What are we to make of that? The omission need not lead to the conclusion that various other immunities did not or could not exist. It does, however, demand the inference that other immunities do not have constitutional stature. At best, they are left to statute or common law, neither of which can properly trump constitutional rights.²¹⁸

The more the Court insists that there are English common-law antecedents for the raft of immunities that the Court now recognizes, the louder the constitutional silence speaks. If all these immunities were so well known at common-law and were part of the backdrop against which the Constitution emerged, where are they?²¹⁹ The Speech and Debate Clause

²¹⁵ *Id.* at 1866.

²¹⁶ *See, e.g.*, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362–63 (2006) (awareness of “contemporary legal context”); *Wood v. Strickland*, 420 U.S. 308, 318 & n.9 (1975) (referring to “[c]ommon-law tradition” but citing only post-constitutional state cases recognizing immunity from some state tort claims but involving no federal constitutional issues). *But see Anderson v. Creighton*, 483 U.S. 635, 644–45 (1987) (explicitly rejecting common-law tradition as a limiting factor on the extent of official immunity).

²¹⁷ *See* U.S. CONST. art. I, § 6, cl. 1. *See also supra* notes 36–37 and accompanying text.

²¹⁸ *See* U.S. CONST. art. VI, § 2. *See also supra* notes 12–13 and accompanying text.

²¹⁹ *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 730–49 (1979) (Powell, J., dissenting). That action concerned whether there was a right of action for individuals asserting injury from violation of Title IX of the Educational Amendments Act of 1972. *Id.* at 687–88. The statute did not expressly

shows the Framers considered immunities. Of the English immunities that the Court routinely says were part of the Framers' thinking, all disappeared but one.

2. The English Record

When the Court does refer to the common law in England, the references are always to judicial and legislative immunity.²²⁰ It could not be otherwise. The leading English case concerning executive immunity, *Entick v. Carrington*, emphatically rejected it.²²¹ *Entick* arrived after a century-long battle over the whether the King's ministers were personally responsible for unlawful actions.²²² What is more, until the Tudors arrived on the scene, the idea that the King himself could do no wrong was an outlier.²²³ Gradually, it

provide one. *Id.* at 683 The majority, following the four-factor analysis it had announced in *Cort v. Ash*, 422 U.S. 66 (1975), implied a private right of action. *Id.* at 709. Justice Powell protested that the *Cort* analysis was supposed to help the Court discern Congress's intent, noting that, "In the four years since we decided *Cort*, no less [*sic*] than 20 decisions by the Courts of Appeals have implied private actions from federal statutes. It defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action." *Id.* at 741–42 (citations omitted).

²²⁰ *See, e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 239 n.4 (1974). *Scheuer* involved executive officials, but the Court's citations of English law refer only to legislative and judicial immunity. *Id.* From there, the Court made its own argument for a general extension of immunity to the executive branch:

Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Id. at 242. If the Founders shared those ideas in any respect, they did a remarkably complete job of hiding their feelings, which may explain why the Court made no effort to attribute its emerging doctrine to them.

²²¹ (1765) 95 Eng. Rep. 807 (KB). *See also supra* notes 125–130 and accompanying text.

²²² *See generally* CLAYTON ROBERTS, *THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND* (1966).

²²³ *Id.* at 4–5:

The maxim that the King can do no wrong was rarely, if ever, heard in the twelfth and thirteenth centuries. Englishmen then believed that their Kings could do, and often did, wrong. Article 61 of Magna Carta is testimony enough to the existence of this belief. But the coercion of a King charged with wrong-doing by a Council of Barons was not the path leading to constitutional monarchy in England. That path was a more devious one, and the signposts along it bore the maxim: the King can do no wrong. This maxim

developed that the King could only express his will in writs under the seals of Chancery (the Great Seal), Exchequer (the Privy Seal), or the Secretary's office (the signet).²²⁴ "These developments in the procedures by which the King expressed his will acquired constitutional significance when the judges began to rule that the King could do no wrong."²²⁵ That was necessary to the rise of responsible government in England; because the King could act only through agents and not directly, a person wronged by an official act *would* have a remedy against the actor. Had the King been able to act directly, there would have been no remedy.²²⁶ The Stuart Kings resisted those developments, ultimately to no avail.²²⁷ In the United States, qualified immunity causes the decline of responsible government.

English sources proclaim the absence of immunity in England for unlawful official acts and illustrate the true meaning of the much misunderstood adage that the King can do no wrong.²²⁸ Albert Venn Dicey,²²⁹ writing of the English constitution, explained: "This maxim, as now interpreted by the Courts, means, in the first place, that by no proceeding known to the law can the King be made personally responsible for any act done by him"²³⁰ This is the classic statement of English sovereign

of law, which first appears in its modern guise in the fifteenth century, really conceals three distinct, though related, principles. The first principle states that the King cannot act himself, but must always act through a servant. The second asserts that a servant of the King should refuse to execute an unlawful command. The third declares that a servant cannot plead the King's command to justify an unlawful act. Together these three principles free the King from all legal responsibility for the acts of his government and place that responsibility on his ministers.

²²⁴ *Id.* at 5.

²²⁵ *Id.*

²²⁶ This historical backdrop hardly supports the proliferation of official immunities that the Supreme Court routinely attributes to English common law. Roberts emphasizes that "though explicit precedents were lacking, the principle that no one could plead the King's command to justify an illegal act was part of the Common Law of late medieval England; and Stuart parliamentarians seized upon it, and applied it to the greatest ministers in the realm." *Id.* at 7.

²²⁷ *Id.* at 35–60.

²²⁸ See generally Jaffe, *supra* note 18.

²²⁹ Dicey was Vinerian Professor of English Law at Oxford University. *Albert Venn Dicey*, ENCYC. BRITANNICA (Jan. 31., 2022), <https://www.britannica.com/biography/Albert-Venn-Dicey>.

²³⁰ DICEY, *supra* note 178, at 24. Even this statement was not always true. See Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1212 (2009) (noting "an uncontested point: from the thirteenth century forward, it was possible to sue the Crown").

immunity, but it is not the only significance of the maxim, for Dicey went on to say:

The maxim means, in the second place, that no one can plead the orders of the Crown or indeed of any superior officer in defence of any act not otherwise justifiable by law; this principle in both its applications is . . . a law and a law of the constitution, but it is not a written law. “There is no power in the Crown to dispense with the obligation to obey a law;” this negation or abolition of the dispensing power now depends upon the Bill of Rights; it is a law of the constitution and a written law. “Some person is legally responsible for every act done by the Crown.”²³¹

Far from recognizing any sort of official immunity, this is a statement of official *liability*, and it is hardly the only one. Dicey noted how completely English law rejected any official’s defense to a civil action on the ground that the official was merely following orders.²³² The Supreme Court’s qualified-immunity doctrine arrogates to American executive officials immunity from the law that not even Crown officials enjoyed.

The great historian William Holdsworth observed:

[T]he rule that the servants of the Crown are personally liable to the law for wrongs committed by them in their official capacity, was the view held by the Parliamentary lawyers in the first half of the seventeenth century; and that it was a well-established rule in the second half of that century. It was in fact a logical deduction from two leading principles of constitutional law—first the principle that the

²³¹ DICEY, *supra* note 178 178 at 24–25. Professor Dicey did not cite sources for the statements within quotation marks. *See also* VI W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 101 (1924) (footnotes omitted):

[The king] could do no wrong. . . . But his subjects, the House of Commons held, could do wrong, and if they committed wrongs, whether in the course of their employment or not, they could be made legally liable. The command or instruction of the king could not protect them. . . . Therefore such an excuse, even if true, merely aggravated the offence. The guilty servant had committed the offence, whether instructed to do so or not, and was liable for his act.

²³² DICEY, *supra* note 178 178 at 299.

King can do no wrong, and, secondly, the principle of the supremacy of the law.²³³

Holdsworth cited *Feather v. The Queen*²³⁴ for its elaboration of the maxim as standing for a simple deductive process, beginning with the axiom and proceeding through a series of necessary deductions and legal rules: (1) the King can do no wrong (axiom); (2) to direct someone else to do wrong makes the act the director's (rule of law); (3) therefore, the King cannot direct a wrongful act (deduction); (4) if an official does an unlawful act, it is neither the King's act nor at the King's direction (deduction); (5) the official's act is therefore attributable only to the individual *per se*, not to the individual *qua* King's official (deduction); and (6) the individual, having committed a wrongful act, is liable for the damages it caused (law).²³⁵ *Feather* is a clear rejection of official immunity for executive officials.

