

# ARTICLES

## Qualified Immunity and Federalism

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*Qualified immunity is increasingly controversial. But the debate about it is also surprisingly incomplete. For too long, both qualified immunity's critics and defenders have overlooked the doctrine's federalism dimensions. Yet federalism is at the core of qualified immunity in at least three respects. First, many of the reasons the U.S. Supreme Court has proffered for qualified immunity best sound in protecting the states' sovereign interests in recruiting competent officers and providing incentives for those officers to faithfully enforce state law. Second, the states have embraced indemnification policies premised on the existence of federal qualified immunity. Third, working against the backdrop of federal qualified immunity, state and local governments are engaged in robust policy experimentation about the optimal balance between deterrence and overdeterrence in their state law liability schemes, thus exhibiting the "laboratories of democracy" benefits of federalism.*

*Drawing on findings from the most comprehensive review of state immunity and indemnification laws to date, this Article argues that these overlooked federalism dimensions have important implications for the future of qualified immunity. The observation, for instance, that the Supreme Court's qualified immunity cases are grounded in protecting state sovereignty and have generated substantial reliance should matter for statutory interpretation and stare decisis. Similarly, state and local governments' experimentation with how to best use state law to achieve optimal deterrence—effectively eliminating or narrowing federal qualified immunity through state liability and narrower state immunities—further supports the notion that reform should be done legislatively, not judicially. Qualified immunity's federalism dimensions further counsel that calls for the Supreme Court to revisit qualified immunity should be redirected to Congress and state legislatures.*

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## INTRODUCTION

Qualified immunity regularly shields government officials from monetary liability when they violate others' constitutional rights. Even if an innocent person has suffered serious damages, the officer will not have to pay any money unless the right was "clearly established" at the time of the violation.<sup>1</sup> And for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate" such that "every 'reasonable official would [have understood] that what he is doing violates that right.'"<sup>2</sup> In this way, when it comes to officials who violate federal rights, qualified immunity shelters "all but the plainly incompetent or those who knowingly violate the law."<sup>3</sup> Accordingly, in light of qualified immunity, violations of federal civil rights regularly go without a federal remedy.<sup>4</sup>

As one might imagine from this Article's opening paragraph, qualified immunity has long been controversial.<sup>5</sup> Yet the intensity of the criticism has markedly increased in recent years. Indeed, Justices Clarence Thomas and Sonia Sotomayor—an unlikely duo—have urged the Court to revisit qualified immunity.<sup>6</sup> And in the lower courts, Judge Don Willett (appointed by President Trump) and the late Judge Stephen Reinhardt (appointed by President Carter)—perhaps an even more unlikely duo—have bemoaned that qualified immunity lets "untold constitutional violations slip" through the cracks<sup>7</sup> and imposes "drastic new restrictions on finding civil liability."<sup>8</sup>

1. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

2. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

3. *Id.* at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

4. *See, e.g.*, *Camreta v. Greene*, 563 U.S. 692, 697–98 (2011) (explaining that the lower court found a constitutional violation but nonetheless denied relief because of qualified immunity); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368 (2009) (holding that strip-searching students can be unconstitutional but awarding immunity to the government official); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 33–38 (2015) (providing data).

5. *See, e.g.*, David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 77 (1989) ("Requiring a plaintiff to demonstrate that the law was clearly established . . . immunizes serious governmental misconduct."); Erwin Chemerinsky, *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> (arguing that qualified immunity is unfair and dangerous).

6. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that the Supreme Court's approach to qualified immunity "tells officers that they can shoot first and think later"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *see also* JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 106 (2014) (urging a constitutional amendment barring a "state officer [from receiving] an immunity from liability for violating any act of Congress, or any provision of th[e] Constitution").

7. *Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019) (Willett, J., dissenting); *see also* *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., dissenting in part) (arguing that "qualified immunity smacks of unqualified impunity").

8. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1222 (2015).

Sounding similar themes, scholars,<sup>9</sup> policymakers,<sup>10</sup> and others<sup>11</sup> have criticized qualified immunity on both legal and policy grounds, and many certiorari petitions—supported by cross-ideological groups—have recently asked the Supreme Court to overrule the doctrine outright.<sup>12</sup> By any measure, qualified immunity is under attack.

In response to this wave of attacks, another group of scholars and judges has risen to qualified immunity's defense.<sup>13</sup> For instance, Richard Fallon has argued that the Supreme Court “should make less drastic changes than [qualified immunity's] sharpest critics have demanded” and that “the *Harlow* formula—under which immunity attaches unless officials violated clearly established law—is basically sound.”<sup>14</sup> Similarly, two judges on the Fifth Circuit have responded by arguing that if one is going to question qualified immunity on the grounds that it

9. See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) (arguing that qualified immunity is unlawful); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) (challenging the policy case for qualified immunity).

