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Fred O. Smith Jr.
Emory Law School

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FORMALISM, FERGUSON, AND THE FUTURE OF QUALIFIED IMMUNITY

*Fred O. Smith, Jr.**

INTRODUCTION

Over the past four decades, the story of suing governments and their agents for money damages is a story marked by change and challenge. Most doctrines in that story have either undergone substantial revisions during that period or faced sharp criticism. The doctrine of state sovereign immunity, for example, has slowly expanded, even as commentators and jurists have sharply questioned its basic tenets and legitimacy.¹ Leading scholars in the field of federal courts have undermined the capacious nature of prosecutorial immunity,² and the Supreme Court seemed close to narrowing

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1 *Compare* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (holding that the Eleventh Amendment bars suits against a state's agency for its failure to comply with the provisions of Title I of the Americans with Disabilities Act of 1990), *and* Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that citizens are precluded from suits against states grounded in federal law), *and* Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (expanding sovereign immunity by holding that despite Congress's "clear intent to abrogate the States' sovereign immunity" in the Indian Gaming Regulatory Act, the Indian Commerce Clause does not grant Congress that power), *with* Alden, 527 U.S. at 761 (Souter, J., dissenting) (questioning the majority's reasoning on sovereign immunity), *and* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001) ("Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law."), *and* Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1973 (2012), *and* Michael G. Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 COLUM. L. REV. 212, 213 (1988) (reviewing JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES—THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987)) (noting that the Supreme Court's treatment of the Eleventh Amendment has some roots in the Court's helping of the "South out of its staggering, multi-million dollar post-Civil War debt crisis").

2 *See, e.g.*, Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 55 (arguing that absolute prosecutorial immunity should be reconsidered).

the doctrine only a few terms ago.³ *Bivens*—the doctrine that allows suits against federal officials for constitutional violations—has faced increased scrutiny at One First Street, becoming narrower virtually each time the Court touches it.⁴ The Court has also narrowed the class of cases allowed against local governments,⁵ even as other Justices and many scholars have insisted that the class of cases should actually be broader.

By comparison, qualified immunity is an anomaly, in that its basic tenets went largely unchallenged by leading scholars and Justices for decades. To be sure, there have been fights at the Court about how the doctrine should apply in given cases.⁶ And scholars have sometimes questioned whether some circuits apply it too stringently,⁷ whether it should apply to suits for nominal damages,⁸ and whether courts should have to answer whether an official's actions are unconstitutional even when said official is entitled to qualified immunity.⁹ But the basics of the doctrine have gone largely unquestioned since the Supreme Court's 1982 case of *Harlow v. Fitzgerald*.¹⁰

3 See *Pottawattamie County v. McGhee*, 558 U.S. 1103 (2010). The Eighth Circuit held that prosecutors were not immune from claims involving their improperly withheld evidence. *McGhee v. Pottawattamie County*, 547 F.3d 922 (8th Cir. 2008). However, the Supreme Court did not review the matter because the case was dismissed via the Court's Rule 46. *McGhee*, 558 U.S. at 1103. But see *Fields v. Wharrie*, 740 F.3d 1107, 1114 (7th Cir. 2014) (finding that a prosecutor had not demonstrated an entitlement to absolute nor qualified immunity for the fabrication of evidence).

4 See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971); see also *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848 (2017) (noting that expanding the *Bivens* remedy is now a “‘disfavored’ judicial activity” (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2008))); *Minneci v. Pollard*, 565 U.S. 118, 131 (2012) (holding that when a “federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison” for an alleged violation of the Eighth Amendment, “the prisoner must seek a remedy under state tort law”); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001) (declining to extend *Bivens* “to allow recovery against a private corporation operating a halfway house under contract with the Bureau of Prisons”).

5 See *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (holding a municipality is not vicariously liable under Section 1983 for the acts of its employees); *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 400 (1997) (“[I]n enacting § 1983, Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the ‘moving force’ behind the plaintiff’s deprivation of federal rights.” (quoting *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978))).

6 See *Hope v. Pelzer*, 536 U.S. 730, 732 (2002) (6–3 opinion).

7 See Elizabeth J. Norman & Jacob E. Daly, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1556 (2002) (noting that the Eleventh Circuit has earned a reputation as being the circuit of “unqualified immunity” (quoting Karen M. Blum, *Too Clearly Cruel & Unusual: Supreme Court Can Right Eighth Amendment Wrong*, FULTON COUNTY DAILY REP. 7 (2002))); see also Karen Blum, *Qualified Immunity: The Constitutional Analysis and Its Application*, 20 TOURO L. REV. 643, 665 (2004) (same).

8 See James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1611 (2011).

9 See John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 137; Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006).

10 457 U.S. 800 (1982).

There, the Court held that qualified immunity is an objective test, not a subjective one.¹¹ Since that decision, it has been the law that a government official is entitled to qualified immunity in claims for money damages unless she has violated a clearly established right that a reasonable person would have known at the time of the violation.¹² This has been generally accepted with relative unanimity.

Until now. In recent years, federal courts scholars have undermined some of the basic empirical and legal assumptions undergirding qualified immunity,¹³ and in 2017, one Justice expressed a willingness to reopen this uncommonly stable doctrine.¹⁴ Indeed, the doctrine seems anachronistic in light of two legal and social moments. First, we are in an age of formalism with respect to federal jurisdiction, as the Court is expressing increased skepticism about court-created causes of action and court-created limits on federal judicial power. Second, we are in an age of “Ferguson” or “post-Ferguson”—the town that arrested the nation’s attention as its racially discriminatory policing practices came to light.¹⁵ There is a palpable sense that contemporary social movements are demanding greater accountability for violations of rights, especially on matters at the intersection of criminal justice and race.¹⁶ And scholars such as Dean Erwin Chemerinsky have argued that qualified immunity is to blame, in part, for the absence of proper accountability in this area.¹⁷

11 *Id.* at 818–19.

12 *Id.* at 818.

13 See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 12 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*] (suggesting adjustments to the qualified immunity doctrine); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) [hereinafter Schwartz, *Police Indemnification*] (providing empirical evidence on the pervasiveness of government indemnification).

14 See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (noting his “growing concern with [the Court’s] qualified immunity jurisprudence”).