The Supreme Court exemplified that rationale in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.²³⁶ In rejecting the government's argument that the plaintiff had only state-law remedies available to him, the Court endorsed part of the government's position. "[I]f the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals."²³⁷ Thus, *the government's own argument*

²³³ X SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 651 (1938) (footnotes omitted).

²³⁴ (1865) 122 Eng. Rep. 1191, 1205.

²³⁵ *Id.* at 295-96.

[F]rom the maxim that the King can do no wrong it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes in law, the act of him who directed or authorized it to be done. It follows that a petition of right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground. Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a minister of the Crown is without a remedy. As the Sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown.

²³⁶ *See* 403 U.S. 388, 391 (1971).

²³⁷ *Id.*

acknowledged that the protection of the government did not extend to officials who acted unlawfully, just as in England.

None of this should be news to the Court. *Poindexter v. Greenhow* unanimously recognized and accepted the English rejection of executive officials' immunity.²³⁸ The opinion noted that the absence of legal authority for an official's action rendered the official "a private wrongdoer," subject to the law like any other.²³⁹ *Poindexter* was even more explicit in response to the official's attempt to invoke the Eleventh Amendment²⁴⁰ to shield himself from liability, firmly rejecting the idea that a state could authorize an act that violated the Constitution.²⁴¹ "That which . . . is unlawful because made so by the supreme law, the constitution of the United States, is not the word or deed of the state, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name."²⁴² There was no talk of common-law

²³⁸ 114 U.S. 270, 288 (1885).

²³⁹ *Id.* at 282.

²⁴⁰ U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

²⁴¹ *Poindexter*, 114 U.S. at 288:

The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the state of Virginia. The state has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The constitution of the United States, and its own contract, both irrevocable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense.

²⁴² *Id.* at 290. *Poindexter* thus echoed Holdsworth and anticipated Dicey's exposition of the consequences of the King being unable to do or command wrong. *See supra* notes 228–235 and accompanying text. Two decades later, *Ex parte Young*, relied on that foundation:

immunities. In its official-immunity jurisprudence, the Court has ignored *Poindexter*; none of its qualified-immunity cases so much as mentions it.

Common-law sources for the liability of English officials abound, and Justice Stevens drew attention to them.²⁴³ He also relied on English cases, quoting *Sands v. Child*'s²⁴⁴ admonition that ““the warrant of no man, not even of the King himself, can excuse the doing of an illegal act.””²⁴⁵ Finally, Justice Stevens relied heavily upon *Ex parte Young*²⁴⁶ and its recognition of the true meaning of the sovereign being unable to do wrong, quoting one of

The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. *It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.* If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. 123, 159–60 (1908) (emphasis added). The final sentence might as well have come from Holdsworth's pen, which reflected the law's supremacy. *See supra* text accompanying note 233233.

²⁴³ *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 142–43 (1984) (Stevens, J., dissenting). *Pennhurst* held that the Eleventh Amendment prohibited a federal court to enjoin state officials to conform their conduct to state law. It took the view that the Eleventh Amendment was a constitutional recognition of state sovereign immunity; it did not distinguish between the state and its officials. Justice Stevens the *Pennhurst* majority's extension of sovereign immunity from governments to their officials.

The doctrine of sovereign immunity developed in England, where it was thought that the King could not be sued. However, common law courts, in applying the doctrine, traditionally distinguished between the King and his agents, on the theory that the King would never authorize unlawful conduct, and that therefore the unlawful acts of the King's officers ought not to be treated as acts of the sovereign As early as the fifteenth century, Holdsworth writes, servants of the kind were being held liable for their unlawful acts.

²⁴⁴ (1693) 83 Eng. Rep. 725, 726 (KB).

²⁴⁵ *Pennhurst*, 465 U.S. at 142 (Stevens, J., dissenting) (quoting *Sands v. Child* (1693) 83 Eng. Rep. at 726). Note that a pardon does not excuse the illegal act; it merely remits the punishment. *See Pardon*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁴⁶ 209 U.S. 123 (1908).

Young's famous passages.²⁴⁷ The *Pennhurst* majority attempted to avoid *Young*'s applicability by arguing that it referred only to constitutional wrongs, not wrongs committed against state law.²⁴⁸

So the Court's qualified-immunity jurisprudence has no support in English common law from the time of the founding. The then-most-recent English case, *Entick v. Carrington*, forcefully denied any such thing.²⁴⁹ One therefore must recognize qualified-immunity jurisprudence for what it is: federal common law that the Supreme Court has created out of whole cloth,

²⁴⁷ *Pennhurst*, 465 U.S. at 144 (quoting *Ex parte Young*, 209 U.S. at 159–60). See also *supra* note 242.

²⁴⁸ *Id.* at 104–06. The Court relied on *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682 (1949). But *Larson* did what English law never had; it equated claims against officials with claims against the sovereign if the relief the plaintiff sought would affect the state. See *id.* at 687–90. English law, over and over again, had refused to do that; relief ran against the official. The Crown might decide to reimburse the official, but English law could not compel that result. The idea of government reimbursing officials found liable for wrongful conduct as officials has currency in the United States. See generally, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (finding after empirical study that “Police officers are virtually always indemnified.”) See, e.g., N.Y. GEN. MUN. L. §§ 50-j, 50-k, 50-l, 50-m, 50-n (MCKINNEY 2016) (requiring reimbursement of law enforcement officials in New York City and on Long Island). That is not exactly a new development. See James E. Pfander, *Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN. ST. L.R. 1387, 1393 & n. 40, 41 (2010) (noting officials found liable to individuals routinely indemnified by Congress). Moreover, *Larson* ignored the fact that the relief the plaintiffs in *Ex parte Young* had sought—an injunction against the state attorney general restraining him from enforcing a railroad-rate statute that the plaintiffs argued (and the Court found) was unconstitutional—clearly would affect only the state; *Young* as a private individual had no personal interest in the dispute. See *Larson*, 337 U.S. 682 (1949). At the same time, the *Larson* Court acknowledged that it had previously distinguished official from government action. See *id.* at 689–90.

There is not involved any question of the immunization of Government officers against responsibility for their wrongful actions. If those actions are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him.

Larson, 337 U.S. at 686 (citing *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580 (1943); *Sloan Shipyards Corp. v. Emergency Fleet Corp.*, 258 U.S. 549 (1922)). *Larson* was considering the Eleventh Amendment. By its own declaration it was not concerned with any question of executive officials having any immunity, much less qualified immunity. That is a good thing, because the common law extant when the Bill of Rights and the Fourteenth Amendment became effective recognized none.

²⁴⁹ See (1765) 95 Eng. Rep. 807 (KB). See also *supra* notes 126–132 and accompanying text.

long after ratification of the Bill of Rights and the Fourteenth Amendment.²⁵⁰ Only by falsely attributing to the drafters of the Bill of Rights and the Fourteenth Amendment knowledge of what the Court has called (without citation) well-established common law has the Court attempted to justify its actions. Thus, the Court has repeatedly asserted that congressional inaction left in place a non-existent common law supporting qualified immunity. The question that then arises concerns the proper time referent for the inaction of which the Court accuses Congress.

3. Discerning the Relevant Intent

The genius of the common law is that it is dynamic, not static, developing over the past thousand years. Society discovered problems requiring solutions. Before legislative predominance, the common-law courts would announce solutions.²⁵¹ If those solutions gave too many results with which society was uncomfortable, the law would evolve toward a more satisfactory rule. That is the common-law process.