10. See, e.g., Jordain Carney, *GOP Senator to Offer Measure Changing Qualified Immunity for Police*, HILL (June 17, 2020, 1:39 PM), <https://thehill.com/homenews/senate/503195-gop-senator-to-offer-measure-changing-qualified-immunity-for-police> [<https://perma.cc/P34R-WFE5>]; Nick Sibilla, *Bernie Sanders, Elizabeth Warren Want New Limits on “Qualified Immunity” for Police Misconduct*, FORBES (Sept. 30, 2019, 1:30 PM), <https://www.forbes.com/sites/nicksibilla/2019/09/30/bernie-sanders-elizabeth-warren-want-new-limits-on-qualified-immunity-for-police-misconduct/?sh=36d2be902e51> (noting political criticisms); Christianna Silva, *Cory Booker Wants to End Qualified Immunity for Police Officers*, NPR (June 7, 2020, 8:29 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/07/871713872/cory-booker-wants-to-end-qualified-immunity-for-police-officers> [<https://perma.cc/AJ2N-M22F>].

11. See, e.g., Editorial, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html>.

12. See, e.g., Alan Feuer, *Advocates from Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), <https://www.nytimes.com/2018/07/11/nyregion/qualified-immunity-supreme-court.html> (detailing petitions). *But see* Devin Dwyer, *Supreme Court Won't Revisit Qualified Immunity for Police, Leaving It to Congress*, ABC NEWS (June 22, 2020, 12:24 PM), <https://abcnews.go.com/Politics/supreme-court-wont-revisit-qualified-immunity-police-leaving/story?id=71374240> [<https://perma.cc/X6PN-3QLJ>] (reporting that the Supreme Court declined to hear ten cases—during its October 2019 Term—that asked the Court to reconsider qualified immunity).

13. See, e.g., Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. (forthcoming 2021) (available at <https://ssrn.com/abstract=3680714> [<https://perma.cc/T8ZN-38PX>]) (offering historical support for the argument that the common law in 1871 recognized something like qualified immunity for discretionary duties); Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 43 (2018) (defending qualified immunity on a “common law” theory of interpretation); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018) (offering a qualified defense that accepts qualified immunity's core but also proposes modifications).

14. Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 989 (2019). Our argument here and elsewhere is different from Fallon's. Fallon grounds his argument in pragmatic concerns, *see id.* at 990 (“[I]mposing damages liability for violations of every newly recognized right could easily deter courts from recognizing new rights . . .”), and a belief that § 1983 is a common law statute, *see id.* at 993 (explaining that “the Supreme Court, in a diverse swath of § 1983 cases, has assumed an entitlement to take substantial interpretive liberties”). By contrast, our argument applies the Supreme Court's current approach to stare decisis, especially augmented by the murkiness of the historical record. Of course, if one believes that § 1983 is a “common law” statute, then concerns about stare decisis are diminished but so are arguments that immunities are ahistorical.

is unlawful, one must also question whether the broad interpretation courts have given to the primary federal civil rights statute for damages—42 U.S.C. § 1983—is proper on those same grounds.<sup>15</sup> And most important of all, the Supreme Court has continued to reverse courts that misapply qualified immunity<sup>16</sup>—often summarily<sup>17</sup> and sometimes even identifying an offending court by name.<sup>18</sup> Hence, unlike other controversial doctrines that are nominally alive but in practice are rarely invoked, qualified immunity remains a central part of our law. Indeed, earlier this year, the Court denied many petitions attacking qualified immunity; only Justice Thomas dissented.<sup>19</sup>

This debate about the future of qualified immunity is important. But to date, the debate is also incomplete—surprisingly so. Specifically, qualified immunity has a number of significant but overlooked federalism dimensions that should change both the substantive content of the debate and, importantly, which institutions are best positioned to resolve the debate. In fact, qualified immunity’s federalism dimensions provide further support for the argument that calls for reform or even elimination of qualified immunity should be addressed to Congress and state legislatures, and not to the Supreme Court.

Under the conventional understanding of § 1983, it is perhaps understandable why federalism concerns have been overlooked thus far. After all, the Supreme Court has held that a state (or state agency) is not a “person” who can be sued under § 1983.<sup>20</sup> Indeed, state officials sued in their official capacities cannot even be sued for money damages under § 1983.<sup>21</sup> Instead, a plaintiff must sue state officials in their *individual* capacities, not their *official* capacities, for monetary

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15. See *Cole v. Carson*, 935 F.3d 444, 477 (5th Cir. 2019) (Ho & Oldham, JJ., dissenting) (“A principled originalist would not cherry pick which rules to revisit based on popular whim.”). In particular, as discussed in Section I.A, it is debatable whether the Supreme Court’s current reading of § 1983’s breadth, including whether the statute applies to state officers acting without state authorization, is consistent with § 1983’s “under color of law” requirement.

