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## Qualified Immunity and Constitutional Structure

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# QUALIFIED IMMUNITY AND CONSTITUTIONAL STRUCTURE

*Katherine Mims Crocker\**

*A range of scholars has subjected qualified immunity to a wave of criticism—and for good reasons. But the Supreme Court continues to apply the doctrine in ever more aggressive ways. By advancing two claims, this Article seeks to make some sense of this conflict and to suggest some thoughts toward a resolution.*

*First, while the Court has offered and scholars have rejected several rationales for the doctrine, layering in an account grounded in structural constitutional concerns provides a historically richer and analytically thicker understanding of the current qualified-immunity regime. For suits against federal officials, qualified immunity acts as a “compensating adjustment” to the separation-of-powers error ostensibly underlying the Court’s decision to allow such suits without congressional approval. For suits against state officials, qualified immunity addresses federalism concerns by leveling the field for constitutional enforcement so that state defendants do not face harsher penalties than their federal counterparts do.*

*Second, while this structural account situates the doctrine within powerful constitutional currents, it does not justify the current qualified-immunity regime. For suits against federal officials, the structural account articulates a poor compensating adjustment because qualified immunity supplies an awkward solution to any separation-of-powers problem. For suits against state officials, the structural account appears to rest on a notion of “free-standing federalism” that is too far removed from the actual constitutional design.*

*Alongside prior scholarship, and for different reasons for suits against federal and state officials, this analysis leaves the present model of qualified immunity ripe for rejection or replacement with a more rights-protective alternative.*

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## TABLE OF CONTENTS

INTRODUCTION.....	1406
I. HASHING OVER THE <i>HARLOW</i> STANDARD .....	1412
A. <i>Doctrinal Overview</i> .....	1412
B. <i>Academic Evaluations</i> .....	1415
II. BRINGING IN THE <i>BIVENS</i> BACKGROUND .....	1421
A. <i>Previous Understandings</i> .....	1422
B. <i>The Separation-of-Powers Line of Logic</i> .....	1424
1. <i>Bivens's Rise and Retrenchment</i> .....	1424
2. <i>Justice Powell's Relevance</i> .....	1429
C. <i>One Wrinkle</i> .....	1431
III. EXPLORING THE § 1983 EXTENSION .....	1432
A. <i>Previous Understandings</i> .....	1432
B. <i>The Federalism Line of Logic</i> .....	1435
1. <i>The Reasoning Behind <i>Economou</i></i> .....	1435
2. <i>Ensuing Entreaties Toward Equivalence</i> .....	1437
C. <i>Two Qualifications</i> .....	1439
IV. ASSESSING THE STRUCTURAL ACCOUNT.....	1440
A. <i>The Separation-of-Powers Line of Logic</i> .....	1440
1. <i>If <i>Bivens</i> Is Not Broken</i> .....	1440
2. <i>Silver Bullet or Square Peg</i> .....	1442
B. <i>The Federalism Line of Logic</i> .....	1448
1. <i>Equal Sovereignty</i> .....	1449
2. <i>The Fourteenth Amendment</i> .....	1452
3. <i>Freestanding Federalism</i> .....	1455
C. <i>Three Upshots</i> .....	1457
CONCLUSION.....	1460

## INTRODUCTION

Qualified immunity, which provides a defense for executive-branch officials in damages lawsuits alleging the violation of constitutional rights, has enjoyed a prominent spot on the Supreme Court's docket for over thirty years. In 1982, the Court articulated the current form of qualified immunity in *Harlow v. Fitzgerald*,<sup>1</sup> holding that "government officials performing discretionary functions, generally are shielded from liability for civil damages"

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1. 457 U.S. 800 (1982).

in constitutional-tort suits “insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known.”<sup>2</sup> Since then, the Court has repeatedly expanded the protections afforded by the doctrine in new and more muscular ways. Over the same period, however, scholars have done a great deal to undermine the reasons that the justices have offered for adopting the current qualified-immunity regime, and much of the legal community more broadly has come out against it.

Why has the Court “doubl[ed] down” on a doctrine that has been the subject of so much criticism?<sup>3</sup> By focusing on the justices’ stated rationales, critics have largely overlooked an account of qualified immunity rooted in constitutional structure and, specifically, in certain separation-of-powers and federalism concerns. This structural account is important because it offers a historically richer and analytically thicker view of the doctrine’s development. But on close examination, the considerations underlying this account provide no compelling justification for the defense, leaving the present model of qualified immunity ripe for replacement or, indeed, rejection.

But why does qualified immunity matter? Among other reasons, because it excuses conduct that seems inexcusable. Consider *Kisela v. Hughes*,<sup>4</sup> one of the Supreme Court’s latest qualified-immunity decisions. A police officer shot a woman four times while she was standing outside her home about six feet from her roommate.<sup>5</sup> To be sure, the woman was holding a kitchen knife at her side, and the police had received a report that a woman had been using a kitchen knife to hack a tree.<sup>6</sup> But the woman was calm when the police confronted her, and the officer who gunned her down gave her no warning.<sup>7</sup> The Court granted qualified immunity.<sup>8</sup> In dissent, Justice Sotomayor said that the majority’s opinion “tells officers that they can shoot first and think later” and “tells the public that palpably unreasonable conduct will go unpunished.”<sup>9</sup> One could say the same thing about *White v. Pauly*,<sup>10</sup> a 2017 Supreme Court decision vacating the denial of qualified immunity where a police officer shot and killed a man inside his home without sufficient warning<sup>11</sup>—or about *Mullenix v. Luna*,<sup>12</sup> a 2015 Supreme Court decision reversing the denial of qualified immunity where an officer fatally shot the driver

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2. *Harlow*, 457 U.S. at 818.

3. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 87 (2018).

4. 138 S. Ct. 1148 (2018).

5. *Kisela*, 138 S. Ct. at 1151.

6. *Id.*

7. *Id.*

8. *Id.* at 1151–52.

9. *Id.* at 1162 (Sotomayor, J., dissenting).

10. 137 S. Ct. 548 (2017).

11. *White*, 137 S. Ct. at 549–51.

12. 136 S. Ct. 305 (2015).

of a fleeing vehicle from a highway overpass in defiance of direct orders and then asked, “[h]ow’s that for proactive?”<sup>13</sup>

These examples are all drawn from the Supreme Court’s recent docket, but the facts of some lower-court cases are even more egregious. In one case, police officers—again without warning—lowered a dog over a wall and into the backyard of a mobile home while pursuing a robbery suspect.<sup>14</sup> The dog bit the mobile-home resident, who was eighty-nine years old.<sup>15</sup> The wound became infected; the man’s leg had to be amputated; and he died the next month.<sup>16</sup> The court granted qualified immunity.<sup>17</sup> In another case, police officers tied a man that they had arrested on a traffic warrant to a metal pole in a deserted parking lot in the middle of the night and drove away, leaving him alone for about ten minutes until officers from another department picked him up.<sup>18</sup> The defendants claimed that they had been playing a prank.<sup>19</sup> The court excoriated them for “Keystone Kop activity that degrades those subject to detention and that lacks any conceivable law enforcement purpose.”<sup>20</sup> But it nevertheless granted qualified immunity.<sup>21</sup>

Qualified immunity shields many kinds of government officials, not just police officers. In one Supreme Court case, for instance, several middle-school employees benefited from the doctrine after strip-searching a thirteen-year-old girl suspected of providing prescription-strength ibuprofen and a nonprescription painkiller to classmates.<sup>22</sup> Indeed, there is “no reliable way to know how often zoning officials, welfare bureaucrats, or prison guards act on unconstitutional grounds or discard mandatory procedures.”<sup>23</sup>

Nevertheless, constitutional violations have become “routinized in some urban neighborhoods.”<sup>24</sup> And qualified immunity has become a prominent part of the national conversation surrounding law-enforcement conduct and racial injustice in the wake of recent events, especially police shootings of

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13. *Mullenix*, 136 S. Ct. at 306–08; *id.* at 316 (Sotomayor, J., dissenting) (quoting *Luna v. Mullenix*, 773 F.3d 712, 717 (5th Cir. 2014)). Indeed, Sotomayor argued that the majority “sanction[ed] a ‘shoot first, think later’ approach” here as well. *Id.* at 316.

14. *McKay v. City of Hayward*, 949 F. Supp. 2d 971, 975 (N.D. Cal. 2013). This case is discussed in Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *YALE L.J.* 2, 67–70 (2017).

15. *McKay*, 949 F. Supp. 2d at 975.

16. *Id.* at 975–76.

17. *Id.* at 984–85.

18. *Robles v. Prince George’s County*, 302 F.3d 262, 271 (4th Cir. 2002). This case is discussed in John F. Preis, *Qualified Immunity and Fault*, 93 *NOTRE DAME L. REV.* 1969, 1974–76 (2018).

19. *Robles*, 302 F.3d at 266.

20. *Id.* at 271.

21. *Id.*

22. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377–79 (2009).

23. *Aziz Z. Huq, Judicial Independence and the Rationing of Constitutional Remedies*, 65 *DUKE L.J.* 1, 3–4 (2015).

24. *Id.* at 3.

unarmed black men.<sup>25</sup> Many believe that “[t]he acquittal” recently “of another Baltimore police officer charged in the death of Freddie Gray, like the acquittal 25 years ago of the Los Angeles officers who beat Rodney King, reveals the inadequacy of the criminal-law remedy” in an acute way.<sup>26</sup> And scholars and advocacy organizations ranging from the NAACP Legal Defense and Educational Fund to the Cato Institute have urged a reevaluation of doctrines like qualified immunity that allow law-enforcement officers who misuse their power to evade civil accountability.<sup>27</sup>

Qualified immunity, of course, matters not only to plaintiffs and others concerned with protecting constitutional rights, but also to defendants and others concerned with curbing spurious suits against public servants. To quote *Harlow*, and as explored in more detail below, “claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole.”<sup>28</sup> Qualified immunity, the thinking goes, helps ease such burdens where they are relatively unlikely to be cost justified.

So why does an account of qualified immunity rooted in constitutional structure matter? Consider the state of the debate. As expounded below, much of the legal community disapproves of qualified immunity,<sup>29</sup> but the Supreme Court continues to enhance its scope and strength.<sup>30</sup> Scholars at-

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25. See Eugene Scott, *Supreme Court Justice Affirms Activists’ Fears That Police Can ‘Shoot First and Think Later,’* WASH. POST (Apr. 3, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/04/03/supreme-court-justice-affirms-activists-fears-that-police-can-shoot-first-and-think-later/> [https://perma.cc/Y522-SZT6].

26. Jon O. Newman, Opinion, *Here’s a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), [https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3\\_story.html](https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html) [https://perma.cc/VS4X-HNR5].

27. See, e.g., Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 911 (2016) (reviewing SARAH STASZAK, *NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT* (2015)); *LDF Statement on the Non-Indictment of Cleveland Police Officers in the Shooting Death of Tamir Rice*, LDF (Dec. 28, 2015), <http://www.naacpldf.org/press-release/ldf-statement-on-the-non-indictment-of-cleveland-police-officers-in-the-shooting-death-of-tamir-rice> [https://perma.cc/8STA-EN3A]; *Qualified Immunity: The Supreme Court’s Unlawful Assault on Civil Rights and Police Accountability*, CATO INST., <https://www.cato.org/events/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability> [https://perma.cc/AYC7-7KQ5].

28. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); see *infra* Section I.A.

29. See Scott Michelman, *The Branch Best Qualified to Abolish Qualified Immunity*, 93 NOTRE DAME L. REV. 1999, 2000 (2018) (“The critics and critiques of qualified immunity . . . are by now legion . . . [T]he chorus of dissent from the doctrine is growing louder of late.”); see also John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89 (1999) (“In today’s constitutional landscape, the largest, most lamented, and least defended gap between right and remedy involves money damages.”); *infra* Section I.B.

30. See Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 64 (2016) (“[T]he Supreme Court’s qualified immunity opinions . . . have made a *sub silentio* assault on constitutional tort suits. In a number of recent rulings, the Court has engaged in a pattern of covertly broadening the defense . . . .”); Schwartz, *supra* note 14, at 6 (stating that the Court “appears to be on a mission to curb civil rights law-

tack the defense on multiple grounds. Several argue that it is unjust, unclear, unfair to disfavored populations, or dependent on assumptions that defy reality. And recent commentary contends that it lacks the historical support necessary to qualify as a background legal principle, represents a poor analogy to the rule of lenity, and fails to rectify the effects of a purported error in precedent that some say provides it cover.

Many prior attacks on qualified immunity focus on rationales that members of the Supreme Court themselves have given. And many of these attacks are compelling. But the judges and commentators who continue to support the doctrine have evidently found them unconvincing or incomplete. Additional accounts of where qualified immunity comes from and why it persists, therefore, may offer both sides of the debate a more comprehensive understanding of the problem. One such account turns on constitutional structure and comprises two lines of logic. The first relates to suits against federal officials, and the second relates to suits against state officials. Ultimately, neither legitimates qualified immunity, but each fails for different reasons.

The starting point is that *Harlow* arose under the Supreme Court's 1971 decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>31</sup> which established an implied cause of action against federal officials for violating federal constitutional rights.<sup>32</sup> When *Harlow* was decided, the *Bivens* regime was facing increasing hostility for separation-of-powers reasons, with several justices arguing that the judiciary should not allow damages suits without congressional approval. The historical context thus suggests that *Harlow* offered an indirect opportunity to restrain the *Bivens* regime by strengthening qualified immunity, and a range of evidence suggests that the Court did just that. Consequently, separation-of-powers concerns appear to provide qualified immunity an important source of support in the *Bivens* context.

The Court next addressed whether the *Harlow* standard should apply beyond *Bivens* actions to suits arising under 42 U.S.C. § 1983, which provides an express cause of action against state officials for violating federal constitutional or statutory rights.<sup>33</sup> The Court answered in the affirmative, explaining that applying different standards to federal and state defendants

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suits against law enforcement officers, and appears to believe qualified immunity is the means of achieving its goal"); *see also infra* Section I.A.

31. 403 U.S. 388 (1971).

32. *Bivens*, 403 U.S. at 397.

33. See 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."). Section 1983 provides a cause of action against both state and local-government officials. For the sake of simplicity, however, I usually refer to the former only.

would have been untenable. The reasoning behind this move suggests that federalism concerns provide qualified immunity an important source of support in the § 1983 context.

This structural account situates the doctrine's development within powerful currents of constitutional jurisprudence. But it does not justify the current qualified-immunity regime. The separation-of-powers strand regards qualified immunity as a judge-made solution to a judge-made problem—that is, as a “compensating adjustment” to the judicial overreach ostensibly underlying *Bivens* actions. But those who support the *Bivens* paradigm would probably reject the premise that a problem exists in the first place. And those who oppose it should be troubled by qualified immunity for the same reason that they are troubled by implied constitutional causes of action: both inquiries allow the judiciary to make arguably legislative determinations about which constitutional-tort suits should proceed. The separation-of-powers aspect of the structural account advanced here thus fails to provide qualified immunity a persuasive justification.

More difficult to see is the theoretical basis underlying the federalism strand of the structural account—other than an intuitive belief that the law should treat state and federal officials the same way. As a thought experiment, though, at least three rationales seem possible: one arising from an equal-sovereignty principle, one from the incorporation doctrine associated with Section 1 of the Fourteenth Amendment, and one from the congruence-and-proportionality concept associated with Section 5 of the Fourteenth Amendment. These theories do not withstand scrutiny as requiring equivalent qualified-immunity standards for state and federal officials. Section 1983 does not seem to infringe state sovereignty in any way that would offend an equal-sovereignty principle. And among other shortcomings, any imperative stemming from Section 1 or 5 of the Fourteenth Amendment should apply to all § 1983 suits concerning the Bill of Rights, but qualified immunity applies only to damages claims against executive officials for discretionary actions. Accordingly, although federal–state parallelism in constitutional enforcement warrants additional attention, no particular legal principle appears to offer sufficient support for applying the *Harlow* standard to § 1983 suits on the federalism grounds identified in this analysis. Instead, this aspect of the structural account advanced here appears to rest on a notion of “freestanding federalism” that is too far removed from the actual constitutional design.

Of note, the term “qualified immunity” here generally refers to the *Harlow* standard except where the context indicates otherwise, notwithstanding the fact that the moniker predates the model. The discussion proceeds as follows. Part I provides an overview of *Harlow* and other key doctrinal developments and then surveys previous academic evaluations of qualified immunity. Part II explores the import of the *Bivens* backdrop to the *Harlow* standard's emergence and excavates the separation-of-powers line of logic from Supreme Court opinions. Part III recounts the *Harlow* standard's expansion from the *Bivens* environment into the § 1983 sphere and uncovers the federalism line of logic. Part IV offers a normative assessment of the

structural account of qualified immunity advanced here, ultimately contending that a sufficient justification for the doctrine remains elusive. This analysis thus bolsters the calls of critics across the legal community to reject qualified immunity—or at least to replace it with a more sensible, and more rights-protective, alternative.

## I. HASHING OVER THE *HARLOW* STANDARD

This Part provides a primer on the Supreme Court's constitutional-tort immunity jurisprudence, including the decisions that paved the way for *Harlow* and those that have subsequently expanded the protections afforded by qualified immunity. The Part proceeds to consider academic evaluations of the *Harlow* standard, including several that undermine the reasons offered by the justices for constructing such a government-protective system.