15 See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter FERGUSON REPORT], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; see also Kyle J. Jacob, *From Garner to Graham and Beyond: Police Liability for Use of Deadly Force—Ferguson Case Study*, 91 CHI.-KENT L. REV. 325 (2016); Samuel P. Jordan, *Federalism, Democracy, and the Challenge of Ferguson*, 59 ST. LOUIS U. L.J. 1103 (2015); Dorothy A. Brown, *Ferguson’s Perfect Storm of Racism*, CNN (Mar. 5, 2015), <http://www.cnn.com/2015/03/05/opinions/brown-ferguson-report/> (“If you were the member of a minority group and tried to create a system to control and oppress the majority, you could not have done a better job than the . . . leaders of Ferguson, Missouri.”).

16 See S. David Mitchell, *Ferguson: Footnote or Transformative Event?*, 80 MO. L. REV. 943, 950 (2015); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018).

17 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?smid=pl-share>; see also Aaron L. Nielson & Christopher J. Walker,

Both moments leave qualified immunity on uneasy ground. If it is the case that courts lack the authority to decline to exercise jurisdiction for prudential reasons, as the Court has strongly suggested in the past few years, how can it be that qualified immunity roars on unabated? The doctrine is utterly untethered from the text or history of Section 1983, for example.¹⁸ And what is more, scholars such as Joanna Schwartz have shown that many of the empirical assumptions that purportedly justify this lack of accountability are wrong.¹⁹ Further, if it is the case that unconstitutional uses of force are in need of a more significant range of deterrent remedies, a doctrine that forgives unreasonable—albeit “reasonably unreasonable”—uses of deadly force stands as an inevitable target. Worse, as I have written elsewhere, when governmental defendants invoke qualified immunity and other immunities in the same case, this sometimes means that there is no one to hold accountable.²⁰

This Essay explores whether formalism and accountability are compatible lodestars as we steer toward a new future for qualified immunity. Ultimately, I argue that two existing proposals would bring the doctrine closer to its text and history, mitigate against fragmentation in the law of constitutional torts, and narrow the rights-remedies gap when government officials violate the Constitution. One proposal, by John Jeffries, would create a fault-based system, where government officials and entities alike would be liable for constitutional violations that are both unreasonable and unconstitutional.²¹ Another proposal would render governmental employers’ liable for the acts of their agents.

I. THE FORMALIST PARADOX

The plain text of Section 1983 begins with two words that place governmental immunities in a precarious position from the outset: “Every person.”²² The statute commands that “[e]very person who” under the color of state law

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 New Qualified Immunity, 89 S. CAL. L. REV. 1, 65 (2015) (observing that scholars had made this link).

18 See Baude, *supra* note 13; see also JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 13–14, 16–17 (2017); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1863 (2010); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987).

19 See Schwartz, *How Qualified Immunity Fails*, *supra* note 13; Schwartz, *Police Indemnification*, *supra* note 13.

20 Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 487 (2016).

21 See *infra* subsection III.B.1.

22 42 U.S.C. § 1983 (2012).

the party injured in an action at law, suit in equity, or other proper proceeding for redress.²³

The text only provides one exception: judicial immunity for certain types of prospective relief.²⁴

Qualified immunity nonetheless routinely blocks Section 1983 suits. Government officials are insulated from damages actions unless those officials violate “clearly established law” that a reasonable official would have known. Sometimes the Court invokes what would appear to be a higher standard, protecting officers unless they are “plainly incompetent.”²⁵ The gap between this standard and the text is yawning. And this gap presents something of a riddle in an age of formalist approaches to understanding both statutory text and the nature of federal jurisdiction.

This Part explores that gap. It observes the possibility that there were multiple approaches to governmental immunity that various jurisdictions across the United States employed at the common law. In the event that there are a range of plausible readings that can be defended on historical grounds, this may well free us to identify, among this range of plausible readings, the one that best ensures accountability in our current time.

A. *Formalism and Judicial Power*

The term “formalism” defies simple definition. It was once used as a term of derision, as scholars contended that judges sometimes used strict linguistic trappings deceptively to hide the range of other plausible legal outcomes.²⁶ By the late 1980s, however, scholars like Fred Schauer noted that formalism need not always embody deception.²⁷ Sometimes legal rules do bind, thereby restricting discretion.²⁸ And, he noted, it is far from evident that strict legal rules are inherently undesirable. In the years that followed, rules-based legal logic met a more strident and public defender by way of Justice Antonin Scalia. In *A Matter of Interpretation*, he proclaimed: “Long live formalism. It is what makes a government a government of laws and not of men.”²⁹

The rise of avowed and strongly defended formalism was not limited to scholarly and public debates. It made its way into legal doctrine. With a

²³ *Id.*

²⁴ *See id.*

²⁵ *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

²⁶ *See* Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1506–07 (1985); *see also* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509–10 (1988) (collecting criticisms of formalism for the proposition that, “[e]ven a cursory look at the literature reveals scant agreement on what it is for decisions in law, or perspectives on law, to be formalistic, except that whatever formalism is, it is not good”).

²⁷ Schauer, *supra* note 26, at 520.

²⁸ *See id.* at 525.

²⁹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 25 (Amy Gutmann ed., 1997).

crescendoing emphasis over the past twenty years, Supreme Court decisions remind us that it is text that matters most in constitutional and statutory interpretation. For example, it has become considerably harder to argue that a congressional statute implies a cause of action.³⁰ In previous eras, when a statute did not explicitly provide for a cause of action, courts looked to a statute's purpose to determine whether Congress nonetheless so intended.³¹ Causes of action were later understood to be implied when a statute provided rights or benefits to an identifiable class of individuals.³² Not so today, unlike the "heady days"³³ of old that ushered in an "*ancien regime*"³⁴ that sometimes focused on legislative purpose and legislative history, implied statutory causes of action are now impermissible absent affirmative text that indicates Congress so intended.³⁵

Constitutional causes of action have experienced a similar shift toward formalist rules. In the early 1970s, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Court held that plaintiffs may sometimes seek damages remedies against federal officials who, while acting under the color of federal law, violated federal constitutional rights.³⁶ While the Constitution does not expressly permit such an action, the Court held that such a remedy was necessary in order to ensure that the Amendment had force in some contexts. The Court observed that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."³⁷ Roughly a decade later, the Court also made clear that litigants may rely on *Bivens* even when the federal constitutional violations they have suffered do not arise from the Fourth Amendment.³⁸

Over the past two decades, however, the scope of *Bivens* claims has been tightly circumscribed, as formalist conceptions of causes of action have taken root. The Court has held, for example, that one cannot rely on *Bivens* to sue corporations that run private prisons for their employees' constitutional violations.³⁹ More recently, in *Ziglar v. Abbasi*,⁴⁰ the Supreme Court considered whether to grant relief to South Asian and Arab men who alleged that they had been rounded up and abused on account of their race and religion in the aftermath of 9/11. The Court held that the detainees could not rely on

30 See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.3 (5th ed. 2007) (describing the shift over time); Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 Nw. U. L. REV. 175, 206 (2010) (same).