16. See, e.g., *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) (Thomas, J.) (unanimously affirming qualified immunity).

17. See, e.g., *Wesby v. District of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (noting the Supreme Court’s pattern of summary reversals).

18. See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (“This Court has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.” (internal quotations omitted)).

19. See, e.g., Dwyer, *supra* note 12; Debra Cassens Weiss, *Supreme Court Rejects Cases on Qualified Immunity Used to Shield Police Officers*, ABA J. (June 16, 2020, 10:30 AM), <https://www.abajournal.com/news/article/supreme-court-rejects-cases-on-qualified-immunity-used-to-shield-police-officers> [<https://perma.cc/S5MW-7GZV>]. Notably, Justice Thomas’s dissent suggested a willingness to also reexamine whether Congress has broadly authorized liability in the first place. See *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 n.2 (2020) (Thomas, J., dissenting from the denial of certiorari) (explaining that it is “understandable” why one might be “concern[ed]” about reexamining qualified immunity without also reexamining the scope of the cause of action itself).

20. See, e.g., *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989).

21. See *id.* at 71 (“Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office.”).

damages.<sup>22</sup> Because the state *itself* cannot be sued, state sovereign immunity is not directly implicated.

Fixating on the Court's interpretation of "person" in § 1983, however, misses something important: the federalism concerns inherent in qualified immunity. Federalism is the core of qualified immunity in at least three respects: (1) Supreme Court precedent demonstrates that many of the justifications for qualified immunity most naturally sound in concerns about state sovereignty rather than concerns about an individual officer's interests; (2) all fifty states have fashioned indemnification laws (and accompanying contractual obligations with government employees) against a backdrop of Supreme Court precedent, including precedent concerning qualified immunity; and (3) acting against that backdrop, states have structured civil liability within their borders in markedly different ways, with some jurisdictions even effectively eliminating qualified immunity for certain types of claims, thereby exhibiting the benefits of a "laboratories of democracy" approach to government official liability.<sup>23</sup> Each of these three dimensions independently points toward a legislative, rather than judicial, response to concerns about qualified immunity.

To begin, although "federalism" receives short shrift in the current debate over qualified immunity,<sup>24</sup> many of the explanations the Court has articulated for qualified immunity sound in traditional notions of federalism. Although the Court's focus on avoiding liability is sometimes framed as referring to the interests of individual officers,<sup>25</sup> in reality, the Court's theoretical explanation reflects concerns about the states' ability to enforce their laws without undue federal interference. States, for instance, have distinctly sovereign interests in hiring competent officers, as well as other distinctly sovereign interests in preventing those officers from shirking their duty for fear of federal liability. States also have limited budgets and, to fulfill their sovereign roles, must use those limited funds for many competing needs. Hence, federalism helps explain the Court's emphasis on the importance of qualified immunity "to society as a whole."<sup>26</sup> Notably, in a case that merits a much more significant role in today's increasingly contentious debate, when the Court was forced to carefully consider the theoretical basis for qualified immunity, it invoked federalism, explaining that qualified immunity "acts to safeguard *government*, and *thereby* to protect the public at large" because

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22. See *Hafer v. Melo*, 502 U.S. 21, 23 (1991).

23. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (explaining a laboratories-of-democracy theory of federalism); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 493 (1954) (similar).

24. See, e.g., *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 153, 280 (2009) (arguing that "[i]n the context of qualified immunity, . . . a federalism-based argument is untenable, from both liberal and conservative perspectives").

25. See, e.g., *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (defending qualified immunity because the issue "concerns the *liability of the individual officers*"); *United States v. Lanier*, 520 U.S. 259, 270–71 (1997) ("[T]he object of the 'clearly established' immunity standard is not different from that of 'fair warning' . . .").