### A. Doctrinal Overview

Qualified immunity is widely viewed as “the most important doctrine in the law of constitutional torts.”<sup>34</sup> The *Harlow* standard provides that “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>35</sup> Explaining that the doctrine represents “an immunity from suit rather than a mere defense to liability,” the Supreme Court has made clear that the protection “is effectively lost if a case is erroneously permitted to go to trial.”<sup>36</sup>

The story behind *Harlow* begins in important ways with *Pierson v. Ray*,<sup>37</sup> a 1967 Supreme Court decision stemming from the arrest of several Freedom Riders for gathering at a Mississippi bus terminal. *Pierson* said that § 1983 “should be read against the background of tort liability.”<sup>38</sup> And in the context of “police officers making an arrest,” the Court said, the background of tort liability included “the defense of good faith and probable cause.”<sup>39</sup> *Pierson* thus adopted a tort-specific concept of a historical common-law de-

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34. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).

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

36. *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985). With respect to damages suits, absolute immunity generally shields officials from claims based on legislative, judicial, and some prosecutorial functions. See *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (prosecutorial functions); *Pierson v. Ray*, 386 U.S. 547, 553–55 (1967) (judicial functions); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (legislative functions). It also protects the president with respect to official acts. See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). And sovereign immunity generally safeguards state and federal entities, as well as individuals sued in their official capacities. See *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985).

37. 386 U.S. 547.

38. *Pierson*, 386 U.S. at 556 (quoting *Monroe v. Pape*, 362 U.S. 167, 187 (1961)).

39. *Id.* at 557.

fense. But seven years later in *Scheuer v. Rhodes*,<sup>40</sup> which arose from the 1970 shooting of students at Kent State University by the Ohio National Guard, the Court extended the good-faith defense beyond the arrest context to suits involving state-level executive action at large.<sup>41</sup> Then, in *Butz v. Economou*,<sup>42</sup> a 1978 case involving claims against defendants affiliated with the U.S. Department of Agriculture, the Court further extended the defense to suits against federal officials under *Bivens*.<sup>43</sup>

*Harlow* followed in 1982. The flagship section of Justice Powell's majority opinion begins by declaring that "[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative."<sup>44</sup> On the one hand, the Court said, "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."<sup>45</sup> But on the other, "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole."<sup>46</sup> These "social costs," the Court remarked, "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."<sup>47</sup> Another cost, the Court said, "is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"<sup>48</sup>

The Court proceeded to consider whether to make "an adjustment of the 'good faith' standard" established by prior decisions.<sup>49</sup> It had become clear, the Court said, that "substantial costs attend the litigation of the subjective good faith of government officials."<sup>50</sup> In addition to "the general costs of subjecting officials to the risks of trial," the Court cited "special costs to 'subjective' inquiries of this kind," like "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues."<sup>51</sup> These inquiries, the Court said, "can be peculiarly disruptive of effective government."<sup>52</sup>

The Court thus concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the

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40. 416 U.S. 232 (1974).

41. *Scheuer*, 416 U.S. at 237.

42. 438 U.S. 478 (1978).

43. *Economou*, 438 U.S. at 507.

44. *Harlow v. Fitzgerald*, 457 U.S. 800, 813–14 (1982).

45. *Id.* at 814.

46. *Id.*

47. *Id.*

48. *Id.* (alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

49. *Id.* at 814–15.

50. *Id.* at 816.

51. *Id.* at 816–17.

52. *Id.* at 817.

burdens of broad-reaching discovery.”<sup>53</sup> Instead, the Court held that “government officials performing discretionary functions” generally should not face damages liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>54</sup> This “objective” inquiry, the Court made clear, did not require subjective good faith on the part of defendants.<sup>55</sup>

The *Harlow* standard has remained the analytical reference point for applying qualified immunity. But the Supreme Court has repeatedly expanded the doctrine’s protections in new and more muscular ways.

One could catalogue multiple substantive examples. For instance, the Court has subtly lowered the bar for benefiting from the defense by shifting the standard for denying qualified immunity from whether “a” reasonable person would have known of the right in question to whether “every” reasonable person would have known of the right in question.<sup>56</sup> And the Court has repeatedly stated that the doctrine shields “all but the plainly incompetent or those who knowingly violate the law.”<sup>57</sup> What is more, the Court has required lower courts to ask whether rights were clearly established at a very low level of generality,<sup>58</sup> such that “the clearly-established-law standard of *Harlow* is fact-specific and qualified immunity is correspondingly broad.”<sup>59</sup> And the Court has strictly limited the sources of law that can render a right clearly established, making qualified immunity increasingly easy to obtain.<sup>60</sup>

The Court has also accorded qualified immunity a privileged position in the law’s procedural scaffolding. It has held, for instance, that federal-court defendants may immediately appeal denials of qualified immunity when the defense fails on the ground that the right in question was clearly established.<sup>61</sup> And the Court has taken up and overturned lower-court decisions concerning qualified immunity with a frequency and consistency of out-

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53. *Id.* at 817–18.

54. *Id.* at 818.

55. *See id.* at 818–19.

56. Kinports, *supra* note 30, at 65.

57. This statement appears in *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018), and *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018), but those are just two of the most recent examples. It first appeared in *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

58. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 639–40 (1987) (“[I]f the test of ‘clearly established law’ were to be applied at [a high] level of generality, it would bear no relationship to the ‘objective legal reasonableness’ that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.”).

59. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L.J. 65, 82 (1999).

60. *See* Kinports, *supra* note 30, at 69–72.

61. *See Mitchell v. Forsyth*, 472 U.S. 511, 524–30 (1985). By contrast, defendants may not immediately appeal denials of qualified immunity that are based on the conclusion that “the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial.” *Johnson v. Jones*, 515 U.S. 304, 307 (1995).

come—in favor of the defendant government officials—seen in few other areas of law.<sup>62</sup> Over the last decade, moreover, the Court has often done so through the relatively rare and especially assertive mechanism of summary reversal, which without merits briefing or oral argument condemns lower-court rulings as incorrect.<sup>63</sup>

At bottom, the Supreme Court “is not just maintaining the doctrine of qualified immunity as a matter of precedent.”<sup>64</sup> Instead, the justices are “doubling down” on the doctrine by “enforcing it aggressively against lower courts.”<sup>65</sup>

### B. *Academic Evaluations*

In contrast to the Supreme Court’s fondness for qualified immunity, *Harlow* and its offspring have experienced an increasingly hostile reception in the academy. Indeed, the rules surrounding qualified immunity have “been roundly criticized as incoherent, illogical, and overly protective of government officials who act unconstitutionally and in bad faith.”<sup>66</sup>

One idea is that qualified immunity contravenes the moral ideal of “corrective justice,” which has been called “the most persuasive nondeterrence justification for awarding tort damages to victims of government unconstitutionality.”<sup>67</sup> Typified by Erwin Chemerinsky’s commentary, this criticism asserts that the doctrine is insufficiently protective of basic freedoms.<sup>68</sup> Under this view, qualified immunity inappropriately allows officials who violate constitutional rights to duck judicial consequences and diminishes individual dignity, governmental accountability, and societal faith in systems of power.<sup>69</sup>

Other evaluations disparage the doctrine as difficult to decipher.<sup>70</sup> As one judge puts it: “Wading through the doctrine of qualified immunity is

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62. See Baude, *supra* note 3, at 82 (“In the thirty-five years since it announced the objective-reasonableness standard in *Harlow v. Fitzgerald*, the Court has applied it in thirty qualified immunity cases. Only twice has the Court actually found official conduct to violate clearly established law. Those two findings, in *Groh v. Ramirez* and *Hope v. Pelzer*, occurred more than a decade ago.” (footnote omitted)).

63. See *id.* at 85–88.

64. *Id.* at 87.

65. *Id.*

66. Schwartz, *supra* note 14, at 11.

67. See John C. Jeffries, Jr., Essay, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 93–96 (1989).

68. See Erwin Chemerinsky, Opinion, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), <https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html> (on file with the *Michigan Law Review*).

69. See *id.* For a somewhat related argument that qualified immunity “does not properly assess fault because it immunizes persons who are at fault and holds liable persons who are not,” see Preis, *supra* note 18, at 1971–72.

70. See, e.g., Jeffries, *supra* note 34, at 852 (“[D]etermining whether an officer violated ‘clearly established’ law has proved to be a mare’s nest of complexity and confusion.”); Chaim

one of the most morally and conceptually challenging tasks federal appellate court judges routinely face.”<sup>71</sup>

Taking a different tack, some scholars have approached qualified immunity from what one could characterize as a functionalist perspective. Exemplified by Richard Fallon and Daryl Levinson, these theorists argue that simplistic criticisms of the right–remedy gap ignore the realities of actual adjudication.<sup>72</sup> “[R]ights and remedies are inextricably intertwined,” they contend, in that “[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”<sup>73</sup>

Aziz Huq’s functionalist critique argues that the Supreme Court devised fault rules like the *Harlow* standard “as a result of the judiciary’s institutional interests in prestige and docket management.”<sup>74</sup> Because these rules incline courts away from addressing the kind of routine and fact-intensive conduct that makes up many constitutional wrongs, Huq contends that “the Court has rendered most difficult to remedy” those injuries that represent “the lowest visible forms of unconstitutional violence” and that affect “many of the least politically powerful communities” in the nation.<sup>75</sup>

Other lines of inquiry examine the arguments that members of the Supreme Court themselves have advanced for qualified immunity. One line critiques rationales rooted in policy, and another critiques rationales rooted in positive law.

Joanna Schwartz has led the charge against the Court’s policy rationales with two empirical studies. The first revolves around the “frequently repeated” contention that qualified immunity “protects government officials” as individuals “from the burdens of financial liability.”<sup>76</sup> Schwartz’s research challenges this assumption by suggesting that “[p]olice officers are virtually always indemnified” by state and local governments and “are also almost always provided with defense counsel free of charge.”<sup>77</sup> This holds true, Schwartz says, even when indemnification is “prohibited by statute or policy” and when defendants are “disciplined or terminated by the department or criminally prosecuted for their conduct.”<sup>78</sup> She therefore concludes that

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Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1155–56 (2005) (“Despite the almost annual ritual of doctrinal clarification, the federal reporters are crammed with dissents and en banc decisions taking issue over the proper scope and role of qualified immunity.”).

71. Charles R. Wilson, “*Location, Location, Location*”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000).

72. See, e.g., Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479 (2011); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

73. Levinson, *supra* note 72, at 858.

74. Huq, *supra* note 23, at 9–10.

75. *Id.* at 70–74.

76. Schwartz, *supra* note 14, at 59.

77. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890, 915 (2014).

78. *Id.* at 890.

“qualified immunity can no longer be justified as a means of protecting officers from the financial burdens of personal liability.”<sup>79</sup>

Schwartz’s second study challenges another hypothesis underlying the Supreme Court’s embrace of the *Harlow* standard. As Schwartz explains, the Court “has described ‘the “driving force” behind’” qualified-immunity doctrine as “resolving ‘“insubstantial claims” against government officials . . . prior to discovery.’”<sup>80</sup> But according to her analysis of § 1983 suits against law-enforcement officers in certain jurisdictions, just 0.6% of cases were dismissed because of qualified immunity before discovery, and just 3.2%, before trial.<sup>81</sup> She therefore concludes that “qualified immunity doctrine infrequently plays its intended role in the litigation of constitutional claims against law enforcement.”<sup>82</sup>

While Schwartz has focused on the Court’s policy rationales, William Baude has focused on positive law by examining three “technical legal justification[s]” that the Court has offered for qualified immunity.<sup>83</sup> The first and “most widely known theory,” Baude writes, argues that “the immunity is a common-law backdrop that could be read into” § 1983 under familiar tenets of statutory interpretation.<sup>84</sup> Echoing others,<sup>85</sup> Baude argues that several historical problems plague this theory.<sup>86</sup> For one, there was no “general immunity” at common law.<sup>87</sup> Accordingly, “there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment.”<sup>88</sup> And recent immunity jurisprudence has “distorted” any common-law connection in multiple ways.<sup>89</sup> *Harlow*, for instance, consciously broke from the good-faith framework of *Pierson* and its progeny.<sup>90</sup> And more broadly, the doctrine has become “increasingly protective” of defendants.<sup>91</sup>

A second justification is what Baude calls the “lenity theory” of qualified immunity.<sup>92</sup> Around the time that it enacted § 1983, Congress passed a crim-

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79. *Id.* at 939.

80. Schwartz, *supra* note 14, at 60 (alteration in original) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

81. *Id.*

82. *Id.* at 76.

83. Baude, *supra* note 3, at 46.

84. *Id.* at 52; *see, e.g., Filarsky v. Delia*, 566 U.S. 377, 383–84 (2012).

85. *See, e.g., David E. Engdahl, Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14–21 (1972).

86. Baude, *supra* note 3, at 55–61.

87. *Id.* at 55. Instead, a defense premised on the defendant’s good faith arose as “part of the elements of” certain torts. *Id.*

88. *Id.*

89. *Id.* at 60–61.

90. *See id.*

91. *Id.* at 61; *see supra* Section I.A.

92. Baude, *supra* note 3, at 69–77.

inal statute, now codified at 18 U.S.C. § 242, that penalized government officials for violating federal constitutional or statutory rights. To provide “fair warning” and avoid vagueness problems, the Supreme Court has long applied a narrowing construction to § 242 by requiring “a specific intent to deprive a person of a federal right made definite by decision or other rule of law.”<sup>93</sup> The Court has on occasion explicitly analogized qualified immunity to this lenity-related rule,<sup>94</sup> and certain aspects of the doctrine may implicitly do the same.<sup>95</sup> Baude, however, identifies multiple problems with this theory too. First, lenity is usually restricted to criminal-law contexts.<sup>96</sup> Second, § 1983 offers no textual hook for a lenient approach (unlike § 242, which punishes only rights violations committed “willfully”).<sup>97</sup> And third, qualified immunity “has come to bear little practical resemblance to the rules applicable to criminal defendants.”<sup>98</sup> In particular, although the Court “has explicitly rejected the relevance of circuit splits to the lenity inquiry,”<sup>99</sup> judicial discord all but answers the qualified-immunity question in the affirmative.<sup>100</sup>

Baude locates a third justification for the *Harlow* standard in a dissenting opinion by Justice Scalia. In *Crawford-El v. Britton*,<sup>101</sup> Scalia admitted that “our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume.”<sup>102</sup> But “[t]hat is perhaps just as well,” Scalia said, because the Court had erroneously expanded liability under § 1983 beyond what the text could bear.<sup>103</sup> As Scalia put it, in *Monroe v. Pape*,<sup>104</sup> the Court had

93. *Screws v. United States*, 325 U.S. 91, 103–05 (1945) (plurality opinion).

94. See *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *United States v. Lanier*, 520 U.S. 259 (1997); see also Baude, *supra* note 3, at 71–72.

95. For example, the refrain that qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law,” which the Court first stated in *Malley v. Briggs*, 475 U.S. 335, 341 (1986), calls to mind “criminal recklessness or deliberate wrongdoing,” Baude, *supra* note 3, at 72. For an extended analysis likening qualified immunity to fair notice in the criminal-law context, see Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998).

96. According to Baude, the Court generally invokes lenity in civil-law settings only where the same statutory language applies in a criminal-law setting as well. See Baude, *supra* note 3, at 72–73 (first citing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (plurality opinion); then citing *id.* at 519 (Scalia, J., concurring); then citing *Crandon v. United States*, 494 U.S. 152, 158 (1990); and then citing *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004)).

97. *Id.* at 73 (quoting 18 U.S.C. § 242 (2012)).

98. *Id.* at 74.

99. *Id.* at 74–75 (emphasis omitted) (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990), and *United States v. Rodgers*, 466 U.S. 475, 484 (1984)).

100. See *id.* at 75.

101. 523 U.S. 574 (1998).

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

103. *Id.*

104. 365 U.S. 167 (1961).

converted an 1871 statute covering constitutional violations committed “*under color of any statute, ordinance, regulation, custom, or usage of any State,*” into a statute covering constitutional violations committed *without* the authority of any statute, ordinance, regulation, custom, or usage of any State, and indeed even constitutional violations committed in stark violation of state civil or criminal law.<sup>105</sup>

Baude finds issues with this reasoning as well. First, he says, *Monroe* was probably right. Among other things, he argues that “under color of [law]” is a historical term of art that includes “false claims of legal authority” and that aspects of § 1983’s drafting history suggest that the statute carries this meaning.<sup>106</sup> Second, even if one grants Scalia’s premise, Baude says, “the results ought to be nothing like the modern regime of qualified immunity.”<sup>107</sup> Instead, they ought to be like the system envisioned by Justice Frankfurter in his *Monroe* dissent, such that federal liability attaches only when the state fails to remedy the wrong.<sup>108</sup> But qualified immunity under *Harlow* “comes closer to tracking state common law than . . . to filling in state law’s gaps.”<sup>109</sup>

Taken together, the arguments outlined above significantly undermine the case for qualified immunity, especially with respect to the justices’ own accounts of their reasoning. But these arguments have not gained universal acceptance in the academic community. A recent essay by Aaron Nielson and Christopher Walker, for instance, attempts to poke holes in Baude’s and Schwartz’s work.<sup>110</sup> As Nielson and Walker point out, the conclusion of Schwartz’s second study (concerning the rejection of § 1983 suits early in the litigation process) seems especially susceptible to skepticism because of some debatable design decisions.<sup>111</sup> The study, for example, counts a case “as dismissed on qualified immunity grounds only if the entire case has been dismissed as a result of the motion.”<sup>112</sup> So it does not include cases where the court granted leave to amend the complaint, where some but not all individual defendants moved for qualified immunity, where an individual defendant moved for qualified immunity on some but not all claims, or where there was a municipal defendant.<sup>113</sup>

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105. *Crawford-El*, 523 U.S. at 611 (Scalia, J., dissenting) (quoting 42 U.S.C. § 1983 (2012)).

106. Baude, *supra* note 3, at 63–65 (citing Steven L. Winter, *The Meaning of “Under Color of” Law*, 91 MICH. L. REV. 323, 325, 344 (1992), and David Achtenberg, *A “Milder Measure of Villainy”: The Unknown History of 42 U.S.C. § 1983 and the Meaning of “Under Color of” Law*, 1999 UTAH L. REV. 1, 4 n.13, 5 n.18, 22 n.151, 59–60).