The dynamic nature of common law compels a nuanced inquiry into the law of qualified immunity and § 1983 in the United States. There are two types of possible reference points in time: the common law as it stood (1) when the constitutional rights plaintiffs seek to vindicate came into existence, or (2) (for cases against state officials) when Congress enacted the original version of today's § 1983. For the first possibility, the relevant dates are 1791, when the states ratified the Bill of Rights, and 1868, when they

²⁵⁰ Justice White candidly admitted as much in *Butz v. Economou*, 438 U.S. 478, 501–02 (1978) (quoting *Barr v. Matteo*, 360 U.S. 564, 569 (1959); *Doe v. McMillan*, 412 U.S. 306, 318 (1973)) (“It has been observed more than once that the law of privilege as a defense to damages actions against officers of Government has ‘in large part been of judicial making’”). In fact, it has been entirely of judicial making.

²⁵¹ The common law developed during the reign of natural-law theory. Common-law judges did not view themselves as creating law at all; they rather discovered it in natural-law principles independent of human creation. See 1 WILLIAM BLACKSTONE, COMMENTARIES *43. In the United States, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), exemplified this view of the law. The advent of legal positivism unseated natural law. John Austin echoed earlier scholars of sovereignty when he declared law as the command of the sovereign. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED xvi-xvii (1832). Legal positivism challenged the natural-law basis for common law, and Justice Holmes inveighed against natural law as a basis for common law: “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified” *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917). Legal positivism eventually led to *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77 (1938), which banished natural law from federal-court jurisprudence.

ratified the Fourteenth Amendment; for the second, the critical date is 1871. Because of the common law's dynamism, it is important to focus precisely on the correct reference point. Otherwise, one may end up considering an irrelevant inferred intent.²⁵²

In *Tanzin v. Tanvir*, a unanimous Court twice recognized the importance of the "correct" intent.²⁵³ The case turned on the meaning of an undefined phrase in the Religious Freedom Restoration Act.²⁵⁴ The Court said, "Without a statutory definition, we turn to the phrase's plain meaning *at the time of enactment*."²⁵⁵ The opinion reemphasized the point: "Although background presumptions can inform the understanding of a word or phrase, those presumptions must exist at the time of enactment. We cannot manufacture a new presumption now and retroactively impose it on a Congress that acted 27 years ago."²⁵⁶ That is precisely why timing is so important.

Regarding immunity, the stronger case is that the relevant reference points are the dates on which the constitutional rights involved became law. To the extent that one thinks that intent is important in construing law—whether constitutional or statutory—the focus should be on the thoughts and understandings of the bodies that participated in the law-making process.²⁵⁷ The understanding or intent of some later body that neither passed nor amended the law is quite irrelevant, lest the interpreting court give effect to later-arising ideas that did not go through the full constitutional-amendment or legislative-enactment process.²⁵⁸

²⁵² Then-Justice Rehnquist made this point precisely when he criticized the majority in *Smith v. Wade*, 461 U.S. 30, 66 (1983) (Rehnquist, J., dissenting) (arguing the majority's reliance on common-law developments *after* Congress enacted § 1983 was irrelevant in determine the enacting Congress's intent).

²⁵³ 141 S. Ct. 486, 491–92 (2020). Justice Barrett did not participate. *Id.* at 486.

²⁵⁴ 42 U.S.C. § 2000bb.

²⁵⁵ *Tanzin*, 141 S. Ct. at 491 (emphasis added).

²⁵⁶ *Id.* at 493.

²⁵⁷ Justice Scalia generally scorned discerned legislative intent as a legitimate tool for courts to use to interpret law. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part). Nonetheless, *if* Justice Scalia had thought reference to legislative intent was appropriate in a particular case, his inquiry would have extended only to the thoughts of the enacting and any amending bodies.

²⁵⁸ With respect to the latter, *see Immigr. and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (rejecting one-House veto of executive immigration decisions because it was legislative in nature yet ignored the constitutionally prescribed procedure).

With respect to cases arising under § 1983, almost all of them assert deprivation of one or more constitutional rights.²⁵⁹ Some of those rights find expression in the Bill of Rights, making 1791 the critical date. For rights asserted under the Fourteenth Amendment *simpliciter*, the relevant date is 1868.²⁶⁰ Therefore, to the extent the Court has sought to ground the immunities it has recognized in common law, the appropriate common law to examine depends on which constitutional provisions underlie the § 1983 action.

It is clear that 1871, the date Congress enacted § 1983, is *not* a proper reference point. There are two reasons for that. The first is structural: To the extent that § 1983 cases rest on constitutional rights, the enacting Congress could not legitimately have intended a mere statute to alter the scope of those rights; the Supremacy Clause forbids it.²⁶¹ The second is evidentiary: In the extensive legislative history of the bill that became today's § 1983, there is no inkling that Congress intended to attach any immunities either to the underlying constitutional rights or to the statute.

That is not to say that there was no discussion of immunity; there was. But, as Justice Douglas pointed out in his *Pierson v. Ray*²⁶² dissent, the discussion revolved around *judicial* immunity. “Many members of Congress objected to the statute *because it imposed liability* on members of the judiciary.”²⁶³ Yet Congress enacted the statute in the face of those objections. So it is not possible to believe that Congress never thought about immunity in connection with § 1983; it clearly did, and it specifically thought about one of the two longest established forms of immunity, one with an actual common-law history—and rejected it. There is no evidence that Congress intended to exempt judges from the statute's reach. Similarly, there is no evidence that Congress intended to engraft any sort of new immunity—even if it could have—on the constitutional rights it enacted § 1983 to protect.

²⁵⁹ There is a small number of such cases that concern federal statutory rights. *See, e.g.*, *Maine v. Thiboutot*, 448 U.S. 1, 4–8 (1980) (holding that 42 U.S.C. §§ 1983, 1988 apply to statutory violations of federal law).

²⁶⁰ Since 1925, the Supreme Court has held that many provisions of the Bill of Rights now apply to the states through the Due Process Clause of the Fourteenth Amendment. Provisions “that the Court considers fundamental to the American system of law are applied to the states” NOWAK & ROTUNDA, *supra* note 56, at 416 (footnote omitted).

²⁶¹ *See* U.S. CONST. art. VI, § 2.

²⁶² 386 U.S. 547 (1967).

²⁶³ *Id.* at 561–62 (Douglas, J., dissenting) (emphasis added).

Therefore, when *Pierson v. Ray* declared that, “[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial discretion . . . ,”²⁶⁴ it was correct about English judicial-immunity law, but it ignored the legislative record of the civil rights statute. Worse, when the Court went on to say that “[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities,”²⁶⁵ it obscured—whether intentionally or not—the clear indication in the legislative record that Congress *had* specifically intended to abolish state judges’ immunity when it enacted § 1983.

But there is more. The Court also equated the common-law history of legislative and judicial immunity.²⁶⁶ As a matter of constitutional interpretation, there is no symmetry between the two doctrines: legislative immunity made it into the Constitution, and judicial immunity did not. If ever the maxim *expressio unius est exclusio alterius*²⁶⁷ cried out for application, it is here.²⁶⁸ The inclusion of one and not the other is more than suggestive of the Framers’ intention, and it may well be that the 1871 Congress thought along those lines when it debated § 1983.²⁶⁹

²⁶⁴ *Id.* at 553–54 (majority opinion).

²⁶⁵ *Id.* at 554. *See supra* text accompanying notes 169–170.

²⁶⁶ *Pierson*, 386 U.S. at 554–55:

[T]his Court held in *Tenney v. Brandhove*, 341 U.S. 367 . . . (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

²⁶⁷ BLACK’S LAW DICTIONARY (8th ed. 2004) (“A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.”).

²⁶⁸ In *Dennis v. Sparks*, 449 U.S. 24, 30 (1980), a unanimous Court recognized the distinction between the constitutionally prescribed immunity of the Speech and Debate Clause, U.S. CONST. art. I, § 6, and the common-law derivation of judicial immunity.

²⁶⁹ The reader may protest that I have previously argued that the relevant intents are those of the constitutional enactments, and so I have, but I demur. Much of the Court’s argument with respect to those immunities that English law did recognize—legislative and judicial immunity—is that the people who adopted the Bill of Rights and the Fourteenth Amendment did so with that law in mind. That may be correct, but they did not place judicial immunity in the Constitution. They placed only legislative immunity there. *See* U.S. CONST. art. I, § 6, cl. 1. Clearly they thought about immunities. The Court has insisted that judicial and legislative immunity were well known and fully established in England when the United States Constitution appeared; that is correct. *See supra* notes 34–36 and accompanying text.