26. *Sheehan*, 135 S. Ct. at 1774 n.3 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

state and local governments have a unique interest in “serv[ing] the public good” and “ensur[ing] that talented candidates [are] not deterred by the threat of damages suits from entering public service.”<sup>27</sup>

Once qualified immunity is understood as sounding in traditional federalism concerns, both how § 1983 should be interpreted and what role *stare decisis* should play in its potential preservation must change. When federalism is implicated, the Justices are much less likely to read a federal statute broadly to interfere with states’ interests<sup>28</sup> and more likely to apply statutory *stare decisis* with solicitude for states’ interests.<sup>29</sup> This focus on traditional federalism also avoids the need for other misplaced federalism arguments that do not, in fact, support qualified immunity well.<sup>30</sup>

Second, focusing on federalism should also affect how we think about indemnification. In Joanna Schwartz’s important study on this subject, she found that a sample of state and local police departments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement.<sup>31</sup> According to Schwartz, this fact cuts against qualified immunity because it means officers are not chilled in their execution of the law.<sup>32</sup> In fact, the presence of indemnification supports qualified immunity, at least for purposes of a judicial rather than legislative response. State and local governments have organized their personnel policies against a backdrop that includes federal qualified immunity. That widespread reliance is important for *stare decisis*,<sup>33</sup> especially because federal qualified immunity is *statutory* rather than *constitutional* in character.<sup>34</sup>

To illustrate the extent of this reliance, this Article offers a state-by-state survey of indemnification laws. Based on that review, it is plain that state and local reliance on the existence of qualified immunity is significant—indeed, overwhelming. Our study finds that indemnification provisions, which have been

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27. *Wyatt v. Cole*, 504 U.S. 158, 167–68 (1992) (emphases added).

28. *See, e.g., Bond v. United States*, 572 U.S. 844, 857–58 (2014) (listing the limitations of the scope presumed when interpreting a federal statute to avoid abrogating the relationship between the federal government and the states); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 67–70 (1989) (refusing to infer that Congress meant to hold states liable via 42 U.S.C. § 1983).

29. *See, e.g., Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 493–95 (1987) (adhering to *stare decisis* and refusing to depart from the doctrine of state sovereign immunity without special justification).

30. For instance, Katherine Mims Crocker has proposed a theory to explain modern qualified immunity in the § 1983 context—namely, that it ensures parallelism for liability with federal officers in the *Bivens* context. *See* Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1411 (2019). She rejects this argument, however, because such “freestanding federalism” finds no support in any “particular legal principle.” *Id.* Our federalism argument, by contrast, is rooted in more traditional notions of federalism—including the power of states to execute state law within their borders.

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

32. *See, e.g.,* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1804–05 (2018).

33. *See, e.g., Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991) (choosing to follow *stare decisis* where Congress had implicitly chosen not to amend law in response to prior court opinions).

34. *See, e.g.,* Nielson & Walker, *supra* note 13, at 1856–63.

enacted against a backdrop that includes federal qualified immunity, are ubiquitously embedded in state statutes. We find that forty-one states require by statute the indemnification of state or local government employees, with another seven states authorizing state agencies or local governments to indemnify their employees, and only two (Alaska and Hawaii) with apparently no state laws on the issue. We also find, however, that many states have enacted various exceptions to statutory indemnification requirements and authorizations: thirty-six states have exceptions for a variety of bad acts or mental states, whereas sixteen limit or outright prohibit indemnification for punitive damages.<sup>35</sup>

Not only would eliminating qualified immunity upend long-standing doctrine, which itself supports *stare decisis*, but it would also affect state policies rooted in state statutes and regulations and accompanying contractual obligations. Without qualified immunity, we should expect—based on the reasoning of the Supreme Court’s cases and some empirical research<sup>36</sup>—that state and local governments operating in competitive employment markets would either pay officers more (to offset the increased risk of judgments) or require officers to do less (to eliminate the risk). In this way, overruling qualified immunity would not simply affect individual officers; it would affect the states *as states*. We submit that Congress and state legislatures have more nuanced tools at their disposal to evaluate and craft policy that addresses these reliance interests.<sup>37</sup>

And third, although the *test* for qualified immunity is the same throughout the United States, how liability is imposed and who actually pays damages varies markedly based on state and local laws and contracts enacted or created against the backdrop of federal qualified immunity. For instance, a number of states have effectively repealed qualified immunity altogether within their borders, at least for certain types of claims, by creating state law liability even where federal liability does not exist. California is a prime example—there, the entire concept of qualified immunity “does not extend to state tort claims against government employees”<sup>38</sup> and “does not apply to state civil rights claims.”<sup>39</sup> Nor is California

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35. The findings of our state-by-state survey are presented in Section III.B.

36. *See infra* note 310.