107. *Id.* at 66.

108. *Id.* at 66–69; see *Monroe v. Pape*, 365 U.S. 167, 202–59 (1961) (Frankfurter, J., dissenting in part).

109. Baude, *supra* note 3, at 68.

110. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018).

111. See *id.* at 1879.

112. Schwartz, *supra* note 14, at 42.

113. *Id.* at 42–43.

Nevertheless, arguments defending the current qualified-immunity regime often include considerable caveats. Nielson and Walker offer only a “qualified defense” of qualified immunity, recognizing that the doctrine “is by no means perfect.”<sup>114</sup> And although Nielson and Walker’s primary concern is largely procedural,<sup>115</sup> other academic advocates of qualified immunity acknowledge more substantive shortcomings.

John Jeffries provides a prominent example. Jeffries endorses incorporating fault-based conditions into constitutional adjudication through qualified immunity and related doctrines.<sup>116</sup> He contends that “the curtailment of damages liability for constitutional violations has deep structural advantages for American constitutionalism” in two ways.<sup>117</sup> First, it “fosters the development of constitutional law” through “facilitat[ing] constitutional change by reducing the costs of innovation.”<sup>118</sup> The argument here is that judges would hesitate to expand constitutional rights if doing so regularly entailed imposing damages on government defendants.<sup>119</sup> Second, making damages less available “biases constitutional remedies in favor of the future.”<sup>120</sup> The argument here is that limiting retrospective monetary relief allows courts to focus on preventing future harms by awarding injunctive and declaratory remedies.<sup>121</sup>

Notwithstanding his general support for qualified immunity, Jeffries admits that there are serious flaws in multiple aspects of the doctrine. These include “the level of generality” at which to assess whether a right is “clearly established”; “the question of which courts count in” making that assessment; and “a dysfunctional interaction between the law of qualified immunity, as currently stated, and the content of certain constitutional rights.”<sup>122</sup> In

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114. Nielson & Walker, *supra* note 110, at 1854.

115. Nielson and Walker’s criticism of qualified immunity revolves around *Pearson v. Callahan*, 555 U.S. 223 (2009), which overruled *Saucier v. Katz*, 533 U.S. 194 (2001), in allowing courts to exercise discretion to hold that an asserted constitutional violation did not contravene clearly established law without addressing whether a constitutional violation actually occurred under the facts as alleged or adduced. *Pearson*, 555 U.S. at 236. Empirical analysis, they argue, shows that *Pearson* may produce “geographic distortions in the development of constitutional law” and may push such development toward the ideological views of the judges most likely to decide unnecessary constitutional questions. Nielson & Walker, *supra* note 110, at 1884 (quoting Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015)).

116. See Jeffries, *supra* note 29, at 90.

117. *Id.*

118. *Id.*

119. *Id.* at 98–105.

120. *Id.* at 90.

121. *Id.* at 105–10. Jeffries acknowledges, however, that if courts frequently exercise the discretion afforded by *Pearson*, see *supra* note 115, “development of the law would be forestalled by repeated applications of qualified immunity.” John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120.

122. Jeffries, *supra* note 34, at 854–66.

short, Jeffries concludes, qualified immunity offers an “extravagant” level of protection to government officials.<sup>123</sup>

A classic article by Richard Fallon and Daniel Meltzer expresses a similar half measure of support for qualified immunity. The article argues that as long as there exists “a general structure of constitutional remedies adequate to keep government within the bounds of law,” the availability of liability turning on novel legal developments ought to be analyzed under a framework that “sometimes tolerates situations in which individual victims receive no effective redress.”<sup>124</sup> The *Harlow* regime, the argument continues, fits comfortably within such a framework.<sup>125</sup> Nevertheless, the article calls official-immunity principles “troublesome” and says that they “restrict the availability of effective individual redress for constitutional violations far more” than Fallon and Meltzer would have liked.<sup>126</sup>

Whatever one’s position, the point is that an important conflict underlies the conversation surrounding qualified immunity. On the one hand, the doctrine not only survives, but also thrives under the Supreme Court’s continuing cultivation. On the other, a significant segment of the legal community stands opposed, and scholars have done much to undermine the justices’ stated reasons for embracing the doctrine. Indeed, the Court knows about Baude’s recent work, but most of its members apparently remain committed to the same course as before.<sup>127</sup> There is thus reason to believe that qualified immunity rests on something more than the justices’ own accounts disclose—and that uncovering and confronting other bases for the doctrine may prove useful in seeking steps forward.

## II. BRINGING IN THE *BIVENS* BACKGROUND

Critiques of qualified immunity tend to overlook or underrate something important. Consider Baude’s article. The central concern relates to the

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123. Jeffries, *supra* note 29, at 91.

124. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1736 (1991).

125. *Id.* at 1821 (“Although individual redress is sacrificed under the *Harlow* immunity standard, other remedies, such as injunctions and the exclusion of evidence obtained through police misconduct, remain available to maintain a judicial check against government lawlessness.”).

126. *Id.* at 1738.

127. Justice Sotomayor cited Baude’s article on qualified immunity in her *Kisela* dissent. *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). And Justice Thomas cited it in a separate opinion in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment), where he surprised observers by indicating an openness to doing away with qualified immunity, *see, e.g.*, Perry Grossman, *Clarence Thomas to the Rescue?*, SLATE (June 21, 2017, 1:24 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/06/in\\_ziglar\\_v\\_abbasi\\_clarence\\_thomas\\_signals\\_his\\_support\\_for\\_civil\\_rights.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/in_ziglar_v_abbasi_clarence_thomas_signals_his_support_for_civil_rights.html) [https://perma.cc/MQH6-SJC7]. Noting that the parties had not asked the Court to reconsider the doctrine in *Abbasi*, Thomas urged his colleagues to do so “[i]n an appropriate case.” *Abbasi*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in the judgment).

*Harlow* standard's validity vis-à-vis a proper interpretation of § 1983. As a formal matter, however, *Harlow* had nothing to do with § 1983. The plaintiff sued two senior aides to President Nixon for eliminating his position with the Air Force in retaliation for congressional testimony protected by the First Amendment, so the constitutional claim arose under *Bivens*.<sup>128</sup> Indeed, observers often regard the *Bivens* aspect of *Harlow*'s heritage as mere historical happenstance.<sup>129</sup> But as this Part argues, Supreme Court opinions suggest that the *Bivens* context supplied *Harlow* both a methodological margin and a structural rationale, with the latter resting on deeply held separation-of-powers concerns.

#### A. Previous Understandings

Judges and others have sometimes noted that the origin of qualified immunity in a *Bivens* case might bear on its operation or legitimacy in the § 1983 context. The inquiry, however, has usually stopped short of exploring the issue in an extended way. In one dissent, for example, Justice Scalia remarked that *Harlow* and another qualified-immunity decision were “technically distinguishable” from the case at bar “in that they involved not the statutory cause of action against state officials created by Congress in § 1983, but the cause of action against federal officials inferred from the Constitution by this Court in *Bivens*.”<sup>130</sup> But, Scalia said, *Harlow* and the other decision “made nothing of that distinction, citing § 1983 cases in support of their holdings.”<sup>131</sup> He therefore dropped the issue.

Indeed, the literature exhibits a widespread assumption that *Harlow* responded to perceived problems with constitutional-tort litigation in general rather than with the *Bivens* regime in particular. Under this view, qualified immunity took root in a *Bivens* action instead of a § 1983 suit largely by “happenstance and accident.”<sup>132</sup> The most nuanced version of this view permits the possibility that the *Bivens* context, as an area grounded in federal common law, supplied the methodological freedom necessary for *Harlow* to loosen the chains of statutory interpretation that had shackled qualified immunity to historical defenses in the § 1983 context.<sup>133</sup> Proponents of this

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128. *Harlow v. Fitzgerald*, 457 U.S. 800, 802–05 (1982); see also *Nixon v. Fitzgerald*, 457 U.S. 731, 733–39 (1982).

129. See, e.g., Baude, *supra* note 3, at 50 n.14 (stating that “one might imagine that [the *Bivens* cause of action] would have produced distinct questions of unwritten immunity” but that “so far, the [Supreme] Court has mechanically equated the two sets of immunities”).

130. *Burns v. Reed*, 500 U.S. 478, 498 n.1 (1991) (Scalia, J., dissenting).

131. *Id.*

132. Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE U. L. REV. 939, 961 (2014).

133. See *id.* at 955 (“[T]he Court seems to have dramatically altered qualified immunity doctrine in the context of *Bivens* actions when it had less need (if any at all) to shape the doctrine as a matter of statutory interpretation. The doctrine may have been trending in this direc-

possibility sometimes suggest that it was therefore improper for the Supreme Court to expand the new standard into the § 1983 domain.<sup>134</sup>

The methodological-freedom point seems right, especially given the Court's concurrent invocations of historical traditions when recognizing immunities in the § 1983 context.<sup>135</sup> Moreover, in a case decided shortly after *Harlow*, Justice Marshall (with whom Justice Blackmun joined and Justice Brennan agreed) suggested that the Court enjoyed greater flexibility to expand immunities in *Bivens* actions than in § 1983 suits.<sup>136</sup>

But was there more to the relationship between *Bivens* and *Harlow*? James Pfander posits that the connection ran deeper than a mere facilitative function in a particular respect. He argues that the “pressure for a uniform federal standard that led in part to the recognition of *Bivens* liability” following the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*<sup>137</sup> “also produced a federal immunity rule” because “[v]ictims and government officials alike can make a strong claim for a consistent federal standard.”<sup>138</sup> But Pfander points out that “the need for a uniform standard does not necessarily entail federal judicial control of the content of the standard or the adoption of the *Harlow* rule.”<sup>139</sup>

As for judicial control and content, at least a couple of scholars have suggested that official-immunity doctrines could be viewed as court-

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tion, but it was in the context of *Bivens* that matters of policy took the reins completely and the Court abandoned any common law underpinnings to immunity doctrine.”)

134. See, e.g., Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 68 (1989); Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of Harlow v. Fitzgerald to Section 1983 Actions*, 38 EMORY L.J. 369, 383–84 (1989) [hereinafter Gildin, *Immunizing Intentional Violations*]; Gary S. Gildin, *The Standard of Culpability in Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 587 (1983); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 984 (1989); Stephen J. Shapiro, *Public Officials' Qualified Immunity in Section 1983 Actions Under Harlow v. Fitzgerald and Its Progeny: A Critical Analysis*, 22 U. MICH. J.L. REFORM 249, 267–68 (1989).

135. See, e.g., *Pulliam v. Allen*, 466 U.S. 522, 529–42 (1984) (judicial immunity), *superseded in part by statute*, Federal Courts Improvement Act of 1996, Pub. L. No. 104–317, 110 Stat. 3847 (codified at 42 U.S.C. § 1983 (2012)); *Imbler v. Pachtman*, 424 U.S. 409, 417–29 (1976) (prosecutorial immunity).

136. *Briscoe v. LaHue*, 460 U.S. 325, 364 n.33 (1983) (Marshall, J., dissenting) (“In my view, we should be even more reluctant to import absolute immunities into § 1983 suits than into *Bivens* actions. First, with § 1983 we deal with explicit statutory language indicating the broad scope of the action, whereas *Bivens* actions have been implied by the federal courts. Second, the need to restrain state action implicit in the 14th Amendment is implicated by § 1983 suits, while that Amendment has no relevance to suits against federal officials.”); *id.* at 346 (Brennan, J., dissenting) (expressing agreement with the relevant portion of Marshall's dissent).

137. 304 U.S. 64 (1938).

138. James E. Pfander, *Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN ST. L. REV. 1387, 1415–16 (2010).

139. *Id.* at 1416.

sponsored efforts to curtail the availability of constitutional-tort causes of action. Baude says that someone could “imagine a separate and distinct two-wrongs-make-a-right argument for qualified immunity in the *Bivens* context,”<sup>140</sup> like the argument that Scalia advanced in the *Monroe v. Pape* context.<sup>141</sup> And Richard Fallon says that “one might well think of official immunity as limiting the scope of causes of action for damages.”<sup>142</sup> These suggestions are both hypothetical and parenthetical. But as the analysis below argues, Supreme Court jurisprudence traces the outlines of just such an account, rooted in separation-of-powers concerns.

### B. *The Separation-of-Powers Line of Logic*

By situating *Harlow* within the pertinent jurisprudential context, it becomes evident that the *Bivens* backdrop likely loomed larger than previous commentators have credited. The *Bivens* regime emerged during a time when the Supreme Court regularly recognized implied causes of action in the statutory sphere. As it moved away from this practice for separation-of-powers reasons, the Court increasingly looked askance at *Bivens* actions too. *Harlow* provided an oblique opportunity to act on this escalating skepticism.

#### 1. *Bivens’s Rise and Retrenchment*

The Supreme Court decided *Bivens*, which involved a warrantless arrest of the plaintiff and search of his home, in 1971. The Court acknowledged that neither the Constitution nor any congressional enactment expressly provided for damages liability against federal officials for constitutional violations.<sup>143</sup> Nevertheless, the Court stated that “where federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant the necessary relief.”<sup>144</sup> Ultimately, the Court held that the plaintiff was “entitled to recover money damages for any injuries he has suffered as a result of the [defendants’] violation of the [Fourth] Amendment.”<sup>145</sup>

Within the next decade, the Court recognized implied constitutional causes of action in two additional cases. The first was *Davis v. Passman*,<sup>146</sup> a 1979 decision allowing an individual to sue a former congressman under the

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140. Baude, *supra* note 3, at 63 n.99.

141. See *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (discussing *Monroe v. Pape*, 365 U.S. 167 (1961)); see also *supra* text accompanying notes 101–105. Because the Supreme Court has “mechanically equated the two sets of immunities” under § 1983 and *Bivens*, however, Baude declines to “consider them separately.” Baude, *supra* note 3, at 50 n.14.

142. Fallon, *supra* note 72, at 487.

143. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971).

144. *Id.* at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

145. *Id.* at 397.

146. 442 U.S. 228 (1979).

Due Process Clause of the Fifth Amendment for terminating her employment because of her sex.<sup>147</sup> The second was *Carlson v. Green*,<sup>148</sup> a 1980 decision permitting the family of a deceased prisoner to sue the director of the federal Bureau of Prisons under the Punishments Clause of the Eighth Amendment for failing to provide proper medical care.<sup>149</sup>

*Bivens* came from a divided Court. Justice Brennan wrote the opinion for a five-justice majority, and Justice Harlan concurred in the judgment.<sup>150</sup> Chief Justice Burger and Justices Black and Blackmun each wrote a dissent, all arguing that the Court offended separation-of-powers principles by recognizing a cause of action without congressional authorization.<sup>151</sup> *Davis* and *Green*, both also penned by Brennan,<sup>152</sup> demonstrated continuing division. In *Davis*, Burger and Justices Stewart, Powell, and Rehnquist all dissented.<sup>153</sup> In *Green*, only Burger and Rehnquist dissented,<sup>154</sup> but Powell, joined by Stewart, authored an acerbic concurrence in the judgment.<sup>155</sup> With one unimportant exception,<sup>156</sup> all of the separate opinions in *Davis* and *Green* echoed the *Bivens* dissents by referencing separation-of-powers concerns.<sup>157</sup>

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147. *Davis*, 442 U.S. at 244–45.

148. 446 U.S. 14 (1980).

149. *Green*, 446 U.S. at 20.

150. *Bivens*, 403 U.S. at 389, 398.

151. *Id.* at 411–12 (Burger, C.J., dissenting) (“I dissent from today’s holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power.”); *id.* at 428 (Black, J., dissenting) (“[T]he point of this case and the fatal weakness in the Court’s judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.”); *id.* at 430 (Blackmun, J., dissenting) (“I had thought that for the truly aggrieved person other quite adequate remedies have always been available. If not, it is the Congress and not this Court that should act.”).

152. *Green*, 446 U.S. at 15; *Davis*, 442 U.S. at 229.

153. *Davis*, 442 U.S. at 249–55.

154. *Green*, 446 U.S. at 30–54.

155. *Id.* at 25–30.

156. In *Davis*, Stewart dissented on the ground that the Court should have vacated the judgment and remanded the case for the court of appeals to address an immunity under the Speech or Debate Clause. *Davis*, 442 U.S. at 251 (Stewart, J., dissenting). Rehnquist joined Stewart’s opinion but also joined the other two dissents. *Id.* at 249 (Burger, C.J., dissenting); *id.* at 251 (Stewart, J., dissenting); *id.* (Powell, J., dissenting).