To the extent that the federal courts recognized judicial immunity before (and since) 1871, and to the extent that it affects federal courts' decisions, it does so as common law, not as constitutional precept. The intent of the 1871 Congress is therefore very relevant. Congress cannot authoritatively interpret constitutional provisions,²⁷⁰ but it can supersede common law by statutory enactment.²⁷¹ The 1871 Congress created no immunities; it merely attempted to nullify judicial immunity.²⁷²

IV. STRUCTURAL AND HISTORICAL PROBLEMS WITH QUALIFIED IMMUNITY

A. Structural Problems

As we have seen, qualified immunity is the Supreme Court's creation, first and last, notwithstanding the Court's declaration: "We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy."²⁷³ Qualified immunity lacks the stature of legislative immunity, which the Constitution guarantees, and it lacks the English common-law pedigree of judicial immunity, which the Constitution

Of judicial immunity there is no mention, and the silence is deafening. It would not shout nearly so loudly if the Framers had also omitted legislative immunity, but to include one and not the other of the English immunities is very pointed. Nonetheless, if the Supreme Court has ever commented on the significance of the Framers including legislative but not judicial immunity other than in *Dennis*, research does not reveal it. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), did note that legislative immunity had been so important to American leaders in the Revolutionary and Constitutional periods that they had included it in the Articles of Confederation and the Constitution, but *Tenney* presented no issue about judicial immunity and is devoid of comment upon it. Federal legislative immunity has constitutional stature; judicial immunity does not. *See* U.S. CONST. art. I, § 6, cl. 1.

²⁷⁰ *See* *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

²⁷¹ *See, e.g., Whitfield v. United States*, 543 U.S. 209, 214 (2005) (holding conspiracy statute, 18 U.S.C. § 371 (2000), requires an overt act, superseding common-law rule); *Holmes v. Hurst*, 174 U.S. 82, 86–87 (1899) (recognizing that federal copyright law superseded common law); *United States v. 1,960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 400 (1814) (holding forfeiture statute overcoming common law); *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 367 (1797) (using strict construction of statutes "in derogation of the common law").

²⁷² *See* An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, ch. 22, § 1, 17 Stat. 13, 13 (1871) (codified as amended at 42 U.S.C. § 1983).

²⁷³ *Tower v. Glover*, 467 U.S. 914, 922–23 (1984).

does not guarantee. It arose in American law long after ratification of the Bill of Rights, after ratification of the Fourteenth Amendment, after enactment of the Civil Rights Law, 42 U.S.C. § 1983, after *Poindexter v. Greenhow*,²⁷⁴ and after *Ex parte Young*.²⁷⁵ Yet it has made violations of constitutional rights ever harder to prosecute. The Supreme Court's common law erodes the protection the Constitution purports to guarantee. This may explain why the Court has been at pains to blur the line between the two immunities that English law recognized during the colonial and constitutional periods on one hand and those the Court has created on the other.²⁷⁶

The attempt to link qualified immunities to the pre-constitutional period makes it possible for the Court to assert that those who wrote and ratified both the Bill of Rights and the Fourteenth Amendment took those immunities into account when drafting the Constitution's rights provisions. It is a responsibility-shifting device. Without an English background, qualified immunity is merely post-constitutional common law. In a supremacy battle between a constitutional provision and common (or statutory) law, the Constitution demands that its provision govern.²⁷⁷ With respect to individual constitutional rights against government and its officials, the Court has stood the Supremacy Clause on its head, because the Court has acknowledged more than once that although there was a constitutional violation, the victim could not recover.²⁷⁸

One should not overlook the unspoken premise that underlies all of the Court's references to English common law. The impression it leaves is that

²⁷⁴ 114 U.S. 270 (1885). See also *supra* notes 241–242 and accompanying text.

²⁷⁵ 209 U.S. 123 (1908). See also *supra* notes 246–248 and accompanying text.

²⁷⁶ See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 644–45 (1987) (citing *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). See also *supra* note 134. The Court asserted that it was “the American rather than the English common-law tradition that is relevant.” *Creighton*, 483 U.S. at 644 n.5. Yet, for purposes of rights that the Fourth Amendment is supposed to guarantee, American common law comes too late. It cannot modify the Fourth Amendment, and it cannot have been part of the common-law background of those who wrote and ratified the Constitution and the Bill of Rights. See *supra* notes 251–271 and accompanying text.

²⁷⁷ See U.S. CONST. art. VI, cl. 2.

²⁷⁸ See, e.g., *Lane v. Franks*, 573 U.S. 228, 246 (2014) (granting qualified immunity to state officials for retaliatory discharge of employee that violated First Amendment); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 379 (2009) (granting qualified immunity to school personnel who violated Fourth Amendment by strip searching thirteen-year-old student); *Wilson v. Layne*, 526 U.S. 603, 614–16 (1999) (unanimously finding that there was a Fourth-Amendment violation but holding, with only one dissent, that it was not theretofore established clearly enough to support recovery).

the new American government “received”²⁷⁹ the whole of English common law, but it clearly did not. Early on, Justice Joseph Story cautioned against the mistake of assuming that the early Americans simply transplanted English common law to the new world.²⁸⁰ Story’s qualification of the reception— “that portion which was applicable to their situation”²⁸¹—invites closer attention. In *Seminole Tribe of Florida v. Florida*,²⁸² Justice Souter’s dissent argued that English law relevant to the King did not make the trans-Atlantic journey.

This should not be surprising. “The substitution of the people for the king as the source of sovereignty made it necessary to exercise some caution in adopting the common law inasmuch as a good many of the old rules would not fit into the political philosophy of the newborn states.”²⁸³ Pause for a moment to consider which of the old rules the new nation would have been least likely to adopt. Having just thrown off the rule of the England of George III, is it conceivable that the Framers and the states would have embedded, unspoken, in the Constitution the (now misunderstood²⁸⁴) idea that the King can do no wrong? The popular misconception of the phrase is a doctrine of non-accountability of the head of state, which the Court discusses as

²⁷⁹ William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 393 (1968) (“‘Reception’ means adoption of the common law as the basis for colonial judicial decisions.”).

²⁸⁰ *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829): “The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.” *Accord* PAUL S. REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 58 (1899).

²⁸¹ *Van Ness*, 27 U.S. at 144.

²⁸² 517 U.S. 44, 134 (1996) (Souter, J., dissenting) (quoting Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 554 (1882)):

[E]ven in the late colonial period, Americans insisted that “the whole body of the common law . . . was not transplanted, but only so much as was applicable to the colonists in their new relations and conditions. Much of the common law related to matters which were purely local, which existed under the English political organization, or was based upon the triple relation of king, lords and commons, or those peculiar social conditions, habits and customs which have no counterpart in the New World. Such portions of the common law, not being applicable to the new conditions of the colonists, were never recognized as part of their jurisprudence.”

²⁸³ Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 798 (1951).

²⁸⁴ See *supra* notes 229–235 and accompanying text.

“sovereign immunity,” neatly overlooking the historical fact that in the United States, government is not sovereign; the people are.²⁸⁵

Now consider the true understanding of the adage in England: A wrongful act, being not attributable to the King, is simply the wrongful act of the individual who performed it, leaving that person to face the law’s consequences as any other individual.²⁸⁶ As between the misunderstood and the properly understood meanings of the King can do no wrong, the mind rebels at the idea that the former colonists would have silently adopted the former rather than the latter. And even had there been a general reception of English common law, the new nation could not have received common-law principles that did not exist even in England.²⁸⁷ If those principles had existed, the Court’s burden would be to demonstrate that the new nation received and accepted them.

Anderson v. Creighton offers a striking example of how the Court’s common law works in this respect.²⁸⁸ The case involved potential Fourth Amendment violations.²⁸⁹ Given the posture of the case, the Court had no occasion to rule directly on the Fourth Amendment question. First, the lower courts would have to decide whether, if there were no exigent circumstances, a reasonable officer could nonetheless have believed that there were. If exigent circumstances did not exist, then the search violated the Fourth Amendment even if there was probable cause, because it is “unreasonable” within the Amendment’s meaning.²⁹⁰ As Justice Stevens pointed out in his dissent, it was well established that a warrantless police entry into a home is *per se* unreasonable unless exigent circumstances exist.²⁹¹

²⁸⁵ See generally DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM’S CHOICE (2005) (arguing that the Framers’ reliance on John Locke caused them to locate sovereignty in the people, not in the government).