31 See *J.I. Case Co. v. Borak*, 377 U.S. 426, 433–34 (1964).

32 See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

33 *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

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

35 See *id.*

36 See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

37 *Id.* at 395.

38 See *Carlson v. Green*, 446 U.S. 14, 14–15 (1980) (Eighth Amendment); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (equal protection under the Fifth Amendment).

39 See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

40 137 S. Ct. 1843 (2017).

Bivens to challenge their allegedly discriminatory detention, or any harsh conditions of this detention that resulted from official policymaking decisions by high-ranking officials.⁴¹ When denying a remedy for the unlawful detention and certain harsh conditions, the Court relied on principles related to separation of powers and national security.⁴²

In so doing, the *Ziglar* Court also expressed unease with the dissonance between an implied constitutional cause of action and contemporary notions of federal judicial power.⁴³ The Court warned that “it is a significant step under separation-of-powers principles for a court to determine that it 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.”⁴⁴ The Court observed that *Bivens* emerged during an “*ancien regime*” of days past in which “the Court assumed it to be a proper judicial function to ‘provide such remedies as are necessary to make effective’ a statute’s purpose.”⁴⁵ Further, “[g]iven the notable change in the Court’s approach to recognizing implied causes of action, . . . expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity.”⁴⁶

In recent years, this formalist emphasis has also characterized the field of subject-matter jurisdiction. Expressing profound ambivalence as to whether avowedly judge-made rules can ever block jurisdiction, the Court has sometimes relabeled formerly prudential rules as “constitutional” or “statutory.”⁴⁷ The bar against generalized grievance—once understood as prudential⁴⁸—is now described as constitutional.⁴⁹ The same is now true of the bar against taxpayer standing.⁵⁰ Another standing rule has been converted into a statutory rule rather than a prudential one: namely, that a plaintiffs’ claim must be within the zone of interests anticipated by a statute or regulation.⁵¹ And the Court has raised questions about the legitimacy of a judge-made or “prudential” component to ripeness.

As the Court stated in *Lexmark v. Static Control Components, Inc.*, it is now apparently the law that: “Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied,” Justice Scalia wrote for a unanimous Court in 2014, “it cannot limit a cause of action

41 *Id.*

42 *See id.* at 1861 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

43 *Id.* at 1856.

44 *Id.*

45 *Id.* at 1855 (citation omitted).

46 *Id.* at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2008)).

47 *See generally* Fred O. Smith, Jr., *Undemocratic Restraint*, 70 *VAND. L. REV.* 845 (2017).

48 *See Allen v. Wright*, 468 U.S. 737, 751 (1984), *abrogated by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

49 *See Lexmark Int’l, Inc.*, 134 S. Ct. at 1387 n.3 (2014).

50 *Compare* *Flast v. Cohen*, 392 U.S. 83, 85 (1968), *with* *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007).

51 *See Lexmark Int’l, Inc.*, 134 S. Ct. at 1377.

that Congress has created merely because ‘prudence’ dictates.”⁵² No wonder qualified immunity is under scrutiny.

B. Restraining Immunity

Qualified immunity, as it applies today, cannot be reconciled with the formalist conceptions of federal jurisdiction articulated in cases like *Lexmark*. As noted, the text of Section 1983 says nothing about qualified immunity. And importantly, the doctrine is difficult to reconcile with the state of the law in the decades before and immediately after the passage of Section 1983 in 1871. For example, in the nineteenth-century case of *Little v. Barreme*, the Supreme Court rejected a government official’s broad claim that he was immune from suit for violating a statute, notwithstanding instructions from the President that authorized the conduct.⁵³ What is more, in *Myers v. Anderson*, the Court initially rejected a state government official’s claim that he was immune from suit. A government official’s reliance on such immunity was “fully disposed of . . . by the very terms of” Section 1983.⁵⁴ A number of scholars have identified the import of this case.⁵⁵

William Baude’s article *Is Qualified Immunity Unlawful?* is among the most recent to elevate these important cases—and it has already proven to be influential.⁵⁶ He applies traditional modes of statutory interpretation to the doctrine of qualified immunity, and demonstrates in a compelling fashion that when applied, these modes of interpretation cannot sustain the doctrine of qualified immunity as it exists today.⁵⁷ The article has already been cited in two judicial opinions, including a concurrence from Justice Clarence Thomas.⁵⁸ Notably, Justice Thomas suggested that the Court reconsider its qualified immunity jurisprudence in an “appropriate case.”⁵⁹ He suggested that the Court should tailor qualified immunity in a manner that better represents the state of the common law in the nineteenth century.⁶⁰

52 *Id.* at 1388 (citations omitted).

53 See *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). This case is described in Baude, *supra* note 13, and Pfander & Hunt, *supra* note 18.

54 *Myers v. Anderson*, 238 U.S. 368, 378–379 (1915).

55 See, e.g., David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 497 n.1 (1992); Baude, *supra* note 13, at 57; Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1983*, 133 U. PA. L. REV. 601, 609 (1985).

56 Baude, *supra* note 13.

57 See Fred O. Smith, Jr., *The Trouble with Qualified Immunity*, JOTWELL (Sept. 14, 2017), <https://courtslaw.jotwell.com/the-trouble-with-qualified-immunity/> (reviewing Baude, *supra* note 13).

58 See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Melton v. Phillips*, 875 F.3d 256, 268 (5th Cir. 2017) (noting that the “clearly established law” standard is increasingly being questioned).

59 *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in the judgment).