157. *Id.* at 249 (Burger, C.J., dissenting) (“I dissent because, for me, the case presents very grave questions of separation of powers . . . Congress could, of course, make *Bivens*-type remedies available to its staff employees—and to other congressional employees—but it has not done so.”); *id.* at 252 (Powell, J., dissenting) (criticizing the majority’s discussion of the federal judiciary’s purported “obligation to entertain private suits that Congress has not authorized” and arguing that “[i]n the present case, . . . principles of comity and separation of powers should require a federal court to stay its hand”); *Green*, 446 U.S. at 29 (Powell, J., concurring in the judgment) (“In my view, the Court’s willingness to infer federal causes of action that can-

The Supreme Court has since taken a dim view of this line of precedent. As *Ziglar v. Abbasi*<sup>158</sup> put it in 2017, to understand *Bivens*, *Davis*, and *Green*,

it is necessary to understand the prevailing law when they were decided. In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this “*ancien régime*,” the Court assumed it to be a proper judicial function to “provide such remedies as are necessary to make effective” a statute’s purpose. Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself.<sup>159</sup>

According to the *Abbasi* Court, *Bivens* essentially imported this framework from the statutory context into the constitutional context, but afterward, “the arguments for recognizing implied causes of action for damages began to lose their force.”<sup>160</sup>

Indeed, by 1975, the Court had started to sour on the implication practice in the statutory arena,<sup>161</sup> and in 1979, the Court declared that “the judicial task was . . . ‘limited solely to determining whether Congress intended to create the private right of action asserted.’”<sup>162</sup> Judges, the Court ultimately said, must “interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.”<sup>163</sup> Without such an intent, the Court concluded, “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”<sup>164</sup>

In view of this evolution, the Court has refused to recognize implied constitutional claims beyond the specific circumstances of *Bivens*, *Davis*, and *Green*. By repudiating *Bivens*’s rationale, Justice Kennedy’s majority opinion in *Abbasi* left little hope for change. The Court stated that “it is a significant step under separation-of-powers principles for a court to determine that it

not be found in the Constitution or in a statute denigrates the doctrine of separation of powers and hardly comports with a rational system of justice.”); *id.* at 30 (Burger, C.J., dissenting) (stating that he had thought that *Bivens*, where he expressed separation-of-powers concerns, was “wrongly decided”); *id.* at 34 (Rehnquist, J., dissenting) (“In my view, it is ‘an exercise of power that the Constitution does not give us’ for this Court to infer a private civil damages remedy from the Eighth Amendment or any other constitutional provision. The creation of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority.” (citation omitted) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 428 (1971) (Black, J., dissenting))). In *Davis*, the justices’ concerns about interbranch conflict also revolved around the fact that the basis for the plaintiff’s suit was a congressman’s personnel decision. *See Davis*, 442 U.S. at 249–51 (Burger, C.J., dissenting); *id.* at 251–55 (Powell, J., dissenting).

158. 137 S. Ct. 1843 (2017).

159. *Abbasi*, 137 S. Ct. at 1855 (citations omitted) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), and *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

160. *Id.*

161. *See id.* at 1855–56 (collecting cases beginning with *Cort v. Ash*, 422 U.S. 66 (1975)).

162. *Id.* at 1856 (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979)).

163. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

164. *Id.* at 286–87.

has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation.”<sup>165</sup> Hence, *Abbasi* reaffirmed that “expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity.”<sup>166</sup> *Abbasi* even declared it “possible that the analysis in the Court’s three *Bivens* cases might have been different if they were decided today.”<sup>167</sup>

Several scholars have suggested that *Abbasi* “all but overrules *Bivens*.”<sup>168</sup> But others believe that the eulogy for *Bivens* is premature.<sup>169</sup> *Abbasi* itself said that “it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose.”<sup>170</sup> Moreover, the Court continued, “[t]he settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.”<sup>171</sup> So *Bivens* seems secure for the moment, at least in its original Fourth Amendment space.<sup>172</sup>

165. *Abbasi*, 137 S. Ct. at 1856.

166. *Id.* at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

167. *Id.* at 1856.

168. Michael Dorf, *SCOTUS Severely Narrows Civil Rights Suits Against Federal Officers*, DORF ON LAW (June 19, 2017, 12:44 PM), <http://www.dorfonlaw.org/2017/06/scotus-severely-narrows-civil-rights.html> [<https://perma.cc/KZV9-WLFL>]; see, e.g., Shirin Sinnar, *The Ziglar v. Abbasi Decision: Unsurprising and Devastating*, SLS BLOGS: LEGAL AGGREGATE (June 20, 2017), <https://law.stanford.edu/2017/06/20/the-ziglar-v-abbasi-decision-unsurprising-and-devastating/> [<http://perma.cc/H87E-M3K2>]; Steve Vladeck, *On Justice Kennedy’s Flawed and Depressing Narrowing of Constitutional Damages Remedies*, JUST SECURITY (June 19, 2017), <https://www.justsecurity.org/42334/justice-kennedys-flawed-depressing-narrowing-constitutional-damages-remedies/> [<https://perma.cc/2TLW-LK9S>].

169. E.g., Richard M. Re, *The Nine Lives of Bivens*, PRAWFSBLAWG (June 22, 2017, 8:30 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/06/the-nine-lives-of-bivens.html> [<https://perma.cc/JDT6-BPJU>].

170. *Abbasi*, 137 S. Ct. at 1856.

171. *Id.* at 1857.

172. *Abbasi* was decided by a six-member bench because of recusals by Justices Sotomayor and Kagan and because the oral argument occurred before Justice Gorsuch joined the Court. See *id.* at 1851. The majority therefore consisted only of Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Id.* The slim line-up seems unimportant, however, for there is little reason to think that either Gorsuch or Justice Kavanaugh, who has since replaced Kennedy, would disagree with the majority’s cabining of the *Bivens* regime. See *Meshal v. Higgenbotham*, 804 F.3d 417, 429–30 (D.C. Cir. 2015) (Kavanaugh, J., concurring) (“The [Supreme] Court has emphasized that it is ordinarily Congress’s role, not the Judiciary’s, to create and define the scope of federal tort remedies. As the Court has explained, *Bivens* carved out only a narrow exception to that bedrock separation of powers principle.”); *id.* at 431 (“If I were a Member of Congress, I might vote to enact a new tort cause of action to cover a case like [the one at bar]. But as judges, we do not get to make that decision.”); Harsh Voruganti, *Judge Neil Gorsuch – Nominee to be Associate Justice of the Supreme Court: Part Five – Bivens and 1983*, VETTING ROOM (Mar. 21, 2017), <https://vettingroom.org/2017/03/21/judge-neil-gorsuch-nominee-to-be-associate-justice-of-the-supreme-court-part-five-bivens-and-1983/> [<https://perma.cc/9AVT-YR7B>] (“In his twelve years on the Tenth Circuit, Gorsuch has voted to dismiss *Bivens* and § 1983 cases over 60 times, while only voting to grant in a handful of

How does *Harlow* fit into this history? In 1982, the year that it decided *Harlow*, the Supreme Court had recently started rejecting the “*ancien regime*” of recognizing implied statutory causes of action.<sup>173</sup> And, fresh from bruising battles in *Davis* and *Green*, the Court would soon begin rebuffing attempts to expand *Bivens* beyond the confines of the first three cases. Indeed, the Court would ultimately refuse to recognize implied constitutional claims in every subsequent case to decide the issue.<sup>174</sup> *Harlow* thus stood astride a jurisprudential inflection point at which *Bivens* faced a developing danger from several justices’ separation-of-powers concerns with the judicial recognition of implied causes of action.

To be sure, in *Butz v. Economou*, the Court had said that “[t]he presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution” but that “once this analysis is completed, there is no reason to return again to the absence of congressional authorization in resolving the question of immunity.”<sup>175</sup> Four members of the Court had apparently disagreed with that statement even then, however, signing on to a separate opinion dissenting in relevant part and suggesting that the absence of congressional authorization was indeed pertinent to the immunity issue.<sup>176</sup>

Importantly, the defendant government officials in *Harlow* framed the matter closely along the lines of the justices’ growing skepticism toward the *Bivens* remedy. In his opening statement, their attorney characterized official immunity as a means of preventing “the already slack criteria for inferring a private cause of action from a constitutionally protected right” from being “stretch[ed] completely out of shape.”<sup>177</sup> Consequently, the arc of the Court’s jurisprudence implies a separation-of-powers connection between *Bivens* and *Harlow*, and the defendants’ argument corroborates this connection.

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cases. . . . Looking at Gorsuch’s *Bivens* and § 1983 jurisprudence, it is difficult to see a commitment to check government power.”).

173. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

174. *See Abbasi*, 137 S. Ct. at 1855.

175. 438 U.S. 478, 503 (1978).

176. *Economou*, 438 U.S. at 525–26 (Rehnquist, J., concurring in part and dissenting in part).

177. Transcript of Oral Argument at 15–16, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (No. 79-1738). The defendants’ attorney was also in favor of adopting an objective standard for qualified immunity on the ground that doing so “would be a contraction of the very wide ramifications of the combination of *Butz* against *Economou* on the one side and *Bivens* on the other.” *Id.* at 22. This “combination,” the attorney said, had “generate[d] over 2,000 *Bivens* type cases now pending, of which to date only nine have resulted in the award of damages.” *Id.* He characterized this as “an enormous volume of litigation with dubious public policy benefit.” *Id.* The briefing was of a piece. *See Reply Brief for Petitioners Harlow & Butterfield, Nixon v. Fitzgerald*, 457 U.S. 731 (No. 79-1738), 1981 WL 390512, at \*8–9 & n.5.

## 2. Justice Powell's Relevance

Strengthening this connection are the views of Justice Powell, *Harlow's* author. Dissenting in *Davis* and concurring in the judgment in *Green*, Powell staked out an ambivalent and idiosyncratic approach to the *Bivens* regime—an approach that later resonated throughout *Harlow*.

Powell strongly opposed recognizing implied causes of action in the statutory setting, arguing that the practice violated constitutional separation-of-powers rules. In his 1979 dissent in *Cannon v. University of Chicago*,<sup>178</sup> for instance, he declared that “the unconstitutionality of the course pursued has now been made clear’ and compels us to abandon the implication doctrine.”<sup>179</sup>

Powell's resistance to implied causes of action carried over into the *Bivens* setting, albeit to a lesser degree. In *Green*, Powell wrote that “the Court's willingness to infer federal causes of action that cannot be found in the Constitution or in a statute denigrates the doctrine of separation of powers and hardly comports with a rational system of justice.”<sup>180</sup> He expressed similar sentiments in *Davis*.<sup>181</sup> He was unwilling to repudiate the *Bivens* regime entirely, however, and in this context, he pitched his separation-of-powers concerns on subconstitutional terrain.<sup>182</sup>

Notwithstanding these objections, Powell embraced the *Bivens* regime's broad understanding of the judicial role by advocating a wide berth for “principled discretion.”<sup>183</sup> He said that “[a] plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task.”<sup>184</sup> In carrying out this task, he argued, courts should “take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy.”<sup>185</sup> Powell, moreover, did not be-

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178. 441 U.S. 677 (1979).

179. *Cannon*, 441 U.S. at 742 (Powell, J., dissenting) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938)).

180. *Carlson v. Green*, 446 U.S. 14, 29 (1980) (Powell, J., concurring in the judgment).

181. See *Davis v. Passman*, 442 U.S. 228, 252 (1979) (Powell, J., dissenting) (criticizing the majority's discussion of the federal judiciary's purported “obligation to entertain private suits that Congress has not authorized” and arguing that “[i]n the present case, . . . principles of comity and separation of powers should require a federal court to stay its hand”).

182. See *id.* at 252–53 (stating that “at least since *Bivens*,” it had “been clear” that “in appropriate circumstances private causes of action may be inferred from provisions of the Constitution” but that the Court had “recognized that the principle of separation of powers continues to have force as a matter of policy”); see also *Green*, 446 U.S. at 29 n.2 (Powell, J., concurring in the judgment) (“I do not suggest that courts enjoy the same degree of freedom to infer causes of action from statutes as from the Constitution.”).

183. *Green*, 446 U.S. at 26 (Powell, J., concurring in the judgment) (quoting *Davis*, 442 U.S. at 252 (Powell, J., dissenting)).

184. *Id.* at 28; see also *Davis*, 442 U.S. at 252 (Powell, J., dissenting).

185. *Green*, 446 U.S. at 28 (Powell, J., concurring in the judgment) (alteration in original) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407

lieve that judicial discretion to shape the contours of constitutional adjudication was limited to the question whether to recognize implied causes of action. He declared it “settled,” for instance, that “where discretion exists, a variety of factors rooted in the Constitution may lead a federal court to refuse to entertain an otherwise properly presented constitutional claim,” citing several federalism-related abstention decisions.<sup>186</sup> And he implicitly acknowledged that qualified immunity could provide a functional backstop to undesired expansions of *Bivens* liability.<sup>187</sup>

To put everything together, Powell thought that although courts could authorize *Bivens* suits, they should use that authority sparingly for reasons grounded in separation-of-powers principles—and that they should contemplate a wide range of policy considerations in doing so. Moreover, Powell endorsed applying a similar framework to other areas where judicial discretion could influence constitutional adjudication. And he indicated an awareness that official-immunity rules could limit the effects of the *Bivens* regime.

It requires little imagination to see how all of this seems to have mapped onto Powell’s majority opinion in *Harlow*. There, the Court set aside the direct *Bivens* question concerning the existence of a cause of action under the First Amendment,<sup>188</sup> for the issue was apparently not properly presented.<sup>189</sup> But *Harlow* still offered an indirect opportunity to sap the strength of the *Bivens* regime by bolstering qualified immunity. In short, the Court—and especially Justice Powell—likely saw enhancing immunity protections as a suitable substitute for reining in *Bivens* itself.

Powell’s case file for *Harlow* is consistent with this possibility in several ways. The papers, for instance, suggest that Powell alighted on the objective standard for qualified immunity in the middle of the drafting process: the majority apparently had not assented to this formulation when the opinion

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(1971) (Harlan, J., concurring in the judgment)); *Davis*, 442 U.S. at 252 (Powell, J., dissenting) (same).

186. See *Davis*, 442 U.S. at 253 n.2 (Powell, J., dissenting).

187. In *Green*, the majority reasoned that concerns about overdetering officials from effectively performing their duties were irrelevant to the *Bivens* analysis because “qualified immunity . . . provides adequate protection.” *Green*, 446 U.S. at 19. Powell’s opinion plainly recognized the push-pull that this understanding of the two doctrines entailed: *Bivens* would begin where qualified immunity ended. See *id.* at 27 (Powell, J., concurring in the judgment) (noting that the majority concluded that “qualified immunity affords all the protection necessary to ensure the effective performance of official duties”).

188. *Harlow v. Fitzgerald*, 457 U.S. 800, 820 n.36 (1982).

189. See Brief for Respondent, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (No. 79-1738), 1981 WL 389866, at \*42 (“The district court’s ruling that Fitzgerald has constitutional and implied statutory causes of action was not appealable as a collateral order, nor was it certified for interlocutory appeal under 28 U.S.C. § 1292(b). The issue was not before the court of appeals. In their petition for a writ of certiorari, Harlow and Butterfield did not present the question for review. Rather, they expressly informed this Court that the issue was not ‘immediately appealable’ and that it was not included in their notices of appeal to the court of appeals.” (citation omitted) (quoting Petition for Writ of Certiorari at 14 n.9, *Harlow*, 457 U.S. 800 (No. 80-945))).

assignment went out.<sup>190</sup> He also expressed concerns about the Court's statutory-implication jurisprudence when corresponding with a colleague.<sup>191</sup> And he appears to have personally requested that his clerk add a footnote disclaiming any approval of the district court's recognition of a *Bivens* cause of action and suggesting that the matter could be reconsidered on remand.<sup>192</sup> To be sure, the case file does not seem to spell out an anti-*Bivens* attitude toward qualified immunity in so many words. But the majority opinion in *Harlow* is in harmony with Powell's overarching approach to *Bivens* claims.

### C. *One Wrinkle*

One wrinkle bears considering before moving on. The plaintiff in *Harlow* sued not only under *Bivens* to vindicate his First Amendment rights, but also under two federal statutes to vindicate subconstitutional rights to testify before Congress.<sup>193</sup> Neither statute "expressly create[d] a private right to sue for damages," and the Court remanded the question whether to recognize implied causes of action for the lower courts to consider alongside the *Bivens* issue.<sup>194</sup> Someone could thus argue that *Harlow* was not a pure *Bivens* case in the way that the separation-of-powers aspect of the structural account advanced here might suggest.

Any such argument should not detain the analysis long. Notwithstanding the presence of statutory claims, the Court focused on the First Amendment claim in fashioning the standard for qualified immunity. Indeed, the Court often discussed the doctrine as if it applied in the constitutional context only.<sup>195</sup> And Justice Brennan's concurrence, which Justices Marshall and

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190. See Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Richard H. Fallon, Law Clerk, U.S. Supreme Court (Mar. 1, 1982), in 84 POWELL PAPERS 3, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1139&context=casefiles> [<https://perma.cc/468G-ZD63>].

191. Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to John Paul Stevens, Assoc. Justice, U.S. Supreme Court (Mar. 12, 1982), in POWELL PAPERS, *supra* note 190, at 11.

192. See Justice Lewis F. Powell, Jr., No. 80-945, *Harlow v. Fitzgerald* 1 (Feb. 15, 1982) (unpublished draft opinion), in POWELL PAPERS, *supra* note 190, at 324 (expressing a desire to address "the *Bivens* issue" in edits directed to his clerk); Justice Lewis F. Powell, Jr., *Harlow and Butterfield v. Fitzgerald* 18 n.31 (Feb. 27, 1982) (unpublished chamber draft), in POWELL PAPERS, *supra* note 190, at 283 (adding a *Bivens*-related footnote).

193. *Harlow*, 457 U.S. at 805 & n.10.

194. *Id.* at 805-06, 819-20, 820 n.36.

195. See, e.g., *id.* at 814 ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."). But the Court did not always limit its discussion of qualified immunity to the constitutional context. See, e.g., *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 . . .").

Blackmun joined, discussed qualified immunity vis-à-vis constitutional claims exclusively.<sup>196</sup>

In light of the evidence outlined here, therefore, there is little reason to think that the incidental presence of statutory claims weakens the contention that *Harlow* rested in part on separation-of-powers objections to the *Bivens* regime. Indeed, for the reasons discussed below, the Court treated the violence that a qualified-immunity standard arising in the *Bivens* context might do to statutory causes of action as collateral damage—or even as a welcome consequence.

### III. EXPLORING THE § 1983 EXTENSION

The Supreme Court soon expanded the *Harlow* standard beyond the *Bivens* environment into the separate § 1983 domain. This Part begins by outlining previous academic appraisals of that maneuver. It then reconsiders the Court's reasoning for stretching the *Harlow* standard to cover state officials, revealing a line of logic rooted in federalism concerns.