²⁸⁶ See *supra* notes 229–235 and accompanying text.

²⁸⁷ See *supra* notes 221–250 and accompanying text.

²⁸⁸ 483 U.S. 635 (1987). See *supra* notes 1–8 and accompanying text.

²⁸⁹ *Creighton*, 483 U.S. at 636–37.

²⁹⁰ See *Payton v. New York*, 445 U.S. 573, 573 (1980).

²⁹¹ *Creighton*, 483 U.S. at 668 (Stevens, J. dissenting) (citing *Payton v. New York*, 445 U.S. 573, 589–90 (1980)). *Payton* involved a warrantless entry to effect an arrest, but the Fourth-Amendment violation there was not the arrest, for which there was probable cause, but rather the home entry without a warrant to effect the arrest in the absence of exigent circumstances. 445 U.S. at 576, 578–79. See also *Steagald v. United States*, 451 U.S. 204, 204 (1981) (analyzing warrantless entry of third party’s home violating Fourth Amendment).

Some have characterized the last part of the Court’s analysis as an inquiry into whether one can reasonably be unreasonable.²⁹² In *Creighton*, Justice Scalia’s majority opinion argued:

We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable.²⁹³

Dean Jeffries suggested that “[d]espite its oxymoronishness (to coin a word), reasonably unreasonable behavior is not an empty concept.”²⁹⁴ As Justice Antonin Scalia pointed out, it is analytically possible to be reasonably mistaken about any legal standard, even one couched in terms of reasonableness.²⁹⁵

I see it differently. Reasonableness is an objective, not subjective, consideration, as the Court and the entire law of negligence have insisted,²⁹⁶ so it is not possible to be reasonably unreasonable. It is no defense in a negligence action that the defendant “reasonably but mistakenly” believed that he acted as the reasonable prudent person. In criminal cases, a defendant’s belief (reasonable or not) that certain conduct is not criminal will not exonerate him if it is, and the Court has recognized that many times.²⁹⁷ If mistake of law in criminal cases is irrelevant, why should a different rule obtain in civil cases, particularly those involving constitutional violations?

Whether a search is reasonable for Fourth Amendment purposes is a question of law²⁹⁸—to be sure, one depending on the facts of the case, but that does not convert it into a question of fact. If an official makes a mistake

²⁹² See, e.g., Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 870–71 (1998) (footnote omitted) (“Hence, *Harlow* creates the paradox of ‘reasonably unreasonable conduct.’ The notion of granting immunity to officers for reasonably unreasonable conduct in violation of the Fourth Amendment has plagued courts, particularly in the context of excessive force cases.”).

²⁹³ *Creighton*, 483 U.S. at 641.

²⁹⁴ Jeffries, *supra* note 18, at 860 (footnotes omitted).

²⁹⁵ *Id.* (citing *Creighton*, 483 U.S. at 641).

²⁹⁶ See, e.g., *United States v. Cole*, 21 F.4th 421, 430 (7th Cir. 2021).

²⁹⁷ See, e.g., *Rehaif v. United States*, 139 S. Ct. 2191, 2198 (2019).

²⁹⁸ *United States v. Cooper*, 893 F.3d 840, 843 (6th Cir. 2018).

of law that deprives someone of a constitutional right or protection, it is hard to see why recovery should not follow. Suppose, for example, that a police officer mistakenly believed that the law permitted using deadly force in the situation confronting her and shot and killed the suspect. Were she charged with homicide, her mistaken belief would provide no defense; but under the Court's civil rights jurisprudence, she might have a defense to a civil action pursuant to 42 U.S.C. § 1983.²⁹⁹

Suppose for a moment that there were no exigent circumstances in *Creighton*. Then the warrantless search was unreasonable. Under *Bivens*, the Creightons then had what should have been a successful action for damages for violation of their rights under the Fourth Amendment. But analyzing qualified immunity might result in a determination that the officials' actions reasonably violated the Creightons' Fourth Amendment rights (which is to say that the officials were reasonably unreasonable). Then it would apply qualified immunity and prevent recovery.³⁰⁰ Thus, Court-created common law would prevent enforcement of a constitutional right. To borrow from Mark Twain, reports of the Supremacy Clause's vitality seem to have been exaggerated.³⁰¹

The Court constantly commits two structural errors in articulating when it will allow claims to proceed under the Constitution. First, the Court takes it upon itself to "weigh the costs and benefits" of enforcing a constitutional right through an action for damages.³⁰² Second, the Court asserts that

²⁹⁹The level of homicide of which the officer might be guilty would almost certainly depend on her state of mind, which is relevant to the degree of homicide and at sentencing; but § 1983 contains no state-of-mind requirement, as the Court often reminds us. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 329–30 (1986). In the case posited, there is a Fourth Amendment violation. The Fourth Amendment contains no state-of-mind requirement; the reasonableness standard is objective. U.S. CONST. amend. IV; *see, e.g., Cole*, 21 F.4th at 430.

³⁰⁰As in *Bivens*, "for people in [the Creightons'] shoes, it is damages or nothing." 403 U.S. at 410 (Harlan, J., concurring). *See also Mitchell v. Forsyth*, 472 U.S. 511, 535–36 (1985) (granting qualified immunity for Attorney General's authorization of warrantless wiretaps in domestic security cases despite unconstitutionality).

³⁰¹The quotation, in the form most often attributed to Twain, is that, "The reports of my death are greatly exaggerated," but there is said evidence that, although the thought is accurate, those were not his words. As part of a response to a reporter's inquiry about his health, Twain actually said, "The report of my death was an exaggeration." *See HAROLD H. KOLB JR., MARK TWAIN: THE GIFT OF HUMOR 84* (2015).

³⁰²*See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857–58 (2017).

Congress has a proper voice in whether constitutional rights are enforceable.³⁰³ Both are remarkable statements.

One thing that the Bill of Rights distinctly does *not* say is that “the following rights shall be enforceable if the Supreme Court or Congress thinks that is a good idea.” There is no constitutional permission—much less a mandate—for the Court to consider “the costs and benefits” of enforcing constitutional entitlements, as it asserted authority to do in *Ziglar v. Abbasi*.³⁰⁴ The first nine amendments³⁰⁵ are entirely mandatory: “shall,” not “may.” Yet the Court’s hostility to recognizing constitutional rights of action effectively converts “shall” into “may.” Consider also the Court’s own words in *Ziglar*:

When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is “who should decide” whether to provide for a damages remedy, Congress or the courts? [*sic*]³⁰⁶

First, note the sleight of hand in that statement; the Court equates constitutional rights with statutory rights, assuming (without asserting) that any branch of government can decide whether to make constitutional provisions effective. The proper answer to the Court’s query is “neither.” The Founders could have left the Bill of Rights to Congress as a matter of ordinary legislation, yet they did not. They thought that by enshrining them in the Constitution, they would be safe from the political winds that might blow through Congress. Yet the Court has, for the most part, treated these rights as unenforceable unless somehow activated by the legislature or the judiciary, simultaneously trying to hide behind the intentions the Court ascribes to the Founders in light of non-existent English common law. The *Ziglar* Court cast itself as constitutional policy maker in the absence of congressional guidance;³⁰⁷ if there is congressional guidance (whatever that phrase may

³⁰³ *See id.*

³⁰⁴ 137 S. Ct. at 1857–58. *See supra* text accompanying notes 88, 211211–215215.

³⁰⁵ The Tenth Amendment is also mandatory; it merely does not use “shall”: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

³⁰⁶ 137 S. Ct. at 1857.

³⁰⁷ The *Ziglar* Court answered its own question, noting its preference for congressional action, “The answer will most often be Congress.” 137 S. Ct. at 1857. But it reserved some power to itself:

mean), then apparently Congress becomes the constitutional policy maker. Either way, the Bill of Rights becomes optional.