60 See *id.* at 1871 (“Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in

The rhetoric of restraint that has resurfaced in the field of federal jurisdiction,⁶¹ then, is beginning to make its way into discussions about qualified immunity in civil rights suits. Whether this is a salutary development remains to be seen. I have written elsewhere that the resurgence of the principle that the federal courts' obligation to hear cases has not always resulted in *fewer* restrictions on federal jurisdiction.⁶² Instead, the Court has recast formerly prudential rules as constitutional and statutory. I have noted that sometimes this recasting is a form of "undemocratic restraint," because these shifts often result in undermining congressional commands, all while decreasing access to courts.⁶³

Qualified immunity need not follow that path. Revisiting qualified immunity offers a rare moment in which the Court's rhetoric of restraint may result in a doctrine that expands access to courts and aligns with congressional intent. This is because by leading accounts, common-law doctrines offered less rigidity and more access to courts.⁶⁴ Further, the possibility remains that a formalist, textualist approach to qualified immunity would result in the eradication of the doctrine in Section 1983 unless or until Congress amends the statute in a manner that matches contemporary norms.

In order to achieve this kind of democratic formalism,⁶⁵ at least two principles are important. First, it is important to disaggregate qualified immunity in the context of Section 1983 and qualified immunity in the context of *Bivens*. Eradicating or reforming one need not mean eradicating or reducing the other. It may well be that Section 1983 suits and *Bivens* suits need not invite the exact same immunities operating in the exact same ways.⁶⁶ The Court, to be sure, has previously suggested that it is undesirable for federal and state officials to receive different types of immunities. But that reasoning has been functionally abandoned. The Court has made it considerably harder to sue federal officials under *Bivens* than state officials under Section 1983. Given that *Bivens* is a judge-made rule, it may well be that judge-made exceptions are more defensible in that context. Congress created Section 1983, and its scope need not be limited to the scope of immunity in the *Bivens* context.

A second caution is that looking for a single common-law state of affairs as of 1871 in the name of restraining qualified immunity may prove illusory. It may well be that there was no single common-law state of affairs. Scholarship has generally focused on how the United States Supreme Court treated

'interpret[ing] the intent of Congress in enacting' the Act." (alteration in original) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986))).

61 See *supra* Section I.A.

62 See generally Smith, *supra* note 47.

63 *Id.* at 851.

64 See Baude, *supra* note 13; Pfander, *supra* note 8, at 1614.

65 This phrase is borrowed from Cass Sunstein, *Justice Scalia's Democratic Formalism*, 107 *YALE L.J.* 529, 530 (1997) (reviewing SCALIA, *supra* note 29).

66 See generally Katherine Mims Crocker, *Qualified Immunity and Structural Constitutionalism* (manuscript on file with author).

questions of immunity in the nineteenth century when defining the scope of immunities under Section 1983. But it is not evident that in attempting to discover a common-law doctrine from 1871 we should limit ourselves to that very small universe. Questions of immunity for state officials were more often decided by state courts,⁶⁷ and looking to those state court rulings may well yield different approaches to qualified immunity.⁶⁸ Some cases embraced a strict liability approach, in which a government official executing a judgment was strictly liable for his or her own mistakes. “An officer seizes property at his peril, and if he errs he must take the consequences,” this view held.⁶⁹ Other cases focused on the distinction between tort and contract, exempting officers from liability for unlawful or breached governmental contract.⁷⁰ And still other cases embraced standards akin to negligence; officials who acted unlawfully and negligently were liable.⁷¹

C. *Freeing Immunity*

If common law is the guide, and there are multiple plausible approaches in the common law, perhaps this frees jurists and commentators to think about which of these approaches works best to further accountability and avoid some of the pitfalls of the current doctrine. Beyond that, as it stands today, there are many prudential, judge-crafted rules that guide courts’ discretion. Examples include aspects of standing, adverseness, the political question doctrine, and abstention.⁷² This is so despite the emphatic asser-

67 See, e.g., *Hetfield v. Towsley*, 3 Greene 584, 585 (Iowa 1852); *Tyler v. Alford*, 38 Me. 530, 532 (1854); *Kuhn v. North*, 1823 WL 2286, at *10 (Pa. 1823); *Tutt v. Lewis*, 7 Va. (3 Call.) 233, 233 (1802).

68 A third note: Even if there were some commonly accepted understanding of immunity for government officials in 1871, it is not apparent this should satisfy the very strictest of formalists. Leading formalists have often warned that we are not bound by what drafters’ *thought* on matters of constitutional and statutory interpretation. We are bound by what they *said* and what those *words* would have meant to an ordinary person. This is why the Court has rejected the view that statutes adopted while the Court had capacious understandings about implied statutory causes of action should receive that broad treatment today. Context matters to the extent it helps us understand and define words and terms. It is not apparent what precise words in Section 1983 could be understood to support qualified immunity, as it exists today or as it existed in some quarters in the nineteenth century. It is not the case that we are discussing a statute that uses the word “immunity” and jurists are left with the task of defining it. The statute says “every person.” 42 U.S.C. § 1983 (2012). Can the strictest forms of textualism find a commonly understood definition of “every” that an ordinary person in 1871 would have understood to exclude some state violators of federal rights? I do not endeavor to answer this question in this short Essay. But I would be remiss not to raise it.

69 *Hibbard v. Thrasher*, 65 Ill. 479, 480–81 (1872); see also *Seip v. Tilghman*, 23 Kan. 289, 291 (1880) (embracing a similar view); *Ayer v. Bartlett*, 26 Mass. (9 Pick.) 156, 164 (1829) (“The officer acts at his peril, and is answerable for any mistake.”).

70 See *Tutt*, 7 Va. at 232 (“A man, contracting on behalf of the State, is not liable in his individual capacity.”).

71 See *Blocker v. Clark*, 54 S.E. 1022, 1024 (Ga. 1906).

72 See *Smith*, *supra* note 47, at 855–65.

tions about the courts' "virtually unflagging" obligation to hear cases within their jurisdiction.⁷³ Scholars such as David Shapiro have sharply defended those limits.⁷⁴ Thus, formalists and nonformalists alike should think about which plausible outcome is the best fit for the future of immunity. Before turning expressly to that question, Part II will explore some of the current doctrine's pitfalls.