#### A. Previous Understandings

There was no § 1983 claim at issue in *Harlow*.<sup>197</sup> Nevertheless, the majority chose to address that context in the following footnote, which quoted the Supreme Court's 1978 opinion in *Butz v. Economou*:

This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983. We have found previously, however, that it would be “untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.”<sup>198</sup>

A few scholars have suggested that this remark represented a mere statement of fact, such that the Court reserved for another day the question whether the new qualified-immunity standard would govern § 1983 suits.<sup>199</sup> But most commentators have apparently long viewed *Harlow* as answering that question.<sup>200</sup> Moreover, in the § 1983 case of *Sanborn v. Wolfel*,<sup>201</sup> the Court

196. See, e.g., *id.* at 820–21 (Brennan, J., concurring) (“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 821 (“[T]he clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes.”).

197. *Id.* at 818 n.30 (majority opinion).

198. *Id.* (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

199. See, e.g., Shapiro, *supra* note 134, at 267 & n.122.

200. See, e.g., Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 148 n.38; Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 691 n.31 (2014); Seth P. Waxman & Trevor W.

granted the petition for certiorari, vacated the judgment, and remanded with instructions for the court of appeals to consider *Harlow*, which had come down just four days earlier. As is customary with “grant, vacate, and remand” (GVR) dispositions, the Court provided very little reasoning. But it did include a quotation of the same statement from *Economou* on which the footnote in *Harlow* relied.<sup>202</sup>

In any event, *Davis v. Scherer*,<sup>203</sup> issued two years later by a Court with the same composition as in *Harlow* and also authored by Justice Powell, made clear that the *Harlow* standard governed § 1983 suits.<sup>204</sup> There, the Court blessed applying *Harlow* to the § 1983 proceeding at bar with (among other statements) the following portion of a footnote, which again cited *Economou*: “*Harlow* was a suit against federal, not state, officials. But our cases have recognized that the same qualified immunity rules apply in suits against state officers under § 1983 and in suits against federal officers under *Bivens* . . . .”<sup>205</sup> This footnote also pointed out that *Harlow*’s holding referenced “clearly established statutory or constitutional rights,”<sup>206</sup> which *Scherer* said embraced the statutory-rights component of § 1983.<sup>207</sup>

Accordingly, the claim that the *Bivens* backdrop appears to have inspired the rise of *Harlow*-style qualified immunity is one of inclusion rather than exclusion. Although a separation-of-powers response to the *Bivens* regime likely played an important part in producing the *Harlow* standard, it did not constitute the whole picture. Indeed, the Court seems to have simultaneously accepted and even welcomed the prospect of expanding the new standard into the § 1983 setting.

There are many possible reasons why the Court thought that the *Harlow* model should apply in the § 1983 context. The only one that it initially cited, however, was a desire to adhere to the statement from *Economou*. And that choice has received very little scrutiny. For even when scholars appreciate the path-dependent history of the *Harlow* standard, they seem often simply to accept the Court’s snippet-like references to *Economou* as sufficient to justify importing that standard from the *Bivens* arena to the § 1983 setting.<sup>208</sup> A few scholars, however, have dug a bit deeper.

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Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2209 n.42 (2003); Stephanie E. Balcerzak, Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 133 n.34 (1985); Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 915 n.81 (1984).

201. 458 U.S. 1102 (1982).

202. *Wolfel*, 458 U.S. at 1102 (citing *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

203. 468 U.S. 183 (1984).

204. *Scherer*, 468 U.S. at 190–91, 193–95, 197.

205. *Id.* at 194 n.12 (citing *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

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

207. *Scherer*, 468 U.S. at 194 n.12.

208. See, e.g., sources cited *supra* note 200.

In *Economou*, the Court stated that it would have been “untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.”<sup>209</sup> As framed by an argument made by the defendants, the question that the Court was addressing was whether to ramp down the protection previously afforded federal officials in some actions (absolute immunity) to match that afforded state officials in § 1983 suits (good-faith immunity).<sup>210</sup> Answering in the affirmative, the Court said that allowing federal officials to claim absolute immunity as a matter of course would have eviscerated the *Bivens* regime.<sup>211</sup> Thus, the argument from some scholars goes, *Economou* established the “equivalency between the two kinds of constitutional tort cases . . . in a case which reduced the insulation afforded federal officials to the same level as that of their state counterparts, in order to preserve the efficacy of a parallel remedy that the Court created judicially.”<sup>212</sup>

With the *Harlow* regime, the Court did the opposite. It increased the insulation afforded federal officials to a higher level than that of their state counterparts and then increased the insulation afforded state officials to a corresponding degree, with both moves reducing access to corrective measures.<sup>213</sup> This exercise, the argument proceeds, improperly elevated the mere means by which the Court adjusted official-immunity standards in *Economou* (rendering them equivalent for federal and state officials) above the more important ends for which it did so (preserving a rights-protective cause of action).<sup>214</sup>

Put differently, some scholars see the original sin against *Economou* as *Harlow*'s election to strengthen the protection available to federal officials beyond that previously available to state officials. That decision, they reason, both disrupted the parallel nature of official immunity in the *Bivens* and § 1983 contexts and made constitutional rights more difficult to enforce. These scholars thus conclude that the Court's subsequent election to extend the same protection to state officials served to obscure rather than absolve this initial transgression.<sup>215</sup>

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209. *Butz v. Economou*, 438 U.S. 478, 504 (1978).

210. *See id.* at 485–504.

211. *See id.* at 501.

212. Oren, *supra* note 134, at 982–83 (emphasis omitted).

213. *See id.*

214. *See id.*

215. *See* Gildin, *Immunizing Intentional Violations*, *supra* note 134, at 382 (stating that the reasoning in the *Harlow* footnote extending the new qualified-immunity standard to § 1983 cases “is facially unassailable, which no doubt accounts for its universal acceptance by the Supreme Court and lower federal courts,” but that “[w]hen it made the policy judgment to abrogate the subjective tier of the immunity in *Harlow*, the Court abandoned the leading premise of its syllogism—that the immunity of federal officials must be no greater than the immunity of state officers”).

### B. *The Federalism Line of Logic*

The preceding argument from prior scholarship looks more to the broader context than to the specific reasoning of *Economou*. Aside from preserving *Bivens* by declining to endorse absolute immunity for such causes of action in particular, why did the Supreme Court apparently believe it important for state and federal officials to bear equivalent burdens in general? And why did *Harlow* and its progeny come to the same conclusion under much different circumstances? Venturing answers to these questions uncovers a murky federalism connection that may help explain the Court's decision to expand the *Harlow* standard into the § 1983 sphere.

#### 1. The Reasoning Behind *Economou*

Recall that in 1974, the Supreme Court extended the good-faith immunity available in § 1983 suits from the false-arrest context of *Pierson v. Ray* to state-level executive action at large in *Scheuer v. Rhodes*.<sup>216</sup> Then in 1978, the Court extended the same immunity to *Bivens* actions in *Economou*.<sup>217</sup> The Court's reasoning suggests at least four explanations for this aspect of *Economou*—which one could call the “equivalence directive.” As the following discussion makes plain, the fourth is especially relevant here.

The first explanation turns on a broad understanding of binding precedent. “The Court's opinion in *Scheuer*,” said *Economou*, “relied on precedents dealing with federal as well as state officials, analyzed the issue of executive immunity in terms of general policy considerations, and stated its conclusion . . . in the same universal terms.”<sup>218</sup> Consequently, *Economou* concluded that “[t]he analysis presented in [*Scheuer*] cannot be limited to actions against state officials.”<sup>219</sup> But to the extent that *Scheuer*, a § 1983 case, said anything about *Bivens* actions, such statements were plainly dicta.

Of course, the rationales for applying a particular immunity standard in § 1983 suits could have carried persuasive force in the *Bivens* context. Hence, the second explanation for the equivalence directive: *Economou* stated that “*Scheuer* was intended to guide the federal courts in resolving th[e] tension” between “the plaintiff's right to compensation” and “the need to protect the decisionmaking processes of an executive department” in “the myriad factual situations in which it might arise.”<sup>220</sup> The Court continued: “[W]e see no reason why [*Scheuer*] should not supply the governing principles for resolving this dilemma in the case of federal officials.”<sup>221</sup> Someone could view these statements (and others) as asserting that the same policy notions that sup-

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216. See *supra* text accompanying notes 37–41.

217. See *supra* text accompanying notes 42–43.

218. *Butz v. Economou*, 438 U.S. 478, 503–04 (1978).

219. *Id.* at 504.

220. *Id.* at 503.

221. *Id.*

ported employing good-faith immunity in the § 1983 context of *Scheuer* supported doing the same in the *Bivens* context of *Economou*.<sup>222</sup>

Assuming that policy notions are a proper source of law in the *Bivens* arena, it is not obvious that the considerations driving how courts handle constitutional claims against state officials will always apply to suits against federal officials. Basic noninterference principles would warrant pausing over that proposition in at least some circumstances. The Court declared just a few years before *Economou*, after all, that the concept of “Our Federalism” occupies “a highly important place in our Nation’s history and its future.”<sup>223</sup> This concept, the Court said, requires respect for the idea that “the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.”<sup>224</sup>

*Economou*’s discussion of lower-court cases subsequent to *Scheuer* suggests a third explanation for the equivalence directive: that a two-track standard for qualified immunity—one for state officials and one for federal officials—would prove unworkable in practice.<sup>225</sup> Certainly, a single standard would be most convenient.<sup>226</sup> But in *Economou*, at least, the losing contender for the standard to govern federal officials was absolute immunity, which is relatively easy to apply.<sup>227</sup> It is not extraordinary, moreover, for different standards to constrain the conduct of different classes of officials. Various federal statutes pertain only to federal actors, for instance.<sup>228</sup> In addition, courts could make clear how to assess which cause of action and affiliated immunity principles should apply to officials who act in joint federal–state capacities.<sup>229</sup> And intergovernmental indemnification agreements could alleviate lingering concerns.

222. These policy notions included avoiding “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,” as well as avoiding “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.” *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974).

223. *Younger v. Harris*, 401 U.S. 37, 44–45 (1971).

224. *Id.* at 44.

225. *See Economou*, 438 U.S. at 498–500.

226. *Economou*, for example, quoted one lower-court case saying that “the practical advantage of having just *one* federal immunity doctrine for suits arising under federal law is self-evident.” *Id.* at 499–500 (quoting *Mark v. Groff*, 521 F.2d 1376, 1380 (9th Cir. 1975)).

227. *Id.* at 485.

228. The Hatch Act provides a prominent example. *See Hatch Act*, P.L. 76-252, 53 Stat. 1147 (1939); *see also Hatch Act*, OFF. SPECIAL COUNS., <https://osc.gov/Pages/HatchAct.aspx> [<https://perma.cc/7KFC-WKJ7>] (explaining that the Hatch Act “limits certain political activities of federal employees, as well as some state, D.C., and local government employees who work in connection with federally funded programs”).

229. For example, issues surrounding officials acting in joint federal–state capacities often arise with respect to the National Guard. Courts appear generally to hold that constitutional-tort suits in this context sound in § 1983, not *Bivens*—but that the *Feres* doctrine and its offspring (which bar damages actions deriving from military-related disputes, *see Feres v.*

The fourth explanation for the equivalence directive is that “[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.”<sup>230</sup> As *Economou* made clear, the Bill of Rights originally restrained federal officials only: incorporation against the states came later with the Fourteenth Amendment.<sup>231</sup> So the Court suggested that it would have offended long-held constitutional commitments to allow federal officials to escape liability for violating individual rights where their state counterparts could not. Federalism concerns appear to have helped animate the equivalence directive from the very start.

## 2. Ensuing Entreaties Toward Equivalence

The Supreme Court relied on *Economou*'s equivalence directive to justify extending the *Harlow* standard from the *Bivens* arena to the § 1983 setting in *Harlow*, *Wolfel*, and *Scherer*.<sup>232</sup> Just as *Economou* appears to rest in significant part on federalism concerns, so too do these ensuing entreaties toward equivalence. In particular, the Court seems to have wanted to safeguard state actors in the name of federalism by requiring them to comply with constitutional commands no more demanding than their federal counterparts confronted.

Again, both the broader context and Justice Powell's jurisprudence support this notion. As for context, “the Burger Court sought to revitalize constitutional federalism” in multiple areas.<sup>233</sup> And a handful of scholars has long perceived a vague federalism justification for applying qualified immunity in the § 1983 setting.<sup>234</sup> As for Powell, he not only penned *Harlow* and *Scherer* (and, as it turns out, suggested that the Court quote the equiva-

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United States, 340 U.S. 135 (1950)), dispose of such claims. See, e.g., *Watson v. Ark. Nat'l Guard*, 886 F.2d 1004, 1005–08 (8th Cir. 1989).

230. *Economou*, 438 U.S. at 504.

231. See *id.*

232. See *supra* text accompanying notes 198–205.

233. Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between “Legitimate” and “Illegitimate” Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847, 868 (2013).

234. See, e.g., Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. ILL. L. REV. 147, 168–69 (stating that qualified immunity “prevents federal judges from intruding unnecessarily into areas of state and local prerogative”); Sheldon Nahmod, *The Long and Winding Road from Monroe to Connick*, 13 LOY. J. PUB. INT. L. 427, 427–28 (2012) (“The Court’s interest in federalism in the § 1983 setting includes an increasing concern with federal judicial intervention in, and second-guessing of, the decisions of local governments. Federalism, broadly defined, has affected . . . the extent of the absolute and qualified immunity of state and local government officials.”); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 59 (2015) (stating that “in the qualified immunity context, . . . federal courts exercise discretion to decide the constitutionality of acts committed by state officials against the backdrop of federalism concerns”).

lence directive in *Wolfel*<sup>235</sup>), but he also authored several opinions directly indicating a desire to rein in litigation against state-affiliated defendants or implicating state-affiliated interests for federalism-related reasons.<sup>236</sup>

Powell's dissent in *Owen v. City of Independence*<sup>237</sup> is especially revealing. There, the majority held that official immunity was unavailable for municipal entities sued under § 1983.<sup>238</sup> Joined by Chief Justice Burger and Justices Stewart and Rehnquist, Powell argued that "[i]mportant public policies" supported extending immunity protections to local governments.<sup>239</sup> He contended that withholding such protections "may restrict the independence of local governments and their ability to respond to the needs of their communities."<sup>240</sup> These concerns would have naturally translated into a belief that qualified-immunity doctrine should not have required state officials to comply with a more intrusive standard of conduct than their federal counterparts faced.<sup>241</sup>

In sum, the Supreme Court repeatedly justified extending the *Harlow* standard from the *Bivens* environment to the § 1983 sphere by invoking *Economou's* statement that it would be "untenable to draw a distinction for purposes of immunity law" between these contexts.<sup>242</sup> And jurisprudential clues suggest that a central aim of employing the equivalence directive in this way was to safeguard state actors for federalism reasons by subjecting them to commands no more demanding than their federal counterparts confronted.

Again, Justice Powell's *Harlow* papers lend this interpretation support. They show, for instance, that it was Powell who proposed the quotation of the equivalence directive in the *Wolfel* GVR.<sup>243</sup> And they show that when doing so, he told his colleagues that he "believe[d] that the *Harlow* standard

235. See *infra* note 243 and accompanying text.

236. See George Clemon Freeman, Jr., Dedication, *Justice Powell's Constitutional Opinions*, 45 WASH. & LEE L. REV. 411 (1988) (emphasizing federalism as a theme).

237. 445 U.S. 622 (1980).

238. *Owen*, 445 U.S. at 622.

239. *Id.* at 667 (Powell, J., dissenting).

240. *Id.* at 668.

241. A few other examples of relevant Powell opinions may prove helpful. As discussed above, Powell endorsed federalism-related abstention principles in *Davis v. Passman*, see *supra* text accompanying note 186, and as discussed below, he advocated applying more lenient standards to state actors than federal actors when incorporating constitutional rights against the states, see *infra* text accompanying notes 323–327. Powell was also a strong supporter of state sovereign immunity. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). And three days before *Harlow* was issued, he argued that § 1983 plaintiffs should be required to exhaust state administrative remedies before bringing suit. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 531–36 (1982) (Powell, J., dissenting).

242. *Butz v. Economou*, 438 U.S. 478, 504 (1978).

243. Memorandum to the Conference, Lewis F. Powell, Assoc. Justice, U.S. Supreme Court (June 23, 1982), in POWELL PAPERS, *supra* note 190, at 119.

should be applicable” to cases arising under § 1983.<sup>244</sup> Given his concern for furthering state and local interests in relevant contexts, the fact that Powell led the charge to expand the *Harlow* standard into the § 1983 domain strengthens the federalism connection posited here.

To review, prior scholarship has missed something significant about qualified immunity. The governing standard arose in *Harlow*, a *Bivens* case, and ample evidence suggests that this background may have contributed to the Supreme Court’s reasoning in multiple important and overlooked respects. These include supplying two potential justifications for enhancing the protection afforded by qualified immunity, both of which sound in constitutional structure. First, in articulating the *Harlow* standard, the Court appears to have responded to a perceived separation-of-powers problem underlying *Bivens*’s increase in liability with a corresponding increase in immunity. Second, in extending the *Harlow* standard from *Bivens* actions to § 1983 suits, the Court appears to have relied on a perceived federalism-related imperative not to hold state officials to a higher bar than federal officials encountered.