37. Developing potential legislative reforms to qualified immunity far exceeds the scope of this Article. But a number of potential reforms come immediately to mind. For instance, as we have previously noted, Congress could statutorily adjust the level of immunity applicable to state officers “based on the type of asserted constitutional rights or types of defendants at issue” and even “eliminate qualified immunity under Section 1983 in some constitutional or factual contexts, but leave it undisturbed in others.” Nielson & Walker, *supra* note 13, at 1856–63, 1878 (noting that Congress took such a subject-matter approach to modifying liability under § 1983 when it enacted the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321-71 (enacted as part of the Act of Apr. 26, 1996) (codified as amended at 42 U.S.C. § 1997e (2018))). Congress could also reintroduce a consideration of the defendant’s subjective intent (again, wholesale or based on the officer, subject matter, etc.), or it could statutorily define what “clearly established” law means, as it has done in the habeas context—albeit to make it harder for a plaintiff to prevail in that context. *See* 28 U.S.C. § 2254(d)(1) (2018).

38. *Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009) (quoting *Venegas v. County of Los Angeles*, 63 Cal. Rptr. 3d 741, 751 (Ct. App. 2007)).

39. *Id.*



alone in this liability-expanding policy experimentation. Other states have adopted narrower versions of qualified immunity in state law. The Iowa Supreme Court provides a recent example. That court, *by name*, refused to adopt *Harlow*'s objective reasonableness standard but instead interpreted its state's law to provide a more plaintiff-friendly "due care" immunity standard.<sup>40</sup> And earlier this year, Colorado—"amidst the protests over the brutal killing of George Floyd"—enacted the Enhance Law Enforcement Integrity Act of 2020 to eliminate qualified immunity for liability under state law for "all local law enforcement officers, sheriff's deputies, and Colorado State Patrol officers."<sup>41</sup>

Based on an extensive review of state statutes, this Article demonstrates that different states approach questions of officer liability differently and in ways that depart from the federal approach. In other words, to borrow from Judge Jeffrey Sutton in the analogous context of constitutional law, federal qualified immunity is a liability floor—not a ceiling.<sup>42</sup> Different states make different choices in light of their own circumstances. This variation allows for closer tailoring of policy to local conditions and greater experimentation. These unnoticed dynamics also counsel in favor of legislative rather than judicial reform because legislatures are uniquely able to balance competing interests and assess real-world evidence.

We do not claim that qualified immunity is perfect. It is not. Nor do we claim that state and local laws are always best; dark moments in history show all too well that state and local governments sometimes fail to protect liberty,<sup>43</sup> which is why federal rights enforceable against the states rightly exist in the first place.<sup>44</sup> And we certainly do not approve of police brutality or other abuses of power. Our point, more modestly, is that these federalism dimensions counsel in favor of statutory *stare decisis* by the federal judiciary and careful, evidence-based reform by state legislatures and Congress. In short, because qualified immunity is the product of federalism-infused statutory interpretation that has now generated significant reliance and robust experimentation, it follows that qualified immunity's

40. See *Baldwin v. City of Estherville (Baldwin I)*, 915 N.W.2d 259, 280 (Iowa 2018) (holding that "to be entitled to qualified immunity [under Iowa law,] a defendant must plead and prove as an affirmative defense that she or he exercised all due care").

41. Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020, 7:36 PM), <https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/#6294bb9b378a>.

42. Cf. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16 (2018) ("As long as a state court's interpretation of its own constitution does not violate a federal requirement, it will stand, and, better than that, it will be impervious to challenge in the U.S. Supreme Court.").

43. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("[W]e hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

44. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) ("We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in *Brown v. Board of Education* have been further challenged and tested in the courts. We reject these contentions.").

critics should stop looking to the Supreme Court for judicial action. They should instead “take their objections across the street, [where] Congress can correct any mistake it sees.”<sup>45</sup>

This Article proceeds as follows: Part I introduces the basics of qualified immunity and outlines the current debates surrounding the doctrine. Part II, in turn, explores how federalism should influence judicial interpretation of § 1983. Part III presents the findings from our original state-by-state survey of indemnification law, which help illustrate the extensive reliance by state and local governments on the Supreme Court’s decisions regarding § 1983 and qualified immunity. In this same Issue of *The Georgetown Law Journal*, Schwartz has penned a characteristically thoughtful response to this Article.<sup>46</sup> Although we cannot provide an exhaustive reply here, we respond to a number of points throughout (primarily in footnotes) and present a more sustained response in Section III.D regarding our differing views on states’ reliance interests in qualified immunity. Part IV explores the robust policy diversity in state and local governments that has emerged against the backdrop of federal qualified immunity. Each of these federalism dynamics, we conclude, counsels in favor of a legislative rather than judicial response to qualified immunity.