II. FRAGMENTATION

Qualified immunity as it exists today is fragmented in ways that undermine constitutional accountability. Among other things, because the doctrine relies on principles of notice, difficult questions arise when binding precedent is clear but the defendant nonetheless is under contradictory commands. That is, what should be done when circuit precedent says one thing, but other legal guidance points in a different direction? Should unreasonable, even outrageous, constitutional violations be forgiven? In addition to this perhaps inevitable internal fragmentation within the doctrine of qualified immunity, individual immunities more generally operate in isolation, with scant attention paid to whether a victim of unconstitutional conduct will see any kind of remedy. This external fragmentation creates its own problems, by increasing the likelihood that no one will be held accountable for a constitutional violation. Understanding these fault lines may help the legal community craft a doctrine of immunity that results in more accountability and better comports with the rule of law.

A. *State of the Immunity*

A troubling Fourth Circuit case from March 2018 demonstrates the fragmented nature of qualified immunity and reveals some of the ways changes to the doctrine are needed. The case is *Sims v. Labowitz*.⁷⁵ In 2014, a police officer commanded a seventeen-year-old boy to undress. In the presence of two other armed officers, he demanded that the child masturbate and become sexually aroused.⁷⁶ The officer proceeded to take photographs of the child's genitals as a part of an ongoing investigation. The crime that led to the officer's actions? The boy had (consensually) sent sexually explicit photographs to his fifteen-year-old girlfriend.⁷⁷

A federal district court held that the officer was entitled to qualified immunity because he was acting pursuant to a court-authorized warrant.⁷⁸

73 *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014); *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

74 See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 546 (1985).

75 885 F.3d 254 (4th Cir. 2018). The initial opinion was issued in December 2017, but was superseded after rehearing. See *Sims v. Labowitz*, 877 F.3d 171 (4th Cir. 2017).

76 *Id.* at 258–59.

77 *Id.*

78 *Sims v. Richardson*, No. 1:16-cv-572, 2016 WL 5219590 (E.D. Va. Sept. 19, 2016).

On appeal, in a 2–1 decision, the Fourth Circuit held that the officer was not entitled to immunity, canvassing the state of the law with respect to privacy and bodily integrity at the time of the officer’s actions.⁷⁹ Judge Robert King dissented, relying on the importance of court orders and official legal advice in American law.⁸⁰ The officer is not protected by qualified immunity.⁸¹ Still, the fact that such troubling facts could lead to such a splintered set of legal opinions is sufficient to warrant a closer look at the law. The case has much to teach us about qualified immunity and its associated fragmented tests, fragmented commands, and fragmented doctrines.

B. *Fragmented Tests*

There is broad agreement that qualified immunity involves two questions. First, whether the government official violated a federal right, and second, whether that right was clearly established at the time of the violation.⁸² Answering the second question can sometimes obviate the need to answer the first. If a right was not clearly established, judges may exercise their discretion and opt not to wade into whether the official’s conduct violated the law.⁸³

There is also agreement as to at least three of the principles that guide the inquiry into whether a right is clearly established. Courts should exercise caution so as not to define the “right” at issue so broadly that qualified immunity provides no meaningful protection or notice to government officials.⁸⁴ In the context of the Fourth Amendment, for example, a court should not merely ask whether it is clearly established that officers should not engage in unreasonable seizures. The right must be defined with enough specificity that a reasonable official will know what conduct is or is not lawful.⁸⁵ By way of illustration, an officer may not use deadly force against a suspect who cannot reasonably be said to constitute an imminent threat to the officer or others.⁸⁶ Further, a right can be clearly established because a violation is “obvious” in light of the fair notice that a legal principle provides.⁸⁷ For example, because the Eighth Amendment makes plain that government officials should not use “malicious[] or sadistic[]” violence against prisoners, officers who violate this standard in ways that are novel, but nonetheless obvious, are not entitled to immunity.⁸⁸

79 *Sims*, 885 F.3d at 261.

80 *Id.* at 270 (King, J., dissenting).

81 *Id.* at 265 (majority opinion).

82 *See Tolan v. Cotton*, 134 S. Ct. 1861, 1865–66 (2014).

83 *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

84 *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

85 *See id.*

86 *See Tennessee v. Garner*, 471 U.S. 1, 9–10 (1985).

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

88 *See id.* at 761 (Thomas, J., dissenting) (quoting *Ort v. White*, 813 F.2d 318, 325 (11th Cir. 1987) (en banc)).

Applying these principles, one might imagine that *Sims* is an easy case. The Fourth Circuit had previously held that the “movement of clothing to facilitate the visual inspection of a [person’s] naked body” is a type of “sexually invasive search” that heightens the liberty interest of the seized person.⁸⁹ And in *Safford Unified School District No. 1 v. Redding*, the United States Supreme Court warned that sexually invasive searches of children raise even greater concerns because their “adolescent vulnerability intensifies the patent intrusiveness of the exposure.”⁹⁰ Given those warnings, one might have thought that officers had notice that commanding a child to masturbate in order for officers to take photographs was unreasonable in light of precedential guidance, even if there were no cases in the circuit with identical facts. When a person violates a clear legal command in a novel way, that person is not necessarily insulated from accountability.⁹¹

Why, then, were federal judges so divided? Simply put, the officer had a warrant.⁹² He did not act alone. A prosecutor condoned and helped seek the warrant. A state magistrate issued the warrant. Even if the officers were violating the law under Fourth Circuit and Supreme Court precedent, he was acting in a way that a court and other legal actors had authorized.⁹³

The split among the federal judges who have reviewed these facts is a microcosm of a larger issue that I will call the conflicting notice problem. What should happen when a circuit’s precedent says one thing, but a state court’s order says another? Beyond that, what should happen when a circuit’s precedent says one thing, but a demand from a supervisor or policy requires a different outcome?⁹⁴ Any future revision or restructuring of the doctrine of qualified immunity must confront and take this issue seriously.

C. *Fragmented Doctrines*

One of the more remarkable aspects of the *Sims* case is that if the named officer had not been amenable to suit, no one would have been. That would have been the end of the suit. The prosecutor who helped the officer seek

89 *United States v. Edwards*, 666 F.3d 877, 882–83 (4th Cir. 2011) (citations omitted).