The Constitution's wording is more than suggestive here. It gives power to Congress quite explicitly: "The Congress shall have Power to . . . ,"³⁰⁸ then listing the seventeen substantive areas in which federal legislation is permissible. Thus, those powers are Congress's to invoke. Notably, the Constitution does not give Congress any power to decide whether any constitutional provision shall be enforceable,³⁰⁹ and when Congress has tried to tamper with the constitutional structure, the Court has strongly rebuked it.³¹⁰

Congressional guidance itself is an interesting concept when it comes to constitutional meaning. Not many years ago, the Court admonished Congress to keep out of the constitutional-interpretation business³¹¹ and struck down a statute because Congress had overreached in precisely that way. And yet, in *Schweiker v. Chilicky*, the Court refused to allow actions for damages where the plaintiffs relied for recovery on the Fifth Amendment's Due Process Clause.³¹² The plaintiffs sued seeking relief for wrongful termination of Social Security disability benefits.³¹³ Some of the plaintiffs depended on

This Court has not defined the phrase "special factors counselling hesitation." The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a "special factor counselling hesitation," a factor must cause a court to hesitate before answering that question in the affirmative.

It is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others.

Id. at 1857–58. Perhaps the question one should ask is whether it is a judicial [or congressional] function to establish whole categories of cases in which federal officers need *not* defend against claims of constitutional violation.

³⁰⁸ U.S. CONST. art. I, § 8, cl. 1.

³⁰⁹ The Civil War Amendments, U.S. Constitutional amendments XIII, XIV, and XV, are not to the contrary. Their final clauses allow Congress to pass legislation to enforce the amendments' provisions, but they contain no hint that the amendments are otherwise not enforceable.

³¹⁰ *See, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919, 956–59 (1983) (disapproving a legislative provision purporting to allow one house of Congress to invalidate immigration authority that Congress, by statute, had delegated to the executive branch).

³¹¹ *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

³¹² 487 U.S. 412, 414 (1988).

³¹³ *Id.* at 417–18.

those benefits for the necessities of life, and there is evidence that some people who were denied benefits because of the wrongful termination died as a result.³¹⁴ The plaintiffs sought consequential damages for the asserted due process violations in addition to restoration of wrongfully withheld benefits.³¹⁵ The Court said no.³¹⁶ The Court made it sound like the plaintiffs sought relief under the statutory scheme, but that is inaccurate. Plaintiffs' claims sounded in due process, not in statutory violation. When the Court spoke of Congress being the appropriate body to make compromises, it glossed over the fact that it allowed Congress to compromise the plaintiffs' Fifth Amendment rights.

B. Historical Problems

Assume for a moment that the Supreme Court's narrative about common-law immunities were fact instead of fiction.³¹⁷ In that light, consider the Bill of Rights, a non-exclusive³¹⁸ enumeration of protections against government action that the first Congress (in which many of the Constitution's Framers served) thought so important that mere statutory protection would not do. The

³¹⁴*Id.* at 430–31 (Brennan, J., dissenting) (noting that the plaintiffs “further allege, and petitioners do not dispute, that as a result of these deprivations, which lasted from seven to nineteen months, they suffered immediate financial hardship, were unable to purchase food, shelter, and other necessities, and were unable to maintain themselves in even a minimally adequate fashion.”). *See, e.g.*, 130 CONG. REC. H6588 (daily ed. Mar. 27, 1984) (statement of Rep. Regula); *id.* at H6596 (statement of Rep. Glickman). *See also* Chilicky, 487 U.S. at 437 n.4 (“The legislative debate over the 1984 Reform Act is replete with anecdotal evidence of recipients who lost their cars and homes, and of some who may even have died as a result of benefit terminations.”).

³¹⁵ *Chilicky*, 487 U.S. at 428.

³¹⁶*Id.* at 429. At the same time Justice O'Connor's majority opinion candidly admitted regarding what happened to respondents:

[It] must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens. . . . Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program.

Id. at 428–29. One should not overlook the irony of the suggestion that the members of Congress were outside the characterization of “anyone of normal sensibilities.”

³¹⁷This is quite an assumption. As Professor Dripps has pointed out, “*Pierson v. Ray* and *Anderson v. Creighton*, the Court's decisions recognizing qualified immunity for law enforcement officers in actions, brought, respectively, under 42 U.S.C. § 1983 and *Bivens*, are bereft of founding-era support.” Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1107 (2012).

³¹⁸*See* U.S. CONST. amend. IX.

source of that idea is not difficult to find; several states ratified the Constitution on the understanding that it would lead to adoption of a constitutional-level bill of rights.³¹⁹ Shortly after the Constitutional Convention ended, Thomas Jefferson expressed his complete support for such a bill.³²⁰ As Justice Brennan observed, “The first 10 Amendments were not enacted because the members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution.”³²¹ Chief Justice Marshall, in the course of ruling that the Fifth Amendment (and, in dictum, the other amendments) did not apply to the states, noted how the amendments came into being:

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained, that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government not against those of the local governments.

³¹⁹See *infra* note 321 and accompanying text. That is not to say that the idea aroused no controversy—quite the contrary. There was considerable debate about whether having an enumeration of rights might, by implication, exclude rights not included on the list. Alexander Hamilton noted his opposition, arguing that having a bill of rights would end up being dangerous for exactly that reason. THE FEDERALIST NO. 84 (Alexander Hamilton). That is why the Ninth Amendment is there.

³²⁰Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), <http://https://founders.archives.gov/documents/Madison/01-10-02-0210> (last visited Mar. 10, 2021) (“[A] bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse or rest on inference.”).

³²¹Marsh v. Chambers, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting). See also *Ullmann v. United States*, 350 U.S. 422, 427 (1956) (referring to “the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States”).

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states.³²²

There can be no serious question that the people who created the new government thought having a bill of rights enormously important, and history at least suggests that the Constitution would have failed of ratification had what eventually became the Bill of Rights not been in the offing.

The Supreme Court's qualified-immunity jurisprudence, with its repeated but unsubstantiated attempts to link itself to English common law, demands that one believe that the same people who felt so strongly about having the Bill of Rights nonetheless enacted it against a common-law background that they knew would make it unenforceable in many cases of constitutional violations by government officials. It also requires believing that they rejected *Entick v. Carrington*³²³ *sub silentio*, opting instead for unspoken rules that would allow government officials to violate with impunity the very documents the Founders were writing. That is more than unlikely; if true, it would represent a great fraud on the American people and the states—perhaps the ultimate bait-and-switch—a sham of purporting to ensure government accountability with a façade of fundamental, but unenforceable, rights.³²⁴ Finally it requires believing that the Founders who wrote the Constitution and the Bill of Rights would have looked upon the officers' actions in *Anderson v. Creighton* and agreed that there should have been no recovery—that they would have smiled benignly.

³²² *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833).

³²³ (1765), 95 Eng. Rep. 807.

³²⁴ Professor Zeigler noted the absurdity:

To begin, a right without a remedy is not a legal right; it is merely a hope or a wish. This follows from the definition of a legal right In Hohfeldian terms, a right entails a correlative duty to act or refrain from acting for the benefit of another person. Unless a duty can be enforced, it is not really a duty; it is only a voluntary obligation that a person can fulfill or not at his whim. In such circumstances, the holder of the correlative “right” can only hope that the act or forbearance will occur. Thus, a right without a remedy is simply not a legal right.

Zeigler, *supra* note 9, at 678 (footnotes omitted). One of my Federal Courts students, Sierra Horton, McGeorge School of Law class of 2023, observed that the Ninth Amendment was not written and ratified by people who intended the first eight amendments to be unenforceable.

Qualified immunity makes constitutional rights unenforceable in circumstances where the Supreme Court thinks it unwise to enforce them. Pause a moment to recall how often the Court has instructed that it is improper for it to concern itself with the wisdom of legislation or the policy that may underlie it.³²⁵ *A fortiori* the same principle applies to constitutional provisions, insulated as they are from ordinary legislative modification or interpretation.³²⁶ As the Court has acknowledged,³²⁷ it is illegitimate for it to decide that allowing recovery for violation of a constitutional right is “unwise.”