## I. THE BASICS OF QUALIFIED IMMUNITY

The heart of qualified immunity is easily stated. Plaintiffs seeking money damages from a government official pursuant to the leading federal causes of action for alleged violations of federal rights—namely, § 1983 (for state officers)<sup>47</sup> and *Bivens* (for federal officers)<sup>48</sup>—must establish that their rights were not only violated but also “clearly established” when the government officer violated those rights. This clearly established requirement—the *immunity* in qualified immunity—has prompted sharp criticism, especially in recent years. Here, Section I.A discusses the history of § 1983 and the emergence of qualified immunity as a defense to § 1983 claims. Section I.B, in turn, details recent criticisms of qualified immunity, both as a matter of law and policy. And Section I.C details the various responses to these criticisms, including our previous response that focused on the Supreme Court’s doctrine of statutory *stare decisis*.

### A. THE EMERGENCE OF QUALIFIED IMMUNITY

The story behind qualified immunity has been told many times before.<sup>49</sup> We briefly recount it here because it is necessary to understand current debates. Be

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45. *Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 456 (2015).

46. See Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305 (2020).

47. 42 U.S.C. § 1983 (2018).

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

49. See, e.g., Baude, *supra* note 9, at 51–61; Crocker, *supra* note 30, at 1412–21; Nielson & Walker, *supra* note 4, at 8–27.

warned, however. Although qualified immunity is simple enough to explain in the abstract, it quickly becomes complicated once one moves into the specifics.

To begin, it is important to recall that two federal causes of action undergird much of today's civil rights litigation, particularly civil rights cases seeking money damages. These federal causes of action are § 1983 and *Bivens*, which comes from the Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>50</sup> The former allows suits against state officials in their personal capacities;<sup>51</sup> the latter permits suits against federal officials in their personal capacities.<sup>52</sup> Qualified immunity applies to both § 1983 and *Bivens*.<sup>53</sup>

Section 1983—named for its placement in the U.S. Code—was enacted following the Civil War as part of the 1871 Ku Klux Klan Act.<sup>54</sup> It was designed to enforce the Fourteenth Amendment against a backdrop of “lawlessness and civil rights violations in the southern states.”<sup>55</sup> Section 1983 is important because a successful plaintiff can receive damages rather than just equitable relief. The possibility of monetary relief should not be downplayed. True, there are other ways federal rights can be litigated, including as defenses in criminal proceedings<sup>56</sup> or in suits for injunctive relief under *Ex parte Young*.<sup>57</sup> But those alternate paths are often inferior from the perspective of a plaintiff whose rights have been violated. Even apart from significant justiciability concerns that may prevent litigation from occurring at all,<sup>58</sup> the prospect of damages is often necessary to

50. 403 U.S. at 388.

51. See 42 U.S.C. § 1983 (explaining that violation must be “under color of . . . State” law); see also *Bivens*, 403 U.S. at 406 (noting the distinction).

52. See *Bivens*, 403 U.S. at 395 (“That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition.”).

53. See, e.g., Crocker, *supra* note 30, at 1410–11 (detailing how qualified immunity was first recognized as a defense in the *Bivens* context and then later extended to the § 1983 context). This Article brackets the propriety of qualified immunity in the *Bivens* context because most of the arguments to date concerning qualified immunity have focused on § 1983. The federalism interests we identify here offer no support for keeping qualified immunity in the *Bivens* context. By definition, *Bivens* creates a federal cause of action *only* against federal officers, whereas § 1983 provides one *only* against state officers. Moreover, *stare decisis* is quite different in the *Bivens* context. The Supreme Court has expressly tied qualified immunity in the § 1983 context to congressional intent. See, e.g., Baude, *supra* note 9, at 53–54 (citing, *inter alia*, *Filarsky v. Delia*, 566 U.S. 377, 384 (2012)); see also *Filarsky*, 566 U.S. at 384 (“Under our precedent, the inquiry begins with the common law as it existed when Congress passed § 1983 in 1871.”). By contrast, the Court has not done so in the context of *Bivens*—presumably because *Bivens* itself is not statutory in character. Federalism thus is another reason why the link between *Bivens* and § 1983 is best understood as a matter of judicial choice. Cf. Nielson & Walker, *supra* note 13, at 1863–64 (“To be sure, the Court seems to treat the immunity standard under *Bivens* and Section 1983 as interchangeable. But that is a matter of judicial choice, not statutory command.”).

54. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2018)).

55. Baude, *supra* note 9, at 49.

56. See, e.g., Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 887–88 (2010); Nielson & Walker, *supra* note 4, at 12 (citing *Mapp v. Ohio*, 367 U.S. 643, 657 (1961)).

57. 209 U.S. 123, 159 (1908).