90 *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009).

91 *Hope*, 536 U.S. at 754–55 (Thomas, J., dissenting).

92 In the words of the dissent:

Strikingly, Detective Abbott did not go directly to the Prince William County magistrate seeking the search warrant. He went first to that county’s Commonwealth’s Attorney and solicited the advice and approval of the prosecutor. We have recognized—in another qualified immunity case arising in the Old Dominion—that an investigating detective’s “conference with the Commonwealth’s Attorney and the subsequent issuance of the warrants by a neutral and detached magistrate weigh heavily *toward* a finding that [the detective] is immune.”

Sims v. Labowitz, 885 F.3d 254, 268 (4th Cir. 2018) (King, J., dissenting) (alteration in original) (quoting *Wadkins v. Arnold*, 214 F.3d 535, 541 (4th Cir. 2000)).

93 *Id.* at 262.

94 See generally *Mullenix v. Luna*, 136 S. Ct. 305, 307 (2015) (providing an officer with qualified immunity for shooting into a moving vehicle before it was about to hit spikes in the road, despite his supervisor’s command that he “stand by”).

the warrant and judge who issued it were both entitled to absolute immunity.⁹⁵ Local governments are not liable under a theory of respondeat superior, so suing Manassas for the acts of government officials was not an option either.⁹⁶ Suing the State of Virginia for the actions of the magistrate? Also impermissible, because the State is entitled to sovereign immunity.⁹⁷ An injunction or declaratory judgment stating that this behavior violates the Fourth Amendment? Also impermissible, because the Court has found that a plaintiff does not have standing to seek prospective relief unless they can demonstrate that a violation is likely to recur against her in the future.⁹⁸ Neither the district court nor majority or dissenting opinions at the Fourth Circuit noted that this was the only remedy available to Sims because when the various immunity doctrines collectively operate there is no one left to sue.

Extant doctrine instead treats various immunities like fragmented islands. Often, when a court dismisses a claim based upon one immunity doctrine, other doctrines that simultaneously block accountability receive no mention.⁹⁹ Worst, sometimes the courts' decisions on immunity questions either imply or assume that there is some other remedy available that, in fact, would not have been available in that case.¹⁰⁰ Consider the case of *Bogan v. Scott-Harris*, in which the Court held that local legislators are entitled to absolute legislative immunity.¹⁰¹ Among the reasons the Court provided for extending the doctrine of absolute legislative immunity was that suits are available against municipal governments. The Court explained that "certain deterrents to legislative abuse may be greater at the local level than at other levels of government."¹⁰² "Municipalities themselves can be held liable for constitutional violations, whereas States and the Federal Government are often protected by sovereign immunity."¹⁰³ However, local governments are often protected from suit because plaintiffs may not sue them for high-ranking officials' negligence,¹⁰⁴ under theories of respondeat superior liability,¹⁰⁵ or based on conduct by high-ranking officials who are not deemed "final

95 See *Stump v. Sparkman*, 435 U.S. 349, 351 (1978) (judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) (prosecutorial immunity).

96 See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); see also *Smith*, *supra* note 20, at 487 (describing this phenomenon).

97 See *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

98 See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

99 See *Smith*, *supra* note 20, at 472 ("It is difficult to appreciate the scope, cause, or nature of the accountability gap in constitutional torts if the various doctrines of immunity and municipal causation are treated as disconnected or unrelated.").

100 See *id.*

101 523 U.S. 44 (1998).

102 *Id.* at 53.

103 *Id.*

104 See *Connick v. Thompson*, 563 U.S. 51, 60 (2011).

105 *Bd. of the Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997) ("We have consistently refused to hold municipalities liable under a theory of *respondeat superior*.").

policymakers” under state law.¹⁰⁶ Indeed, in the *Bogan* case itself, before the case reached the Supreme Court, the First Circuit had already overturned a jury’s finding that the city was liable.¹⁰⁷

If we take accountability seriously, violations of civil rights that are met with *no* remedy are of important concern. Cases like *Bogan* and *Sims* show the importance of thinking about the synergistic way that immunity doctrines operate to proverbially close the courthouse door. Understanding and appreciating this, rather than treating the doctrines so disparately, can enrich dialogue as to how to build a doctrine that works in the twenty-first century. That is, a doctrine where *no* accountability for serious violations of the Constitution is treated as wrong, not routine.

III. THE FUTURE OF QUALIFIED IMMUNITY

Something is in the air with respect to qualified immunity. Three decades after the Court created the governing two-part test in *Harlow v. Fitzgerald*, there is a palpable and growing sense that the test needs to be revisited. It is an avowedly judicially made rule that attempts to balance competing deterrence concerns. This appears amiss in an era in which the Court increasingly demands textual support in positive law for causes of action and limits on judicial discretion. What is more, as other scholars in this symposium issue have documented, some of the empirical assumptions that guide the *Harlow* test are highly questionable. Further, the fact that constitutional violations sometimes go unchecked in the current doctrine raises strong normative concerns in the way of accountability. This lack of accountability stems in part, though not exclusively, from the fragmented nature of the law of constitutional torts.

Where do we go from here? There is a temptation, perhaps, to do away with it. If it has no basis in the text of positive law, and if its underlying assumptions are wrong, then why not eradicate it in Section 1983 cases? The basic answer is that this creates new problems. Holding a government official personally liable for something she could not have reasonably known was against the law would raise fairness concerns. It would also have questionable deterrence value, and place officials in untenable catch-22 situations when the law, and an official’s prediction of what the law may one day be, come into conflict. Even those who insist that courts have no warrant to create judicially crafted limits on their discretion should consider that consequence. If judges eliminate qualified immunity, it would be up to Congress to determine whether and what type of qualified immunity should operate in the future. And thus, formalists and nonformalists who think about constitutional torts have a responsibility to think both about a world without immunity and what a new form of immunity should look like.

106 *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion).

107 See *Scott-Harris v. City of Fall River*, 134 F.3d 427 (1st Cir. 1997), *cert. granted sub nom.* *Bogan v. Scott-Harris*, 520 U.S. 1263 (1997), *rev’d*, 523 U.S. 44 (1998), *and cert. denied sub nom.* *Scott-Harris v. City of Fall River*, 523 U.S. 1003 (1998).