Thus, with respect to the Bill of Rights and the Fourteenth Amendment, the Court now implicitly takes the position that they are not enforceable in damage actions unless either the Court or Congress somehow activates them—the Court by recognizing private rights of action in constitutional provisions, as it did in *Bivens*, *Passman*, and *Carlson*, or Congress by creating statutory rights of action as it did in 42 U.S.C. § 1983. With respect to Congress’s role, Justice Sotomayor firmly rejected such a thing during the oral argument in *Whole Women’s Health v. Jackson*,³²⁸ in response to the Texas Solicitor General’s argument that the federal courts’ ability to review claims that a state statute is unconstitutional depends on specific congressional authorization. That argument seemed to ignore the statutory grant of federal-question jurisdiction, but Justice Sotomayor made a more fundamental point: “[I]sn’t the point of a [constitutional] right that you don’t

³²⁵ See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978) (holding courts only to determine statute’s meaning and constitutionality); *Ferguson v. Skrupka*, 372 U.S. 726, 729 (1963) (holding wisdom and utility of legislation within the legislature’s domain, not the courts’); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (“[W]e do not sit as a super-legislature to weigh the wisdom of legislation.”). That may be, but after admitting that “the predecessor of § 1983 said nothing about immunity for state officials,” the Court went on to say it had:

[N]evertheless ascertained and announced what it deemed to be the appropriate type of immunity from § 1983 liability in a variety of contexts. . . . The federal courts are equally competent to determine the appropriate level of immunity where the suit is a direct claim under the Federal Constitution against a federal officer.

Butz v. Economou, 438 U.S. 478, 502–03 (1978) (citations omitted). Equally able they may be, but that asks the wrong question. The correct question is whether they have the power. Evidently the Court sometimes does view itself as a super-legislature.

³²⁶ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (disapproving legislation having the effect of altering the sweep of a constitutional provision).

³²⁷ See *supra* note 273 and accompanying text.

³²⁸ 142 S. Ct. 522 (2021) (U.S. Sup. Ct. argued Nov. 1, 2021).

have to ask Congress? Isn't the point of a [constitutional] right that it doesn't really matter what Congress thinks or what the majority of American people think [*sic*] as to that right?"³²⁹

Pause again to ponder whether the states that insisted on having a bill of rights, the First Congress that drafted the Bill and sent it to the states for ratification, and the states that subsequently ratified it contemplated that it would avail persons harmed by constitutional violations nothing without the subsequent *imprimatur* of either the Supreme Court or Congress. To suggest that Congress had such a role is to reduce the amendments to the status of mere statutes that Congress might effectively repeal by not activating.³³⁰ Indeed, the fact that the states demanded *constitutional* guarantees of the rights makes clear that the states did not think such rights should be left to congressional control, else statutes would have been satisfactory.

V. MAKING RIGHTS REAL WHILE PROTECTING OFFICIALS' SCOPE OF ACTION

The Court regularly explains why it thinks immunity is a good idea and when it thinks immunity is not a good idea. For that lesson, one returns to *Harlow v. Fitzgerald*.³³¹ There the Court described the balance that it has been attempting to strike:

[T]he recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, . . . but also “the need to protect officials who are required to exercise their discretion and the related

³²⁹ Transcript of Oral Argument at 75, *Whole Women's Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-463_6kgm.pdf (last visited Nov. 10, 2021).

³³⁰ A Canadian scholar presciently commented on *Bivens*'s fragility thirty years ago, before the Supreme Court had made its disdain for *Bivens* as clear as *Ziglar* manifests it is. “It does not appear, however, that the *Bivens* remedy, as it is currently understood, can be regarded as firmly enshrined in the Constitution itself, for its availability depends very much on congressional will.” Ghislain Otis, *Personal Liability of Public Officials for Constitutional Wrongdoing: A Neglected Issue of Charter Application*, 24 MANITOBA L.J. 23, 32 (1996).

³³¹ 457 U.S. 800 (1982).

public interest in encouraging the vigorous exercise of official authority.”³³²

Harlow stated the balance: “[G]overnment 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.”³³³ Viewing the two statements together leads to the conclusion that the Court thinks that the federal and state governments want their officials (a) to be able to operate as close to the line of unconstitutionality as possible—in effect to take risks with people’s constitutional rights—and (b) not to pause in the vigorous exercise of their duties to ponder nice constitutional questions. Those goals are quite understandable; power exists to be used, though not to be abused.

Those *desiderata* are benefits that governments want to enjoy, and governments are entitled to enjoy the benefits of all legitimate exercise of their powers. There is no reason, however, why those benefits should be cost free to the governments and lead ineluctably to having constitutional loss fall on the innocent victim. An unconstitutional act by an official is not a legitimate exercise of government power, irrespective of what the “reasonable official” would have thought.

One might think of this in terms of economics. The governments want certain benefits and freedom of action for their officials. They instruct their officials to act in certain ways, with the presumed understanding that those ways are consistent with the Constitution. When they clearly are not, the Court makes the officials liable.³³⁴ But what about when the law is not clear? If governments want their officials to act rather than either refraining from acting or getting legal advice in such situations, then the governments have created a policy, and they should stand behind that policy.³³⁵ They should pay for the “reasonable” mistakes of the officials. The loss from the mistakes should fall on the governments that authorized them, not on the victim. That is a statement of policy, not of constitutional law.

The objection to such an approach that leaps to mind is that it establishes a degree of *respondeat superior* liability for government, and indeed it does.

³³² *Id.* at 807 (citations omitted) (quoting *Butz v. Economou*, 438 U.S. 478, 504–06 (1978)).

³³³ *Id.* at 818.

³³⁴ *See id.*

³³⁵ *See Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397 (1997); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

The Supreme Court has ruled that § 1983 does not contemplate *respondeat superior* liability,³³⁶ resting that part of its holding on the 1871 Congress's rejection of the Sherman Amendment to the Civil Rights Act of 1871, from which today's 42 U.S.C. § 1983 descends.³³⁷ The Sherman Amendment would have made municipal inhabitants liable for damage caused by the following actors:

[A]ny persons riotously and tumultuously assembled together . . . with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude³³⁸

The House rejected the Sherman Amendment, and a conference committee produced a revised version that would have made the judgment executable against municipal property if not satisfied from the assets of the perpetrators.³³⁹ That version did not pass either, with Congress eventually settling on liability for individuals who knew of conspiracies to violate civil rights and could have done something but made no effort to prevent them.³⁴⁰ So the Sherman Amendment did not survive.

³³⁶ *Monell*, 436 U.S. at 658.

³³⁷ *Id.* at 664.

³³⁸ *Id.* at 666 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 363 (1871)). The amendment would have required suits to proceed nominally against the municipality but execution would have run only against the private property of any inhabitant. *Id.* at 666 n.14.

Senator Sherman stated his purpose: “to enlist the aid of persons of property in the enforcement of the civil rights laws by making their property ‘responsible’ for Ku Klux Klan damage, *id.*, and he noted that similar statutes “had long been in force in England and were in force in 1871 in a number of States.” *Id.* at 667.

Nonetheless there were critical differences between the conference substitute and extant state and English statutes: The conference substitute, unlike most state riot statutes, lacked a short statute of limitations and imposed liability on the government defendant whether or not it had notice of the impending riot, whether or not the municipality was authorized to exercise a police power, whether or not it exerted all reasonable efforts to stop the riot, and whether or not the rioters were caught and punished.

Id. at 668 (footnote omitted).

³³⁹ *See id.* at 666–67.

³⁴⁰ *See id.* at 668–69. *See also* 42 U.S.C. § 1986.

Monell rejected municipal *respondeat superior* liability by relying on that legislative history, but its conclusion is at least questionable.³⁴¹ The Sherman Amendment would have made municipal inhabitants liable for the acts of persons *not* their agents. The conference substitute, which also failed to pass, would have transferred that liability from the inhabitants to the municipality, making the municipalities directly liable for the acts of persons *not* their agents. As *Monell* noted, that would have imposed upon municipalities a policing duty that did not then exist.³⁴² Rejection of the Sherman Amendment certainly does nothing to suggest that Congress sought to absolve municipalities of responsibility for the acts of persons who *were* their agents. Perhaps the correct consideration is not whether the 1871 Congress intended *respondeat superior* to apply but rather whether those who ratified the Bill

³⁴¹ Justice Souter, joined by Justices Stevens and Breyer, objected to the Court's interpretation. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 396, 425 (1997) (Souter, J., dissenting). Justice Ginsburg joined Justice Breyer's separate dissent making the same point, *see id.* at 436 (Breyer, J., dissenting), so at that point there were four Justices willing to reconsider that *Monell* finding.