58. See, e.g., Nielson & Walker, *supra* note 4, at 12 (citing, *inter alia*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)).

meaningfully redress the violation. Hence, the Court has explained that “an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.”<sup>59</sup>

In its current form, which is largely—but not entirely—unchanged in material respects from the original version, § 1983 reads in relevant part:

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 . . . .<sup>60</sup>

As Ann Woolhandler has carefully documented, case law surrounding immunity was murky and inconsistent in the 1800s.<sup>61</sup> Thus, it is difficult to know precisely against what backdrop Congress enacted § 1983.<sup>62</sup> However, the statute’s text does not include a defense like qualified immunity; indeed, it does not include *any* defenses at all. But for good or ill, Congress in the 1800s did not always expressly enact defenses that nonetheless applied.<sup>63</sup> Then and now, Congress sometimes relies on courts to infer defenses from background norms or common law principles.<sup>64</sup> Congress has been doing this for a long time.

For instance, the Supreme Court unanimously inferred a defense just two years before § 1983’s enactment, when it held in *United States v. Kirby* that a federal statute that prevented anyone from “knowingly and wilfully [sic] obstruct[ing] or retard[ing] the passage of the mail” did not apply to a state official who arrested a federal mail carrier for murder because the state official was simply enforcing

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59. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

60. 42 U.S.C. § 1983 (2018). There are differences, however. For instance, the current version of § 1983 states: “except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” *Id.* Congress added this language in 1996, well after the Supreme Court had established the modern qualified immunity standard. See Nielson & Walker, *supra* note 13, at 1858 & n.37 (discussing the Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853).

61. See Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414–33 (1987).

62. See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–97 (1979) (explaining the rule that “[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law” when they enact legislation).

63. See, e.g., *Dixon v. United States*, 548 U.S. 1, 19 (2006) (Alito, J., concurring) (“Dress was an established defense at common law. When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to this defense.” (citation omitted)); Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 292 (1974) (collecting examples of early federal cases recognizing a necessity defense).

64. See, e.g., Baude, *supra* note 9, at 50 (acknowledging that the textual lack of a qualified immunity defense is not dispositive because “legal provisions are often subject to defenses derived from common law”).

state law against a *mala in se* offense.<sup>65</sup> The Justices explained that if Congress wished to prevent a state officer from enforcing state law, a clear statement was required.<sup>66</sup> *Kirby* does not prove that Congress intended something like qualified immunity when it enacted § 1983. But it does support the notion that Congress acted against a backdrop in which federal courts were both mindful of federalism and willing to infer defenses in support of federalism. And considering that it was unthinkable to the unanimous Supreme Court in 1869 that Congress would have barred a state officer from taking steps to punish a *mala in se* violation of state law, it is also at least conceivable that Congress did not intend to punish a state official who reasonably believed he was acting in the public interest.<sup>67</sup> Indeed, the Court had already previously endorsed the rule, albeit in dicta about a federal official, that it would “be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.”<sup>68</sup> This concern mirrors the key justification for qualified immunity. Although impossible to say for certain, it is at least conceivable that Congress enacted § 1983 against a backdrop of concern for legitimate state interests in the enforcement of state law.

In all events, § 1983 was rarely invoked for almost a century. Between 1871 and 1961, “§ 1983 was remarkable for its insignificance. Indeed, one commentator found only 21 suits brought under this provision in the years between 1871 and 1920.”<sup>69</sup> Some speculate the reason for this dearth of litigation is that plaintiffs understood § 1983’s use of the phrase “under color of” state law to mean that

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65. 74 U.S. (7 Wall.) 482, 485–87 (1869) (internal quotation marks omitted); *see also id.* at 486–87 (“General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.”).

66. *See id.* at 486 (“Indeed, it may be doubted whether it is competent for Congress to exempt the employees of the United States from arrest on criminal process from the State courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But whether legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language.”).

67. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 745 (2002) (“The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope’s constitutional protection against cruel and unusual punishment. . . . This wanton treatment was not done of necessity . . .”); Nielson & Walker, *supra* note 13, at 1874 (explaining that in evaluating “fair notice” for immunity purposes, one should consider whether the unlawful act was “‘*malum in se*’ (or at least ‘*malum in se*-ish,’ recognizing that this can be a fuzzy spectrum more than a binary divide),” given that “acts taken with a credible claim of benefiting the public potentially will not trigger the same alarms” as those “that by their nature harm others with no obvious offsetting benefit”).

68. *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 131 (1849) (quoting *Jenkins v. Waldron*, 11 Johns. 114, 121 (N.Y. Sup. Ct. 1814)); *see also Woolhandler, supra* note 61 (explaining the complicated history of immunity from liability for official acts). Justice Thomas recently suggested that at common law, “the defense for good-faith official conduct appears to have been limited to authorized actions within the officer’s jurisdiction,” which may not include unconstitutional behavior. *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari).