In this final Part, I attempt to draw on some of the lessons of this Essay and other scholarship in the field of constitutional torts to think through the consequences of: (1) no qualified immunity and (2) two existing proposals to amend the law of governmental immunities in Section 1983 suits. I argue that these proposals could appeal to legal formalists by bringing the law closer to the common law and render the law more consonant with the text, all while increasing accountability.

A. *Goodbye to All That?*

As research mounts demonstrating qualified immunity's deficiencies, it is almost impossible not to at least ask the question whether the doctrine should be eliminated altogether. This is not only because of the doctrine's shaky legal foundation, but also because of the empirical reality that other scholars have documented. Governments, not government officials, tend to foot the bill when an official is found liable, raising questions about the doctrine's deterrence value.¹⁰⁸ And the doctrine is not invoked nearly as often as is generally assumed, which further undermines the notion that it is a great bulwark between fairness and anarchy.¹⁰⁹

My chief rebuttal to that argument comes by way of a hypothetical. Imagine a county clerk in 2014 who, because it is against state law, does not award marriage licenses to same-sex couples. Let us call him Obbie Loving. Imagine too that at the time, there is no binding precedent in Loving's jurisdiction concluding that same-sex couples have a constitutional right to marry. Our imaginary county clerk, let us add, is gay and believes deeply in marriage equality. Now imagine that after the United States Supreme Court *does* find that same-sex couples have a right to marry in 2015, couples who were denied this right in 2014 sue Loving in his individual capacity for money damages.¹¹⁰ They contend that even though the right for same-sex couples was not clearly established in 2014, it does not matter. Loving denied them their constitutional rights, the plaintiffs argue, and must therefore pay. Should Loving be liable in his individual capacity on the ground that he should have ignored state law and foreseen new shifts in federal constitutional law?

Concerns about notice and fairness in this hypothetical abound. With no immunity, a person could be held liable even when he or she is objectively following the law as it exists, and is subjectively acting in good faith. We would sometimes be asking government officials to gamble: Follow state and local guidance, or follow your perception of what the law may one day be. If you guess wrong, then you may find yourself liable. Even beyond that, the Court in *Harlow* noted that such a regime would potentially deter government officials from doing their jobs, because they will sometimes wrongly

108 See Schwartz, *Police Indemnification*, *supra* note 13.

109 See Schwartz, *How Qualified Immunity Fails*, *supra* note 13, at 12.

110 See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

predict the future direction of the law and refuse to do things that are perfectly constitutional.

These concerns are lessened, to be sure, by Joanna Schwartz's work showing that governments ultimately pay a defendant's cost.¹¹¹ But it does not necessarily follow that qualified immunity should be eliminated altogether. For one, even if the government indemnifies an individual defendant, there are consequences to being held personally liable in a civil suit. It has implications for one's credit history and background checks, which routinely ask about civil judgments.¹¹² Indeed, one could well conclude based on Schwartz's research that since governments are paying anyway, it is governmental immunity that should be eliminated or reduced, not qualified immunity.

Immunity for government officials in some form has benefits in the way of fairness and even accountable governance. The question should be what this immunity should look like, not simply whether it should exist at all.

B. *The Future Is Now*

As commentators and jurists continue to elevate the conversation about qualified immunity, it is perhaps useful to think about preexisting proposals in the field of constitutional torts, and ways in which they may be equipped to address some of the rule-of-law, empirical, and normative concerns that plague the doctrine. At least two proposals could bring the law more in line with formalism and accountability.

1. Fault-Based Regime

John Jeffries, Jr., a leading voice in the field of constitutional torts, offered a proposal to address how "[t]he proliferation of inconsistent policies and arbitrary distinctions renders constitutional tort law functionally unintelligible."¹¹³ He observed that while there are articles about various individual immunities, "there are relatively few sustained efforts to understand the relations among these issues or to justify particular doctrines in terms applicable to all."¹¹⁴

Jeffries contends that the organizing principle of constitutional torts should be "fault." This should be true regardless of the identity of the governmental defendant, whether that defendant be a teacher, a municipality, or a state. Rather than the "gross negligence" or "recklessness" standard that currently approximates the Court's approach to qualified immunity,¹¹⁵ something more akin to negligence should trigger liability for most officials

111 See Schwartz, *Police Indemnification*, *supra* note 13, at 885.

112 See generally *Henson v. CSC Credit Servs.*, 29 F.3d 280, 285 (7th Cir. 1994) (discussing a court judgment's effect on a credit report).

113 John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 208 (2013).

114 *Id.*

115 *Id.* at 258.

and defendants. The question should not be whether a right was “*clearly established*”—which places courts and litigants on a path toward identifying the nuances of precedent at the time of the violation. Rather, the question is whether the conduct was “*clearly unconstitutional*.”¹¹⁶ He also contends that a similar standard should apply to judges and prosecutors, at least where no one else can be held liable for the conduct. He objects to extending absolute immunity to individuals “who could *not* reasonably have thought their actions lawful” in “cases in which the remedial alternatives that make that regime tolerable do not exist.”¹¹⁷ Further, unreasonable and unconstitutional actions by high-ranking state and local policy officials should result in liability against a state or local government.

Jeffries’s proposed approach would represent a significant improvement over the current doctrine. Cases like *Sims v. Labowitz*,¹¹⁸ discussed in Part II, would not be close calls in the sense that at least one government actor (whether it be the prosecutor, the judge, the officer, or the government itself) would have been held liable. That is, at least to the extent that the judges would have been more likely to agree that it was an unreasonable and unconstitutional decision to force a child to masturbate so that officers could take photographs during the course of an investigation. Even if it is so that officers should have protection when they are acting pursuant to a warrant or court order, the law should not ignore the fact that there were other government officials who were more at fault. If those officials acted unreasonably and unconstitutionally, they should face liability. To quote Jeffries,

That the defendant’s conduct was outrageous should not be irrelevant. While it is true that outrageous misconduct is not necessarily unconstitutional, the fact that an officer’s conduct was egregious should surely affect whether she could reasonably have thought it lawful. Conduct that is both outrageous and unconstitutional should not be immune from damages liability.¹¹⁹

This approach also has much to commend it from a rule-of-law perspective, both in terms of text and history. Section 1983 renders “every person” acting under the color of state law who commits a violation of federal rights, or causes such a violation, to face liability.¹²⁰ By treating all government officials who are at “fault”—officials who have behaved in an unreasonable and unconstitutional manner—Jeffries’s approach would bring the law much closer to the language of the statute.