### C. *Two Qualifications*

Two qualifications are appropriate at this point. First, the focus here is on a particular structural account of qualified immunity—and, therefore, on *Harlow*, which most clearly crystallized this account. But the intent is not to imply that one should view these considerations of constitutional structure as the only, or even the primary, inputs in producing the doctrine—or that one should see *Harlow*’s publication as the only, or even the primary, moment that matters. Other forces, including additional structural factors and the factors on the face of the justices’ opinions, have surely played a role in shaping the Court’s thinking about qualified immunity. The primary consequence of this qualification is that the case for rejecting the doctrine must turn on analyses beyond the present examination. The discussion below thus explores the upshots of the structural account advanced here for the propriety of qualified immunity more generally.<sup>245</sup>

Second, this examination emphasizes Justice Powell’s positions. This is a valuable exercise because Powell authored *Harlow* and other pertinent opinions. But an individual justice does not a Supreme Court make. The discussion here thus points to Powell’s opinions primarily as underappreciated representatives of larger movements. Other justices, of course, have made significant marks on constitutional-tort jurisprudence too. Future projects examining such contributions should therefore prove fruitful in further illuminating this area.

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244. *Id.*

245. *See infra* Section IV.C.

## IV. ASSESSING THE STRUCTURAL ACCOUNT

The discussion so far has mostly sought to establish a structural account of qualified immunity as a descriptive matter. This Part assesses the normative purchase of this account. The conclusion is that neither the separation-of-powers principles nor the federalism concerns explored here provide sufficient support for the *Harlow* standard as applied in *Bivens* actions or § 1983 suits, respectively.

Some preliminary observations provide an important preface. Scholars rarely evaluate qualified immunity in a bifurcated way. But the fact that the *Harlow* standard developed along separate paths for *Bivens* actions and § 1983 suits helps illustrate why one should analyze the doctrine along distinct lines in these different contexts. Moreover, qualified immunity is not necessarily susceptible to the same criticisms in the federal-common-law setting of *Bivens* and the statutory setting of § 1983. And even if qualified immunity runs afoul of good interpretive principles on an a priori basis in the § 1983 domain, opponents cannot rest their case against the doctrine without confronting subsequent questions. Is the *Harlow* standard nevertheless justifiable in the *Bivens* context? If so, does that render it justifiable on an a posteriori basis in the § 1983 context?

Attempting to provide some answers, this Part appraises the merits and demerits of the separation-of-powers and federalism aspects of the structural account advanced here. These potential justifications for the current qualified-immunity regime are powerful in many respects. But they ultimately fail to vindicate the *Harlow* standard in either of the spaces in which they apply.

A. *The Separation-of-Powers Line of Logic*

Inherent in Supreme Court jurisprudence is the notion that the *Harlow* standard lessens the impact of *Bivens* in allowing courts to recognize implied constitutional claims. To assess whether this notion offers a legitimate separation-of-powers justification for the current qualified-immunity regime, the analysis must account for the perspectives of both *Bivens* advocates and *Bivens* antagonists.

1. *If Bivens Is Not Broken*

For those who believe that the *Bivens* regime rests on a lawful foundation, two primary possibilities present themselves. First, invoking the maxim *ubi jus, ibi remedium* (where there is a right, there is a remedy), some observers have argued that the Constitution commands that courts recognize *Bivens* claims, at least for some alleged violations or at least absent an effective alternative means for fully vindicating constitutional rights.<sup>246</sup> These ar-

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246. Akhil Amar has advanced a well-known version of this argument. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1485 (1987) (“The legal rights against governments enshrined in the Constitution strongly imply corresponding governmental obli-

guments have often enlisted, to quote a proponent, “one of the most important and inspiring passages”<sup>247</sup> from *Marbury v. Madison*.<sup>248</sup> This passage proclaims that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury”—and that “[o]ne of the first duties of government is to afford that protection.”<sup>249</sup>

Second, some commentators think that the Constitution permits, but does not require, the judiciary to recognize implied constitutional causes of action—at least, again, absent an effective alternative.<sup>250</sup> A prominent version of this view contends that the *Bivens* doctrine simply provides a damages remedy where both a legal right and jurisdiction to adjudicate that right already exist—and that courts have long possessed authority to select among traditional remedies under such circumstances.<sup>251</sup>

Someone who backs *Bivens* on either of these bases is unlikely to perceive a separation-of-powers problem necessitating a qualified-immunity solution.<sup>252</sup> Under the starkest version of the former view, in which each right always requires the availability of a damages remedy, qualified immunity must be unconstitutional. And even under the latter, more lenient view, adherents would seem likely to believe that the *Bivens* regime represents “a

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gations to ensure full redress whenever those rights are violated.”); *id.* at 1507 (discussing how *Bivens* “partially fulfilled” this principle). And John Harrison offers an insightful take. See John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 1021 (2008) (stating that “[t]he Fourth and Eighth Amendments . . . are among the Constitution’s closest analogs to the law of tort,” such that “[i]f the tort-like rules that they impose on government officers differ from the rules the ordinary private law imposes on private people, then it is certainly plausible to say that they must have their own tort-like remedy because they have their own tort-like content”). For other work in this general vein, see, for example, Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995).

247. Amar, *supra* note 246, at 1486.

248. 5 U.S. (1 Cranch) 137 (1803).

249. *Marbury*, 5 U.S. (1 Cranch) at 163.

250. Fallon and Meltzer’s theory of constitutional remedies fits into this category. Their article on constitutional remedies argues that “*Marbury*’s apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule.” Fallon & Meltzer, *supra* note 124, at 1778. The article therefore calls it “regrettable, but tolerable” that “[t]here historically always have been, and predictably will continue to be, cases in which effective individual redress is unavailable.” *Id.* at 1789. But “[w]hat would be intolerable,” it says, “is a regime of public administration that was systematically unanswerable to the restraints of law.” *Id.* The piece thus concludes that the primary question in deciding whether to recognize various constitutional remedies should be whether “an overall structure of remedies adequate to preserve” governmental accountability exists. *Id.*

251. See, e.g., *Davis v. Passman*, 442 U.S. 228, 236–48 (1979); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 405 (1971) (Harlan, J., concurring in the judgment).

252. This also holds true for those who back *Bivens* on a third basis: that subsequent legislative events have “preserve[d] and ratif[ied] the *Bivens* remedy” in a manner that “puts the *Bivens* action on a much firmer federal statutory foundation, analogous if not identical to § 1983.” James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121, 123 (2009).

central means of vindicating, rather than aggrandizing, separated powers” because “the purpose of constitutional rights is to constrain the political branches, and not the other way around.”<sup>253</sup> At bottom, this position affords courts substantial policymaking leeway, so the issue largely becomes whether the contours of qualified immunity make good sense. And for all of the reasons that others have adduced (ranging from Chemerinsky’s corrective-justice concerns to Huq’s distributive considerations to Schwartz’s practical problems—and beyond<sup>254</sup>), any attempt at defending the *Harlow* standard on policy grounds faces an uphill battle.

The separation-of-powers aspect of the structural account advanced here arises from an ostensibly restorative relationship between *Harlow* and *Bivens*. But this logic appears unlikely to persuade those who see no need to restore anything in the first place, and at any rate, the question largely collapses into a policy debate that advocates of qualified immunity appear to be losing. If *Bivens* is not broken, why fix it?

## 2. Silver Bullet or Square Peg

Others, of course, reject *Bivens*, viewing the regime as a judicial usurpation of legislative power (either as an initial or ongoing matter, setting aside different theories of *stare decisis*). Should these people see qualified immunity as a silver bullet for some portion of the *Bivens* problem, or should they see *Harlow* as having tried to fit a square peg into a round hole? The essence of the separation-of-powers reasoning explored above is that qualified immunity serves as a judge-made fix to a judge-made failure. But even for those who are amenable to such a consequentialist course of thought, the reasoning should fall flat.

Drawing on work by philosopher David Hume, Adrian Vermeule describes counteracting institutional maneuvers in constitutional implementation as “compensating adjustments.”<sup>255</sup> Put simply, this is “the idea that

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253. Vladeck, *supra* note 168 (emphasis omitted); see Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 796–97 (1989) (reasoning that “the unrepresentativeness of the federal judiciary . . . imposes a political obligation on the judiciary to enforce the countermajoritarian norms of the Constitution,” such that it “is consistent with constitutional democratic theory to entrust to the judiciary the final say as how best to enforce and protect basic constitutional rights and interests”). Of course, someone who supports the *Bivens* remedy in some instances could also take a big-picture approach to questions about the availability of constitutional-tort causes of action and official-immunity doctrines, eschewing all-or-nothing answers in favor of seeking the best balance between the competing concerns driving doctrinal developments as a package. See Fallon, *supra* note 72, at 480. While someone who takes this approach could be relatively open to qualified immunity, it would still stand to reason that “immunity doctrine, as currently framed, rests on a number of shaky assumptions” and that “there might be better tools for achieving the same purposes.” *Id.* at 481.

254. See *supra* Section I.B.

255. Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421 (2003). Others described the concept of compensating adjustments in American constitutional implementation before Vermeule’s article. See, e.g., Randy E. Barnett, *Reconceiving the Ninth*

multiple departures from the optimal or first-best constitutional arrangements might offset each other,” thereby “ensur[ing] constitutional equilibrium.”<sup>256</sup> This model seeks “simultaneously to identify both a departure from optimal constitutional design and an offsetting institutional adjustment that compensates for the initial defect.”<sup>257</sup> For instance:

If constitutional doctrine has permitted excessive delegations from Congress to the President—excessive on either an originalist or a functional account—then a laudable compensating adjustment would be to allow the legislative veto, congressional restrictions on the appointments power, and other structural innovations intended to check the presidential power, even if those innovations would otherwise be unconstitutional.<sup>258</sup>

And:

If the President’s veto power has been effectively undermined by the increasing incidence of omnibus legislation, which puts the President to an illegitimate all-or-nothing choice, then a laudable compensating adjustment would be to treat the Constitution as affording the President a line-item veto, even if that is not the best textual or original interpretation of the veto power.<sup>259</sup>

Other examples abound.<sup>260</sup>

Vermeule calls this theory “second-best constitutionalism” for a reason.<sup>261</sup> The whole idea rests on the notion that a first-best option exists. And that notion rests on the further notion that the constitution in question provides a determinative-enough rule of decision along whatever dimension the interpreter favors (originalism, pragmatism, etc.).

This observation produces two pertinent corollaries. First, only where the first-best option is actually or practically unavailable should one accept a second-best state of affairs. It may be preferable, therefore, to insist on restoring the former, if possible, rather than assent to enduring the latter.<sup>262</sup>

*Amendment*, 74 CORNELL L. REV. 1, 26 (1988); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 3 (1994). Still others have made valuable contributions to understandings of the concept since Vermeule’s article. See, e.g., Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733 (2005). I focus on Vermeule’s work, however, largely because of the relative clarity and detail with which he isolates and addresses the theoretical issues discussed here.

256. Vermeule, *supra* note 255, at 421.

257. *Id.*

258. *Id.* at 432 (footnotes omitted).

259. *Id.*

260. See *id.* at 429–33; see also Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 20–23 (2009).

261. Vermeule, *supra* note 255, at 421.

262. Vermeule assumes “an irreversible departure from, or violation of, ideal constitutional design.” *Id.* at 426. And he notes that “[t]he analogy here is to a technical idea in economics” that applies “[i]f perfect efficiency cannot be obtained.” *Id.* at 431 (citing R.G. Lipsey & R.K. Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956)).

Second, not all compensating adjustments are created equal. “A standard conceptual objection is that the policy of adjustment is indeterminate, as the interpreter may choose the margin on which the adjustment is made,” Vermeule explains.<sup>263</sup> For instance, “[i]f sweeping delegations produce excessive presidential power, why adjust by upholding the legislative veto, as opposed to, say, granting Congress the commander-in-chief power?”<sup>264</sup> Vermeule counters that second-best constitutionalism gives rise to some “easy cases.”<sup>265</sup> For instance, he says, “[i]f the growth of omnibus legislation has undermined the veto power, we need no elaborate theoretical apparatus to appreciate that permitting the (otherwise suspect) line-item veto is a more fitting compensating adjustment than, say, making the veto immune from congressional override.”<sup>266</sup>

Vermeule thus argues that some compensating adjustments are better than others, but he offers little explanation for why that may be. Baude advances the ball a bit. He draws a contrast between appropriate compensating adjustments on the one hand and Justice Scalia’s justification for qualified immunity in *Crawford-El v. Britton* on the other.<sup>267</sup> Recall that this justification contends that qualified immunity is permissible because *Harlow* contracted liability after *Monroe v. Pape* had incorrectly expanded it.<sup>268</sup> Baude points out that “[i]f one looks with a wide enough lens, one might say that it’s enough that the first decision erroneously expanded the number of lawsuits and the second decision will decrease the number of lawsuits.”<sup>269</sup> But, he asserts, “with the lens that wide nearly every doctrine of constitutional law and civil procedure would be swept in,” meaning that “[t]he theory would not provide special justification for the doctrine of qualified immunity.”<sup>270</sup> Instead, “to the extent that the original scheme had an animating purpose or logic, one would expect the adjustment to be consistent with that purpose.”<sup>271</sup>

What Vermeule and Baude appear to be driving toward is a distinction between the scope and substance of compensating adjustments. The best compensating adjustments, the thinking goes, respond not only to the quantitative aspects of the initial departures from optimal constitutional design

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263. *Id.* at 433–34.

264. *Id.* at 434.

265. *Id.*

266. *Id.*

267. See Baude, *supra* note 3, at 63, 68–69.

268. See *supra* text accompanying notes 101–105.

269. Baude, *supra* note 3, at 68.

270. *Id.*

271. *Id.* Thus, with respect to Scalia’s *Crawford-El* justification for qualified immunity, Baude says that “it would be a far closer approximation to the Frankfurterian scheme to require that § 1983 claims be exhausted or to substantively alter the doctrine for certain kinds of constitutional claims.” *Id.* at 68–69 (footnote omitted); see *supra* notes 107–109 and accompanying text.

by offering modifications of roughly analogous scope. They respond also to the qualitative aspects of the initial departures by offering modifications of roughly antagonistic substance. The latter feature seems to entail advantages of both principle and practicality, allowing compensating adjustments to address problems in particularized ways and to operate where the problems actually exist. So one might say that actions ought to have both equal and opposite reactions in the context of compensating adjustments.

This framework helps show why addressing sweeping delegations by allowing the legislative veto would be preferable to granting Congress the commander-in-chief power. The legislative veto would both reduce the problematic scope of presidential power in this context, its “excessive” quantity (to quote Vermeule),<sup>272</sup> and better counter the problematic substance of such power, its legislative quality. To combat increasing omnibus legislation, permitting the line-item veto would be superior to making the veto immune from congressional override for similar reasons. The line-item veto would both strengthen the veto power and bear a closer connection to the cause of the concern—Congress’s insistence on putting the president to “an illegitimate or all-or-nothing choice” (to quote Vermeule again).<sup>273</sup>

Applying this framework to the issue at hand suggests that qualified immunity represents a poor compensating adjustment for the separation-of-powers error ostensibly underlying the *Bivens* regime—or at least derives no “special justification” from that error.<sup>274</sup>

Returning to the two corollaries outlined above fleshes out why.<sup>275</sup> First, a compensating adjustment is necessary only where there has been an irreversible departure from optimal constitutional design.<sup>276</sup> From an anti-*Bivens* perspective, the departure here is a separation-of-powers problem: in recognizing implied constitutional causes of action, courts allegedly invade Congress’s domain. Any such problem, however, does not arise in the § 1983 context, and courts apply the same form of qualified immunity there. Of practical necessity, the range of a solution may sometimes exceed the range of the corresponding problem. This appears to be the case for both of the examples drawn from Vermeule’s work above. It would be difficult to limit the legislative veto to sweeping delegations for all of the reasons that the non-delegation doctrine requires hard line-drawing decisions. And similar challenges would likely beset efforts to confine the line-item veto to omnibus legislation. But there are good reasons why the *Harlow* standard need not govern both *Bivens* actions and § 1983 suits.<sup>277</sup> Consequently, even assuming that spillover effects are inevitable and therefore tolerable for some second-

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272. Vermeule, *supra* note 255, at 434.

273. *Id.* at 432.

274. Baude, *supra* note 3, at 68.

275. See *supra* notes 262–273 and accompanying text.

276. See *supra* note 262 and accompanying text.

277. See *supra* Section III.B.1.

best solutions (a question that deserves further academic attention), the present situation is not necessarily one of them.

Furthermore, overruling *Bivens* may be better than tolerating *Harlow*-style qualified immunity. This is especially so because Congress could respond by providing an express cause of action in *Bivens*'s place, thereby alleviating the separation-of-powers ailment allegedly afflicting the current system.

Second, the best compensating adjustments respond to departures from optimal constitutional design in both scope and substance.<sup>278</sup> Here again, the scope of *Harlow*'s separation-of-powers solution is overinclusive in the § 1983 setting because there is no separation-of-powers problem to which qualified immunity could respond. And it may be overinclusive or underinclusive (or both) in the *Bivens* arena. One simply does not know and cannot realistically ascertain the number (or nature) of *Bivens* actions that Congress would want courts to eliminate through an immunity mechanism.

More significantly, as for substance, the supposed solution fundamentally fails to address—and instead arguably exacerbates—the purported problem. Just as one can believe that Congress rather than the judiciary should craft federal causes of action, one can believe that Congress rather than the judiciary should generally craft federal defenses (subject to the understanding that statutory enactments incorporate common-law defenses absent contrary indications<sup>279</sup>). But as Pfander has observed, the Supreme Court's repeated refusals to expand the *Bivens* regime through unilateral action contrast sharply with its “remarkable willingness to re-fashion the rules of qualified immunity . . . without awaiting legislative guidance.”<sup>280</sup> This creates a “juxtaposition” indicative of a “Janus-faced,” “on-again, off-again attitude toward the legitimacy of judge-made law.”<sup>281</sup>

A comparative peek at two passages from *Ziglar v. Abbasi* illustrates this point. In addressing whether a *Bivens* action was available, the Court explained that separation-of-powers concerns mandate the careful consideration of “‘who should decide’ whether to provide for a damages remedy, Congress or the courts?”<sup>282</sup> The majority declared that “[t]he answer most often will be Congress.”<sup>283</sup> In particular, the Court said, “[w]hen an issue ‘involves a host of considerations that must be weighed and appraised,’ it should be committed to ‘those who write the laws’ rather than ‘those who

278. See *supra* notes 263–273 and accompanying text.

279. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1099 (2017) (“Statutes of course trump unwritten rules, just as new statutes trump old ones. But an unwritten legal rule, like an old statute, governs of its own force until something else abrogates it. A common law duress defense might interrupt the operation of a criminal statute, even though the statute outranks the defense.”).