Several scholars have argued forcefully that *Monell*'s exclusion of municipal liability by *respondeat superior* in § 1983 actions is historically unsupportable:

The Court's conclusions rest on historically inaccurate assumptions about the nineteenth-century justifications for *respondeat superior*. In 1871, when § 1983 was enacted, lawyers and judges saw *respondeat superior* as the natural result of four underlying rationales which both justified and limited employer liability: (1) the legal fiction that master and servant were a single "legal unity," (2) the concept that legal responsibility necessarily followed from the legal power to control another's actions, (3) the belief that masters implicitly warranted that their servants were competent and well-intentioned, and (4) the principle that those who sought to profit from servants' actions should bear the costs that those actions imposed on others. While some of these rationales may sound strange to twenty-first-century ears, they were well-recognized legal truisms regularly invoked in nineteenth-century treatises and decisions. To the nineteenth-century lawyer-legislators who dominated the Forty-Second Congress, these rationales were powerful arguments in favor of holding employers (including municipal employers) liable for the torts of their employees and were equally powerful arguments against adopting the type of liability contemplated by the Sherman Amendment. Rejection of the Sherman Amendment was not a rejection of those rationales but instead a straightforward application of them.

David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 *FORDHAM L. REV.* 2183, 2196–97 (2005).

³⁴² *See supra* notes 336–340 and accompanying text. *See also* Russell Glazer, *The Sherman Amendment: Congressional Rejection of Communal Liability for Civil Rights Violations*, 39 *UCLA L. REV.* 1371, 1409–10 (1992) (Sherman Amendment and its substitute failed because it would have required municipalities to form police forces, in violation of state sovereignty). Senator Sherman recognized that problem. *See supra* note 338.

of Rights intended as a general matter that governments should not be responsible for the reasonable acts of their agents. This Article suggests no more than making governments responsible for such acts, as they were when the nation began.

This is not a new idea; it is a very old one. Professor Engdahl powerfully reminds us that officials' liability for unlawful acts was the rule in the early United States, despite the common-law background of immunity that the Court routinely tries to assure us was there.³⁴³ As Professor Pfander has pointed out,³⁴⁴ in 1804 Chief Justice Marshall stated the then-extant American law of executive immunities: "A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution."³⁴⁵ Congress responded to the case by indemnifying the defendant in a private

³⁴³ Professor Engdahl elaborates on this position:

The insistence of nineteenth century courts upon [the] strict rule of personal official liability, even though its harshness to officials was quite clear, is very significant. Just as in the case of private agents, an act actually authorized by the state as principal was regarded as an act of the state. If nevertheless unauthorized in contemplation of law because the act was a trespass, or because the authorization was unconstitutional and void, the official could be held personally liable, but that did not make his act any less the acts of the state, if it actually was authorized-in-fact. In other words, just as with a private agency, state and official might both be guilty of a wrong, and a cause of action lie against each, although the state itself, because of immunity, could not be sued. There was no notion that the state was incapable of committing wrongs. The fact that an officer personally could be separately liable *where the wrong was equally a wrong by the state*, is what gave the principle of personal official liability its major importance. It is this feature that made it more than merely a means of redressing strictly personal wrongs, and made it, in effect, an instrument for enforcing certain legal rights and particularly constitutional limitations against the state.

See David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 UNIV. COLO. L. REV. 1, 19 (1972)

³⁴⁴ James E. Pfander, Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation, 114 PENN. ST. L. REV. 1387, 1393 (2010).

³⁴⁵ *Little v. Barreme*, 6 U.S. 170, 170 (1804). *Barreme* was hardly an outlier. Justice Brennan's dissent in *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), noted "the settled principle of the accountability, in damages, of the individual governmental officer for the consequences of his wrongdoing." *Id.* at 656 (citing eight cases after *Barreme*, in the years 1836 to 1912, upholding official liability). Justice Brennan also cited three cases (from 1922 to 1947) holding state judges liable for abuse of process.

bill.³⁴⁶ Apparently neither Chief Justice Marshall nor Congress was familiar with the then-unmistakable English history of executive immunity that the modern Supreme Court assures us was at the forefront of the Founders' thinking during the constitutional period.

CONCLUSION

The Court's refusal to enforce individual constitutional rights, either by allowing claims under the Bill of Rights *simpliciter* or, when it does allow such claims, by pulling their teeth with the Court's qualified-immunity doctrine, makes the underlying rights illusory. Nothing in the Constitution gives the Court the power to decide *whether* to give effect to a constitutional provision. Certainly the Court can construe the Constitution to see whether its provisions are broad enough to cover varying fact patterns, and then we would be looking at a different landscape, but that is not what the Court has done in either the qualified-immunity cases or in the implication cases. In both, the Court acknowledges that there may have been constitutional violations; it simply refuses to allow a remedy. In such circumstances, as the unanimous Court said more than a century ago, those rights "might as well be stricken from the Constitution."³⁴⁷ And they have been.³⁴⁸

³⁴⁶ Pfander, *supra* note 344, at 1394 (citing An Act for the Relief of George Little, ch. 4, 6 Stat. 63 (Feb. 17, 1807)).

³⁴⁷ *Weeks v. United States*, 232 U.S. 383, 393 (1914).

³⁴⁸ Professor Pfander sums up the change in the judiciary's assumed role from the nineteenth century to the present:

One finds in the nineteenth century model a rather modest conception of the judicial function that contrasts sharply with the view of today. Nineteenth century courts passed solely on the issue of legality and left the task of determining issues of good faith, immunity, and indemnity to the legislative branch. The task of balancing the interest of the victim in vindication of his rights and that of the officer in securing protection against liability for actions in the course of employment fell to Congress. Today, by contrast, the Court has explicitly taken on the task of attempting to calibrate the incentives of federal officers who face personal liability. Thus, while the Court has acknowledged the importance of compensating victims and deterring government wrongdoing, it has also sought to minimize what it has called the "social costs" associated with official liability. These costs include "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." In addition, the Court has expressed concern that the threat of liability " 'will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " Nineteenth century courts (and the members of Congress who adopted the pay and incentive packages for government

In short, today's Court ignores the Supremacy Clause, which commands constitutional superiority over statutory and common law. The law of qualified immunity is entirely judge-made. It has no English common-law antecedents; it lacks even nineteenth-century American common-law antecedents. In creating and enforcing it, the Court violates the constitutional hierarchy. It is not merely unlawful, as Professor Baude persuasively demonstrates;³⁴⁹ it is unconstitutional because it ignores the Supremacy Clause. The Court's common law becomes the supreme law of the land; the Constitution yields before it. The Court should, instead, return to the practice that the Founders and the government followed in our nation's formative period.³⁵⁰

The Founders never said to balance constitutional rights against public policy *desiderata*. They lived in a time when *ubi jus, ibi remedium* meant something. As a practical matter, the Supreme Court has silently changed that maxim to *nullum remedium, nullum ius*,³⁵¹ and the Court's maxim has effectively repealed constitutional rights long thought to exist. Judge Don R. Willett of the Fifth Circuit described the Court's doctrine as "allowing federal officials to operate in something resembling a Constitution-free zone,"³⁵² and making "[a] written constitution . . . mere meringue when rights can be violated with nonchalance."³⁵³ The Court has reduced a once-fundamental document to paper promises. That's what it was to the Creightons. The Court wants us to believe that the Founders would have smiled benignly.

officers and the private indemnity bills that protected them from liability) would have viewed this task of ensuring official zeal in the face of personal liability as a matter for legislative rather than judicial determination.

Pfander, *supra* note 344, at 1394–95 (footnotes omitted).

³⁴⁹ See Baude, *supra* note 18.

³⁵⁰ See *supra* notes 126, 345 and accompanying text.

³⁵¹ "Where there is no remedy, there is no right."

³⁵² Byrd v. Lamb, 990 F.3d 879, 884 (5th Cir. 2021) (Willett, J., specially concurring), *petition for certiorari filed*, Aug 10, 2021 (No. 21-184).

³⁵³ *Id.* at 884–85 (Willett, J., specially concurring).