It is also likely that Jeffries’s approach would find some support in the common law. As observed in Part I, American courts adopted a number of regimes when it came to liability for government officials in the decades before and after Section 1983’s passage.¹²¹ These standards sometimes

116 *Id.* at 263.

117 *Id.* at 220.

118 885 F.3d 254 (4th Cir. 2018).

119 Jeffries, *supra* note 113, at 263.

120 42 U.S.C. § 1983 (2012).

121 See *supra* Part I.

looked much like negligence. In the 1836 case of *Tracy v. Swartwout*, the Supreme Court explained that “[w]here a ministerial officer acts in good faith, for an injury done, he is not liable to exemplary damages; but he can claim no further exemption, where his acts are clearly against law.”¹²² This standard arguably comes closer to Jeffries’s “clearly unconstitutional” or “clearly unlawful” standard than the Court’s “clearly established” standard. Further, in *Blocker v. Clark*,¹²³ a Georgia court found that a government official could be liable even if the conduct fell short of recklessness. Even where an officer is not animated by “spite” and is not “reckless,” “the failure to exercise ordinary care” is sometimes “inconsistent with good faith.”¹²⁴ This, too, looks more like a standard based in negligence and fault than the gross negligence or recklessness regime that current doctrine approximates.

Jeffries’s proposal, then, has the ability to bolster accountability while also appealing to concerns about formalism and fragmentation. His proposal also has the ability to meet some of the demands of a different “F”: the Ferguson or Post-Ferguson Era. Jeffries wrote his article before the deaths of Eric Garner, Walter Scott, Tamir Rice, John Crawford, Sandra Bland, Sam Dubose, or Philando Castile. It was written before Ferguson became a household word as that city burned on American television sets and into our collective imaginations. But Jeffries devoted special attention in his piece the problem of excessive force. “The unconstitutional use of excessive force presents the most glaring case of the inadequacy of current law.”¹²⁵

Jeffries’s proposal would dramatically improve the law in a way that has the power to appeal to formalists seeking support in the common law, observers concerned about officers who face fragmented legal commands, commentators who recognize that various fragmented doctrines operate together to block liability, and citizens demanding more accountability from the government that swears to protect them.

2. Expansion of Respondeat Superior

Another approach would be to make local governments liable for the unconstitutional acts of their employees. This approach has multiple advantages.

First, this approach is compatible with some, though not all, textually based formalist conceptions of how Section 1983 should operate. As an initial matter, scholars generally agree that the most plausible, textually sound reading of Section 1983 would result in broad respondeat superior liability.¹²⁶ This proposal would bring the law closer to that textual reading. Fur-

122 35 U.S. (10 Pet.) 80, 95 (1836).

123 54 S.E. 1022, 1024 (Ga. 1906).

124 *Id.*

125 Jeffries, *supra* note 113, at 264.

126 See David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 *FORDHAM L. REV.* 2183, 2196 (2005); Jack M. Beerermann, *Municipal Responsibility for Constitutional Torts*, 48 *DEPAUL L. REV.* 627, 635 (1999); Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons*

ther, this reading is entirely compatible with investigating and adopting whichever form of qualified immunity (if any) is determined to be most prevalent prior to 1871. It would only mean that, whatever the scope of qualified immunity, there would be governmental liability in other cases.

Second, it would ensure that violations of constitutional rights always have a remedy. Today it is entirely possible for violations of constitutional rights to go with no remedy at all. This almost happened in *Sims v. Labowitz*, but it actually happens in others, a phenomenon I have documented in prior work. It is one thing to say that an individual should not be held personally liable when he violates the Constitution in a manner that was not apparently unlawful at the time of the violation. It is another to say that there should be no remedy at all under these circumstances—no moment for the court to hold someone accountable in anyway whatsoever for violating the Constitution.

Third, this approach would bring the law of constitutional torts into greater dialogue with the important empirical work that has happened in this area. The Court has expressed concern that respondeat superior liability might undermine federalism by diverting city resources in ways that undermine the ability of local residents to govern themselves. But generally speaking, governments often already pay damages awards when their employees violate the Constitution.¹²⁷ The identity of the defendant in the wake of a judgment may matter for some purposes, such as whether an individual has to report a judgment to creditors or those conducting background checks. But its effect on government budgets would seem overblown. Expanding respondeat superior liability brings the doctrine more in line with these facts.

Fourth, this approach reduces the negative consequences of fragmentation. Various immunities doctrines can continue to develop independently, but in individual cases, the fragmentation would not result in the absence of a remedy. In a case like *Sims v. Labowitz*, for example, even if the officer were not liable because he acted pursuant to a court order, his employer would still be liable.

This proposal differs from my own preferred approach to constitutional liability against local governments, which I have offered elsewhere, and which is markedly less formalist.¹²⁸ My preferred approach would expand respondeat liability *only* when there is no other remedy available at law as a result of various individual immunities. Still, if formalism and accountability are the primary lodestars, these norms are advanced by expanding respondeat superior liability to all cases in which a local official acting within the scope of her employment. And in this moment, the scholarship advocating that position deserves renewed attention.

from *Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1755 n.13 (1989); Russell Glazer, Comment, *The Sherman Amendment: Congressional Rejection of Communal Liability for Civil Rights Violations*, 39 UCLA L. REV. 1371, 1406–21 (1992).

127 See Schwartz, *Police Indemnification*, *supra* note 13.

128 See *id.* at 478.

CONCLUSION

This is a promising moment in the life of constitutional accountability. Qualified immunity is at the crossroads of multiple legal and social moments. The Court is increasingly resisting legal rules that outpace statutory or constitutional text. And social movements are demanding more accountability, especially with respect to constitutional violations at the intersection of criminal justice and race. As courts and commentators revisit the doctrine, there is an opportunity to meet the demands of this moment. We can achieve a doctrine simultaneously more faithful to text and history, more consistent with empirical reality, and better equipped to achieve justice for victims of constitutional harms. The problems with the current doctrine are both glaring and growing. And they cannot be unseen.