280. Pfander, *supra* note 138, at 1391.

281. *Id.* at 1391, 1405.

282. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

283. *Id.*

interpret them.’”<sup>284</sup> For “[i]t 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.”<sup>285</sup> In the *Bivens* context, the Court said, these burdens include both the monetary costs accompanying “defense and indemnification” and “the time and administrative costs attendant upon intrusions resulting from the discovery and trial process.”<sup>286</sup>

A few pages later, *Abbasi* addressed qualified immunity. There, the Court described how its own precedent “seeks a proper balance between two competing interests.”<sup>287</sup> On the one hand, the Court remarked, “damages suits ‘may offer the only realistic avenue for vindication of constitutional guarantees.’”<sup>288</sup> But on the other, “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.”<sup>289</sup> Accordingly, *Abbasi* explained, “[a]s one means to accommodate these two objectives,” the Court has sought to “give[] officials ‘breathing room to make reasonable but mistaken judgments about open legal questions.’”<sup>290</sup>

These passages are in some tension. The Court’s tone suggests, after all, that it is largely illegitimate for the judiciary to determine which claims should proceed based on competing cost considerations in the *Bivens* context but perfectly fine for it to do the same thing in the qualified-immunity context.<sup>291</sup> Perhaps the Court was only half-serious in saying that such issues “should be committed to ‘those who write the laws’ rather than ‘those who interpret them’”?<sup>292</sup>

In short, the two possible separation-of-powers wrongs represented by these passages do not make a constitutional right in the same manner as the compensating adjustments that Vermeule endorses. And that is so for reasons similar to Baude’s argument for why qualified immunity represents a problematic response to Scalia’s criticism of the *Monroe* regime in *Crawford-El*.<sup>293</sup> Even if the doctrine addresses the scope of the departure from optimal

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284. *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

285. *Id.* at 1858.

286. *Id.* at 1856.

287. *Id.* at 1866.

288. *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

289. *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

290. *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

291. Perhaps one way to think about these two contexts is that they both pertain to “beneficial powers” of the judiciary and should therefore stand or fall together. See Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 743 (2001).

292. *Abbasi*, 137 S. Ct. at 1857 (quoting *Bush v. Lucas*, 462 U.S. 380 (1983)).

293. See *supra* notes 101–109 and accompanying text.

constitutional design in a proportional way, which is far from clear, it fails to address the substance of the departure in a principled manner.<sup>294</sup>

These impressions are all contestable. Thoroughgoing consequentialists could refuse to worry themselves with the means of undermining judges' ability to recognize implied constitutional claims where the ends of qualified immunity accomplish this goal.<sup>295</sup> But anti-*Bivens* individuals would seem more likely to subscribe to formalist modes of constitutional reasoning than pervasively consequentialist ones. Otherwise, they would be unlikely to embrace the relatively rigid separation-of-powers principles that lead many to reject the *Bivens* regime. Other skeptics might contend that three-plus decades of legislative silence in declining to supersede *Harlow* by statute demonstrate approval of the decision.<sup>296</sup> But inaction is a thin reed on which to rest a doctrine as momentous as qualified immunity. And numerous institutional forces combine to favor stasis over advance even in some instances where a majority of congresspeople would endorse a proposal in the abstract.<sup>297</sup> On balance, therefore, the separation-of-powers aspect of the structural account advanced here appears to provide no persuasive argument for qualified immunity in the *Bivens* context (at least over and above any number of other ways that one could reduce the sum of such suits).

### B. *The Federalism Line of Logic*

Now assume that a separation-of-powers rationale—or any other rationale, for that matter—justifies qualified immunity in the *Bivens* context. Would some principle of federalism then justify applying the *Harlow* stand-

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294. One could ask what an appropriate compensating adjustment might look like. To the extent that *Bivens* empowers courts at the expense of Congress, an ideal modification would involve empowering Congress at the expense of courts along some related line. Perhaps, for example, the legislature should be allowed to nullify the outcome of *Bivens* verdicts, contra *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and possibly due-process principles. A less drastic maneuver (although arguably not a classical compensating adjustment) might involve conditioning the availability of *Bivens* actions on the absence of effective alternative congressional remedies. As it happens, however, *Bivens* doctrine has long incorporated just such a principle (albeit not limited to congressional remedies), see *Abbasi*, 137 S. Ct. at 1858, which may simply show that *Bivens* has not taken the legal system as far afield from optimal constitutional design as some suggest. The point is that variations like these, unlike the *Harlow* standard, would embody some attempt to respond to the substance, not just the scope, of separation-of-powers concerns with the *Bivens* regime.

295. See Baude, *supra* note 3, at 68 (suggesting that the power of Scalia's *Crawford-El* dissent "depends a lot on how brutal a compensating adjustment is allowed to be").

296. See *id.* at 80 (suggesting the argument that "[b]ecause qualified immunity has been on the books for years and Congress has declined to revisit it, it may have obtained a belated Congressional imprimatur").

297. There is a great deal of literature on this topic, of course. But Judge Easterbrook put the matter especially well when he wrote that "[t]here are a hundred ways in which a bill can die even though there is no opposition to it." Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 538 (1983); see also William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 98–99 (1988).

ard in the § 1983 context, as the Supreme Court has suggested by repeatedly relying on the equivalence directive from *Butz v. Economou*? Three such theories bear considering: an equal-sovereignty principle arising from structural inferences, the incorporation doctrine arising from Section 1 of the Fourteenth Amendment, and the congruence-and-proportionality concept arising from Section 5 of the Fourteenth Amendment.

### 1. Equal Sovereignty

Equal sovereignty is a prominent yet provocative concept. The notion became notorious after the Supreme Court's 2013 decision in *Shelby County v. Holder*,<sup>298</sup> where Chief Justice Roberts's majority opinion declared that "[n]ot only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States."<sup>299</sup> *Shelby County* acknowledged that the concept first emerged in the context of "the admission of new States" into the Union.<sup>300</sup> The Court insisted, however, that "the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States."<sup>301</sup> *Shelby County* proceeded to invalidate an important provision of the Voting Rights Act that subjected different states to different standards.<sup>302</sup>

Justice Ginsburg's dissent countered that beyond the admission context, equal sovereignty existed only as dicta in another opinion by Roberts,<sup>303</sup> *Northwest Austin Municipal Utility District No. One v. Holder*.<sup>304</sup> Scholars tend to agree.<sup>305</sup> Indeed, *Shelby County* "prompted savage criticism not only from the left, but also from the right."<sup>306</sup>

*Shelby County*'s arguable conception of equal sovereignty as presumptively proscribing disparate treatment among the states is controversial enough. No one appears to have endorsed a similar principle proscribing

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298. 570 U.S. 529 (2013).

299. *Shelby County*, 570 U.S. at 544 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

300. *Id.*

301. *Id.*

302. *Id.* at 544–57.

303. *Id.* at 587–89 (Ginsburg, J., dissenting).

304. 557 U.S. 193 (2009).

305. See, e.g., Jon Greenbaum et al., *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 HOW. L.J. 811, 852–54 (2014); Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 732–33 (2014); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2133–34 (2015); Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1208–12 (2016).

306. Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1089–90 & nn.5–9 (2016) (collecting sources); see also Jeffrey M. Schmitt, *In Defense of Shelby County's Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 210 & nn.8–14 (2016) (collecting sources and noting that "[s]cholars have attacked the equal sovereignty principle with a surprising degree of unanimity and contempt").

disparate treatment between the states on the one hand and the federal government on the other. And the elemental structure of American government—as reflected, for instance, in the text of the Supremacy Clause<sup>307</sup>—would contradict any such contention.

Some scholars, however, have offered a more nuanced theory of equal sovereignty. The key, they claim, is not equal treatment in all circumstances, but equal respect for basic sovereign prerogatives.<sup>308</sup> Because the states retained and the federal government received the fundamental attributes of sovereignty at the founding,<sup>309</sup> this theory would seem to require a minimum measure of equality between the two levels of government. Accordingly, one could argue that the same standard for qualified immunity must govern both *Bivens* actions and § 1983 suits to the extent that constitutional-tort litigation would otherwise infringe basic sovereign prerogatives.

But for at least two reasons, constitutional-tort actions against government officials in their personal capacities do not appear to violate any such principles. First, important to arguments about state sovereignty is a theory about what the concept entails. Timothy Zick, for instance, invokes social-construction theory to derive four “constitutive rules” of state sovereignty.<sup>310</sup> These include the “rule of preservation,” which protects the “necessary existence” of states within the constitutional system; the “rule of separateness,” which provides that states retain “exclusive control” over composing their governments; the “rule of participation,” which “preserves a substantial role for the states in national governance”; and the “rule of interpretive independence,” which “provides that the states should generally be free to interpret their own laws and constitutions.”<sup>311</sup>

Zick notes that these rules define a baseline rather than the boundaries of state sovereignty.<sup>312</sup> But there is little reason to think that § 1983 suits affront this or any other credible model of the concept. States have no legitimate interests in allowing their officials to violate federal constitutional rights. And states are not required to satisfy § 1983 judgments from their public fiscs.<sup>313</sup> Indeed, the idea that constitutional-tort litigation against gov-

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307. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

308. See Colby, *supra* note 306, at 1148–59; Schmitt, *supra* note 306, at 219–22.

309. See *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (“It is incontestible that the Constitution established a system of ‘dual sovereignty.’ Although the States surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty.’” (citation omitted) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), and *THE FEDERALIST* NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961))).

310. Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 288–93 (2005).

311. *Id.*

312. *Id.* at 292.

313. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68–69, 69 n.24 (1997).

ernment officials in their personal capacities offends state sovereignty would run counter to the tenet that such suits generally do not impose constitutionally significant burdens on states qua states.<sup>314</sup> Naturally, responding to § 1983 suits against individual officers may effectively require states to expend resources (by, say, handling discovery requests). But courts do not generally consider indirect obligations in analogous contexts suspect.<sup>315</sup> And the financial burden does not seem substantial enough to raise the kind of state-sovereignty concerns that have caused the Supreme Court to condemn federal actions in other areas.<sup>316</sup>

At bottom, the constitutional dimensions of § 1983 neither require nor forbid any “primary conduct” that the Bill of Rights, through the Fourteenth Amendment, does not already regulate.<sup>317</sup> So the notion that constitutional-tort litigation against state officials infringes basic sovereign prerogatives would seem fairly far-fetched.

The second reason that constitutional-tort actions against individual officials do not appear to disturb any basic sovereign prerogatives is that federal authority may reach its zenith—and equal-sovereignty concerns, their nadir—when the government implements the Reconstruction Amendments,<sup>318</sup> as § 1983 does.<sup>319</sup> To quote Thomas Colby:

Reconstruction probably did not radically alter the basic architecture of federalism generally, including the inherent structural principle of equal state sovereignty, but it did bring about a sea change in the federal–state balance in one particular regard: the ability of the federal government to protect the fundamental rights of the people from state infringement.<sup>320</sup>

Put simply, “the history supports a claim that Congress should be afforded greater leeway to bend the equal sovereignty principle when it is acting pursuant to its Thirteenth, Fourteenth, and Fifteenth Amendment enforcement powers.”<sup>321</sup> Thus, the civil-rights setting may make it permissible for quali-

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314. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104–05 (1984). Although this principle is plainly contestable in the injunction environment, it stands on firmer logical and historical footing in the damages domain. See *id.* at 109 n.21.

315. See *South Carolina v. Baker*, 485 U.S. 505, 523 (1988) (“[U]nder current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals.”).

316. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (plurality opinion) (holding the Affordable Care Act’s Medicaid expansion unconstitutionally coercive for threatening states with potentially crippling budgetary losses).

317. *Tennessee v. Lane*, 541 U.S. 509, 559–60 (2004) (Scalia, J., dissenting).

318. See Colby, *supra* note 306, at 1159–70; see also Schmitt, *supra* note 306, at 248–51.

319. See *Monroe v. Pape*, 365 U.S. 167, 171 (1961) (stating that § 1983 represents “one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment”).

320. Colby, *supra* note 306, at 1167–68 (footnotes omitted).

321. *Id.* at 1168.

fied immunity to overstep any otherwise applicable equal-sovereignty principle.

All in all, no one seems to have proposed that an equal-sovereignty principle governs the relationship between the states and the federal government; any equal-treatment version appears groundless; any sovereign-prerogatives version appears inapposite given the limited impact of personal-capacity constitutional-tort suits on states qua states; and § 1983's foundation in the Fourteenth Amendment renders the appeal of any such principle especially tenuous in the present context.

## 2. The Fourteenth Amendment

Contemplating the Fourteenth Amendment calls to mind two more potential bases for the equivalence directive, the first sounding in Section 1 and the second, in Section 5.

The Supreme Court has concluded that Section 1's Due Process Clause<sup>322</sup> incorporates at least most of the Bill of Rights against the states.<sup>323</sup> Early cases adopted a model where "even when a right set out in the Bill of Rights was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from the protection or remedies provided against abridgement by the Federal Government."<sup>324</sup> The Court later "abandoned" this model as "incongruous," holding that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'<sup>325</sup> But Justice Powell resisted this move, arguing that the Court should continue to distinguish between the content of the Bill of Rights and the content of due process.<sup>326</sup> Holding states to the same standards as the federal government, he said, "derogates principles of federalism that are basic to our system," particularly the principle of allowing the states "freedom to experiment" with policies "different from the federal model."<sup>327</sup>

322. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

323. See *McDonald v. City of Chicago*, 561 U.S. 742, 758–59 (2010); see also *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019). Justice Thomas, however, has advanced a substantial argument that Section 1's Privileges or Immunities Clause actually performs this function. See *McDonald*, 561 U.S. at 805–50 (Thomas, J., concurring in part and concurring in the judgment); see also *Timbs*, 139 S. Ct. at 691–93 (Thomas, J., concurring in the judgment).

324. *McDonald*, 561 U.S. at 761 (citing *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949), overruled by *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), and *Betts v. Brady*, 316 U.S. 455, 473 (1942), overruled by *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963)).

325. *Id.* at 765 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)).

326. See *Johnson v. Louisiana*, 406 U.S. 356, 373 (1972) (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca v. Oregon*, 406 U.S. 404 (1972)); see also *McDonald*, 561 U.S. at 766 n.14 (explaining that Powell alone held this view in *Apodaca*).

327. *Johnson*, 406 U.S. at 375–76 (Powell, J., concurring).

The question whether the *Harlow* standard should govern § 1983 suits does not concern incorporation, of course. But it does concern whether “incorporated Bill of Rights protections ‘are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.’”<sup>328</sup> And it also concerns the extent to which states enjoy the “freedom to experiment” with policies “different from the federal model.”<sup>329</sup> Consequently, one could view the equivalence directive as an analogical compromise between the majority’s position and Powell’s position on the incorporation issue.

One could also look to Section 5 of the Fourteenth Amendment<sup>330</sup> to support employing the equivalence directive in the *Harlow* context. In 1997, the Supreme Court described the contours of Congress’s power under this provision in *City of Boerne v. Flores*,<sup>331</sup> which invalidated the Religious Freedom Restoration Act (RFRA) as applied against the states. RFRA had reinstated the framework that governed the First Amendment’s Free Exercise Clause before the Court’s decision in *Employment Division v. Smith*.<sup>332</sup> For Congress to legislate under Section 5, *Flores* said, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>333</sup> RFRA, the Court held, ran afoul of this rule because it was substantive, not prophylactic or remedial, in nature.<sup>334</sup> This, the Court said, constituted “a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”<sup>335</sup>

What does *Flores* have to do with *Harlow*? Although *Harlow* was formally a remedial decision, one could characterize it as functionally restricting the substance of individual rights in the context of damages suits against federal officials. Indeed, it is not unusual for scholars to do so.<sup>336</sup> Under this view, someone could argue that § 1983 could not call for enforcing the Fourteenth Amendment more strictly against state officials than *Harlow* calls for enforcing individual rights against federal officials without transgressing the congruence-and-proportionality concept (or an anticipatory variant of the concept, since *Harlow* predates *Flores*). Put differently, § 1983 arguably represents an appropriate remedial measure under the federalism principles

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328. *McDonald*, 561 U.S. at 765 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)).

329. *Johnson*, 406 U.S. at 375–76 (Powell, J., concurring).

330. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

331. 521 U.S. 507 (1997).

332. 494 U.S. 872 (1990); see *Flores*, 521 U.S. at 512.

333. *Flores*, 521 U.S. at 520.

334. *Id.* at 529–36.

335. *Id.* at 534.

336. See, e.g., Fallon, *supra* note 72, at 485 (“[O]fficial immunity doctrines perform an equilibrating function by diminishing the social costs that constitutional rights would have if officers who violated them were always strictly liable in suits for damages.”).

embodied in Section 5 only if it includes the defense of *Harlow*-style qualified immunity. The protection afforded by that standard, after all, sets the lowest common denominator between the schemes for holding federal officials versus state officials accountable in damages for constitutional violations.

These potential justifications for expanding the *Harlow* standard into the § 1983 sphere may seem promising, but for several reasons, neither succeeds. To start, the Supreme Court does not appear to have drawn any connection between the scope of the *Harlow* standard and Section 1 or 5. So the intent underlying the expansion likely had nothing to do with avoiding problems under the Fourteenth Amendment.

In addition, any principle that arises from Section 1 or 5 ought to govern all matters implicating those provisions. At a minimum, this set includes all § 1983 claims involving the Bill of Rights (for Section 1 undergirds the general ability to enforce such rights against the states,<sup>337</sup> and Section 5 undergirds the specific ability to do so through a congressionally created cause of action<sup>338</sup>). But qualified immunity applies only to claims for damages against executive officials involving discretionary conduct.<sup>339</sup> It does not apply, for instance, to claims for injunctive relief,<sup>340</sup> claims against municipal entities,<sup>341</sup> or claims involving nondiscretionary behavior.<sup>342</sup> If some model of qualified immunity represented a constitutional minimum required by Section 1 or 5 of the Fourteenth Amendment, it should reach those kinds of claims under § 1983 as well. Although this point does not directly address whether the qualified-immunity standards applicable to state and federal defendants must match one another, it provides a powerful argument against locating any such imperative in Section 1 or 5 of the Fourteenth Amendment.

Setting the functionalist perspective momentarily aside, there is little reason to think that § 1983 operates as a backdoor for dictating the content of constitutional rights. Section 1983 is far more plainly remedial than RFRA was,<sup>343</sup> simply making a cause of action available for certain independent wrongs.<sup>344</sup> To quote the Supreme Court, although reasonable minds could “disagree[] regarding the scope of Congress’s ‘prophylactic’ enforcement

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337. See *McDonald v. City of Chicago*, 561 U.S. 742, 754–66 (2010).

338. See *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

339. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 818 (1982).

340. See *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

341. See *Owen v. City of Independence*, 445 U.S. 622 (1980).

342. Some decisions hold that qualified immunity does not apply to suits challenging merely ministerial actions. See, e.g., *Groten v. California*, 251 F.3d 844, 851 (9th Cir. 2001). Others hold that qualified immunity does not apply to suits challenging conduct that falls beyond the scope of the defendant’s job responsibilities. See, e.g., *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265–67 (11th Cir. 2004).

343. See *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (“RFRA cannot be considered remedial . . .”).

344. See *Tennessee v. Lane*, 541 U.S. 509, 559–60 (2004) (Scalia, J., dissenting).

powers” under Section 5, “no one doubts” that Section 5 “grants Congress the power to ‘enforce . . . the provisions’ of the Amendment by creating private remedies against the States for *actual* violations of those provisions.”<sup>345</sup>

In any event, to say that *Harlow* functionally restricted the substance of individual rights may conflate rights and remedies in a fashion antithetical to *Flores* itself, which maintained a “decisive distinction” between the two.<sup>346</sup> Or, paradoxically, if the functionalist literature is correct that rights and remedies are ontologically inseparable ideas,<sup>347</sup> the congruence-and-proportionality concept is problematic in the first place. Levinson, for instance, argues that “the question of whether prophylactic rules are really remedies or really redefinitions of rights” is “empty and indeterminate.”<sup>348</sup> For “[i]f the very same prophylactic rules . . . may either be built into the definitions of rights or stand apart as remedies, nothing about the nature of any given prophylactic rule will reveal whether it is ‘really’ a remedy or a right.”<sup>349</sup>

Sections 1 and 5 of the Fourteenth Amendment offer plausible theoretical hooks for the otherwise amorphous inkling that federalism principles require courts to apply equivalent qualified-immunity standards to state and federal officials. But neither provision ultimately justifies that notion.

### 3. Freestanding Federalism

A proponent of the present qualified-immunity model could try to salvage the federalism rationale for applying the *Harlow* standard in the § 1983 setting by attempting to invoke a general norm of federal–state parallelism in constitutional enforcement.

As an initial matter, one could respond by arguing that such a norm is by no means universal. There is a substantial disparity between the frameworks for enforcing constitutional rights against federal and state officials, for instance, in the sense that the range of rights that a plaintiff can vindicate through a *Bivens* action is far narrower than the range of rights that a plaintiff can vindicate through a § 1983 suit.

Furthermore, some of the most prominent examples of federal–state parallelism are distinguishable. *Brown v. Board of Education*<sup>350</sup> prohibited racial segregation in public schools. *Brown*’s holding, however, applied only to states because it arose from the Fourteenth Amendment’s Equal Protection Clause. In *Bolling v. Sharpe*,<sup>351</sup> issued the same day as *Brown*, the Supreme Court held that the Fifth Amendment’s Due Process Clause required

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345. *United States v. Georgia*, 546 U.S. 151, 158 (2006).

346. Levinson, *supra* note 72, at 865.

347. *See supra* text accompanying notes 72–73.

348. Levinson, *supra* note 72, at 917 (emphases omitted).

349. *Id.*

350. 347 U.S. 483 (1954).

351. 347 U.S. 497 (1954).

the same result for Washington, D.C. The Court stated that “[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”<sup>352</sup> But the actual basis for the decision was a discrete due-process rule. Segregation in public schools, the Court held, was “not reasonably related to any proper governmental objective” and thus arbitrarily deprived black students of liberty.<sup>353</sup>

As another example, *Hurd v. Hodge*<sup>354</sup> held that federal courts could not enforce racially restrictive covenants, just as *Shelley v. Kraemer*<sup>355</sup> had held for state courts under the Fourteenth Amendment’s Equal Protection Clause. In *Hurd*, the Court stated that “[w]e cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.”<sup>356</sup> But the actual basis for the decision was a federal statute and, in the alternative, a contract-law doctrine.<sup>357</sup> Of the latter, the Court said, “[t]he power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States.”<sup>358</sup>

Accordingly, in both cases, the Court grounded its reasoning in particular legal principles, not in (or at least in addition to) general concerns about federal–state parallelism.<sup>359</sup> Issues of parallelism in constitutional enforcement warrant further attention. At bottom, however, attempting to justify expanding the *Harlow* standard into the § 1983 setting on these grounds appears to represent an appeal to what John Manning has termed “freestanding federalism.”<sup>360</sup>

The Constitution, Manning contends, “defines ‘federalism’ only through its adoption of a number of particular measures that collectively reflect the background aim of establishing a federal system.”<sup>361</sup> Thus, he argues, “[t]reating that background aim as a freestanding legal norm devalues the choice to bargain over, settle upon, and present to the ratifying conventions

352. *Bolling*, 347 U.S. at 500.

353. *Id.*

354. 334 U.S. 24 (1948).

355. 334 U.S. 1 (1948).

356. *Hurd*, 334 U.S. at 35–36.

357. *Id.* at 30–36.

358. *Id.* at 34–35.

359. See David E. Bernstein, Essay, *Bolling*, *Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253, 1253–54 (2005) (discussing *Bolling*); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 409–10 (1995) (discussing *Bolling*); Richard Primus, Essay, *Constitutional Expectations*, 109 MICH. L. REV. 91, 103 n.75 (2010) (discussing *Hurd*).

360. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004 (2009).

361. *Id.* at 2040 (emphasis omitted).

a cluster of relatively, even if imperfectly, specified means to achieve that aim.”<sup>362</sup> One way to understand Manning’s point is that one cannot properly conjure legal doctrine out of mere intuitions about the way that federalism should operate in the constitutional system.<sup>363</sup> But that seems to be just what the federalism aspect of the structural account advanced here entails.

In sum, neither equal sovereignty nor incorporation nor congruence and proportionality can justify employing the equivalence directive to apply the *Harlow* standard to § 1983 suits. Instead, inappropriate notions of free-standing federalism appear to lie at the heart of such reasoning. The federalism aspect of the structural account advanced here thus fails to justify the current qualified-immunity regime.

Two additional points that support the same conclusion bear mentioning. First, the particular details of the previous discussion should not obscure the general nature of the predicament. Congress provided an express damages action against state officials, but not federal officials, for violating constitutional rights. There are good reasons to think that the absence of a statutory cause of action encouraged the Supreme Court to apply an especially protective qualified-immunity standard to federal officials. If that is correct, the Court’s subsequent decision to extend the same standard to state officials at least arguably constricted congressionally enacted text to conform to federal common law, which seems exactly backward.

Second, the very viability of the equivalence directive depends on *Harlow*’s legitimacy in the *Bivens* environment. If qualified immunity is improper in *Bivens* actions, others have identified good reasons why the doctrine should not survive for § 1983 suits either.<sup>364</sup> Given the many grounds for skepticism on the *Bivens* front, the validity of the *Harlow* standard in the § 1983 domain seems all the more doubtful.

### C. *Three Upshots*

The above discussion addresses the doctrine’s roots in constitutional structure, but what are the upshots for the propriety of qualified immunity more generally? Several answers come to mind, but an initial note may prove helpful.

As explained above, the justices have offered various rationales for the Supreme Court’s muscular conception of qualified immunity, and previous scholarship has rebutted these rationales along multiple compelling, but not

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362. *Id.*

363. For a somewhat similar point, see Ernest A. Young, Essay, Alden v. Maine and the Jurisprudence of Structure, 41 WM. & MARY L. REV. 1601, 1604 (2000). Young argues that a “big ideas” approach to constitutional structure “will frequently be helpful” in “offer[ing] determinate answers when more familiar sources, such as text and specific history, run out.” *Id.* But, he contends, those who adopt this approach must maintain an “appropriate awareness” of “potentially serious liabilities” that “aris[e] from [the] tendency to press courts toward more complete theorization of constitutional issues.” *Id.*

364. See *supra* Section I.B.

universally convincing, lines. The present project offers an account of the Court's course grounded in structural constitutional concerns. But it bears emphasizing that the justices' own accounts and the structural account advanced here do not cover the waterfront of possible explanations and potential justifications for the doctrine's development. Other scholars have identified additional considerations that played and may continue to play a part in producing and supporting qualified immunity.<sup>365</sup> And still more scholars will identify still more considerations, both descriptive and normative. In short, the rise of the current qualified-immunity regime is susceptible of multiple coincident accounts—and even multiple structural accounts.<sup>366</sup>

That said, the primary answer to the upshots question is that rejecting *Harlow*-style qualified immunity would seem well warranted. The present analysis has attempted to offer a more accurate and attractive account of the defense than an exclusive focus on the justices' explicit rationales provides. But an adequate justification remains elusive. It is notoriously difficult to prove a negative—in this case, that no possible basis provides sufficient support for the current qualified-immunity regime. But the burden of persuasion as to the doctrine's propriety should rest on its proponents, and even over thirty years after *Harlow* came down, they have not yet carried the weight.

A secondary answer is that someone could reject the *Harlow* standard in part, seeing qualified immunity as illegitimate in suits against state defendants but legitimate in suits against federal defendants. The present analysis argues that the doctrine rests on different foundations in the § 1983 and *Bivens* contexts. And that means that qualified immunity should be more difficult to justify for state officials than federal officials, at least insofar as the statutory setting of § 1983 constrains the range of available defenses more than the federal-common-law milieu of *Bivens* does. So someone could agree with the analysis here but accept qualified immunity in the *Bivens* domain because the possible assessments of the policy contentions for and against the doctrine are almost endless. These contentions, after all, concern values that are not only arguably incommensurable, but also to which people can reasonably attach different weights—for instance, providing full vindica-

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365. See, e.g., Huq, *supra* note 23, at 52–63 (positing a heightened concern on the Supreme Court about docket management at a time of increasing crime and incarceration rates); Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1060–62 (2013) (connecting qualified immunity to concerns about opening the “floodgates of litigation” more generally).

366. The past and prospective role of departmentalist-type thinking in qualified-immunity doctrine deserves greater academic attention, for instance. See Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1746–47 (2017) (arguing that qualified immunity is “[t]he most visible” area where the Supreme Court “recognizes a distinction between what the Constitution requires and what judicially developed doctrine has said that the Constitution requires” and that this distinction “can be understood as an example of judicial departmentalism in action”).

tion to victims of governmental mistreatment on the one hand versus preventing overdeterrence of and unfairness to executive officials on the other.

A tertiary answer is that someone could see qualified immunity as legitimate in both suits against state officials and suits against federal officials despite crediting that the doctrine should be evaluated differently in these distinct areas. To do so in a manner consistent with the contentions offered here, however, would require rejecting either the view that the statutory setting of § 1983 substantially constrains the range of available defenses or the work of Baude and others who have argued against the justices' own accounts of qualified immunity as rooted in positive law.<sup>367</sup> Or it would require pointing to some other justification for qualified immunity in the § 1983 context.

To be clear, Baude's argument is not that § 1983 "permits absolutely no immunities at all because the text is categorical on its face."<sup>368</sup> Indeed, Baude recognizes that "[u]nwritten defenses are not unknown to the law."<sup>369</sup> And scholars like Caleb Nelson have recently suggested more sophisticated understandings of federal common law than many skeptics previously propounded.<sup>370</sup> Baude's argument, instead, is that "[t]he real problem with qualified immunity is that it is so far removed from ordinary principles of legal interpretation."<sup>371</sup> Accordingly, Baude contends that "[e]xposing the Court's choices lets us make a clearer and more responsible decision about whether those choices are the rights ones or whether, having given us such a categorical immunity doctrine, the Court should now take some of it back."<sup>372</sup>

The possibility of abandoning the *Harlow* standard naturally leads to questions about stare decisis. *Harlow*'s status as Supreme Court precedent merits respect. Stare decisis, however, "is not an inexorable command," as the Court has made especially clear in the qualified-immunity context.<sup>373</sup> And inquiring into the justifiability of qualified immunity as a matter of first principles is important in any event. There is inherent value in understanding whether the Court has been right or wrong to embrace an immunity standard with the apparent effect of denying monetary redress—and in many cases, any redress—to large numbers of people who have suffered constitutional violations. And *Harlow*'s legitimacy bears on whether and to what extent the Court should extend or overrule subsidiary aspects of qualified-immunity doctrine as well.

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367. See *supra* Section I.B.

368. Baude, *supra* note 3, at 77.

369. *Id.*

370. See Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 44 (2015).

371. Baude, *supra* note 3, at 77.

372. *Id.* at 78.

373. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

Furthermore, and fortunately, others have begun drilling down on significant issues concerning the doctrine's future. These issues include not only the effects of *stare decisis*,<sup>374</sup> but also which institution, the Court or Congress, is better situated to modify qualified immunity,<sup>375</sup> as well as what more rights-protective amendments short of completely eliminating the defense might look like.<sup>376</sup>

It is worth noting, however, that there are good reasons to think that completely eliminating qualified immunity would not cause the sky to fall. Setting aside qualified immunity would simply mean that executive officials would face the same litigation landscape that private defendants face. And the law does a great deal to protect private defendants from meritless suits—especially through pleading and summary-judgment standards that are more difficult for plaintiffs to overcome now than when *Harlow* was decided.<sup>377</sup>

#### CONCLUSION

Qualified immunity is under attack. Stakeholders ranging from the NAACP to the Cato Institute have advocated its reconsideration. But the Supreme Court persists in employing and even extending the doctrine. Perhaps, therefore, the governing *Harlow* standard rests on something more than the policy and positive-law rationales on which previous criticisms have focused.

Indeed, the *Harlow* standard emerged in the *Bivens* context, and that provenance points toward an account of the doctrine that sounds in constitutional structure and resonates throughout the relevant jurisprudence. One aspect involves separation of powers: that *Harlow* righted the *Bivens* regime's alleged wrongs by cutting back on a cause of action that had expanded judicial power and had contracted an arguably exclusive congressional prerogative. The other aspect involves federalism: that equivalent standards must

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374. See Baude, *supra* note 3, at 80–82; Nielson & Walker, *supra* note 110, at 1856–63.

375. See Michelman, *supra* note 29.

376. See Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1832–36 (2018).

377. See *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (suggesting that “subsequent clarifications to summary-judgment law” lessen defendants’ needs for the protection afforded by *Harlow*). As Hillel Levin explains, the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), “fundamentally alter[ed] the Court’s approach to the standards governing pleading.” Hillel Y. Levin, *Iqbal*, *Twombly*, and *the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143, 143 (2010). In particular, these decisions represented a “shift from a liberal notice pleading standard to a heightened, but nebulous, plausibility standard.” *Id.* They also reflected “striking parallels to the Court’s similar shift in the summary judgment context” through three cases decided in 1986. *Id.* at 144. The latter decisions are known as the “*Celotex* trilogy,” *id.*, and consist of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To continue quoting Levin: both sets of decisions provide tools for “getting rid of cases that seem (at least to someone) to be meritless.” Levin, *supra* at 146.

govern in the *Bivens* and § 1983 contexts to avoid holding state officials to stricter constitutional rules than their federal counterparts face.

This structural account is important on a descriptive level. But it cannot sustain qualified immunity as a normative matter. With respect to the separation-of-powers aspect, a compensating-adjustments framework provides an apt mode of analysis. For those who support the *Bivens* regime, there is unlikely to be a sufficient departure from optimal constitutional design for qualified immunity to offset. And for those who oppose the *Bivens* regime, qualified immunity should represent a problematic response in both scope and substance. The theory underlying the federalism aspect of the structural account is unclear, and more work remains on questions concerning federal-state parallelism in constitutional enforcement. But to the extent that support could come from an equal-sovereignty principle, the incorporation doctrine, or the congruence-and-proportionality concept, the equivalence directive as applied in *Harlow* and its progeny stretches each area beyond recognition. The directive thus appears to turn on a notion of freestanding federalism that is too far removed from the actual constitutional design.

At bottom, the structural account advanced here cannot rescue the *Harlow* standard for qualified immunity from the cloud of suspicion that previous criticisms have created. And the dangers of denying what often embodies the only possible remedy for constitutional violations are too substantial to rest on a doctrine that lacks legitimacy. There are good reasons to conclude, therefore, that proponents of the defense, including the Supreme Court itself, have failed to make their case—and that the legal community should significantly restrain or simply reject qualified immunity.