69. Nielson & Walker, *supra* note 13, at 1870–71 (quoting JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 9 (3d ed. 2013)).

a plaintiff could sue only when a state law authorized the state officer's violation of the plaintiff's federal rights.<sup>70</sup> That understanding of § 1983, however, was changed in 1961, when the Supreme Court decided *Monroe v. Pape*.<sup>71</sup> The *Monroe* Court held that Congress "meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position," regardless of whether the state officer was also violating state law.<sup>72</sup>

This conclusion is controversial because *Monroe* "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."<sup>73</sup> In other words, the *Monroe* Court concluded that even if a state official was acting without authorization from state law, the official could still be sued under § 1983, greatly expanding the number of potential claims. It is debatable whether that criticism of *Monroe* is compelling, of course,<sup>74</sup> and a large majority of the Justices certainly were not persuaded. Whether *Monroe* was decided correctly or not—a question others have addressed<sup>75</sup>—after *Monroe*, § 1983 quickly became a central pillar of modern civil rights litigation.<sup>76</sup>

But what would that new, post-*Monroe* litigation under § 1983 look like? Did Congress create what could amount to strict liability, as even a state officer's reasonable mistakes about federal law could ground liability? The Supreme Court soon answered the question in the negative. Six years after *Monroe*, the Justices first recognized something akin to qualified immunity as a defense in § 1983 litigation in *Pierson v. Ray*.<sup>77</sup> There, the Court held—in rejecting liability against an officer who "acted in good faith and with probable cause in making an arrest under a state statute not yet held invalid"<sup>78</sup>—that after *Monroe*, "§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions'" and "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause."<sup>79</sup> In 1974, the Court extended that subjective defense

70. See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

71. 365 U.S. 167, 183 (1961).

72. *Id.* at 172.

73. *Crawford-El*, 523 U.S. at 611 (Scalia, J., dissenting) (citations omitted); see also Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 913 (2015) (observing that the "founding" of § 1983 was in 1961).

74. See generally Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992) (explaining the historical understanding of "under color of").

75. Compare *id.* at 404–07 (defending *Monroe*), with Eric H. Zagrans, "Under Color of" What Law: A Reconstructed Model of Section 1983 Liability, 71 VA. L. REV. 499, 502–03 (1985) (criticizing *Monroe*).

76. See Nielson & Walker, *supra* note 13, at 1871 & n.109 ("[T]here were 8267 civil rights lawsuits filed ten years after *Monroe* and nearly 35,000 such lawsuits in 2010." (citing JEFFRIES, JR. ET AL., *supra* note 69, at 14)).

77. 386 U.S. 547 (1967).

78. *Id.* at 550.

79. *Id.* at 556–57 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)).

to liability in *Scheuer v. Rhodes*, holding that it applies not only in the arrest context but also to “higher officers of the executive branch.”<sup>80</sup>

In between *Ray* and *Scheuer*, the Supreme Court decided *Bivens*,<sup>81</sup> the other pillar of modern civil rights litigation.<sup>82</sup> *Bivens* involved a claim for money damages against federal officials, not state officials. Nothing in § 1983 authorizes that type of suit. The Court, however, concluded that such claims should also be allowed.<sup>83</sup> That recognition of a federal cause of action without congressional authorization is also controversial. Although the principle that rights should have remedies is well established,<sup>84</sup> the notion that courts should create those remedies is less obvious.<sup>85</sup> Hence, Justice Scalia derided *Bivens* as “a relic of the heady days in which this Court assumed common-law [sic] powers to create causes of action,”<sup>86</sup> and federal judges—now including a majority of the Supreme Court—have increasingly been reluctant to construe *Bivens* broadly.<sup>87</sup> In *Butz v. Economou*, decided in 1978, the Justices recognized that the same sort of defense available to state officials in *Scheuer* should apply also to federal officials.<sup>88</sup>

Then in 1982 came *Harlow v. Fitzgerald*, in which the Court established the modern test for qualified immunity.<sup>89</sup> *Harlow* involved a suit against “senior aides and advisers of the President of the United States” under *Bivens*.<sup>90</sup> The Court concluded that “government officials are entitled to some form of immunity from suits for damages,” especially because “[a]s recognized at common

80. 416 U.S. 232, 246 (1974); see also *id.* (“In common with police officers, however, officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act.”).

81. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Notably, in a world without *Bivens* and the Westfall Act (a federal statute channeling litigation against federal officials to federal court), suits against federal officers could have proceeded in state court, with a federal official’s claim to be exercising official duties acting as a defense to potential state liability. See, e.g., Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 514 (2013).

82. See, e.g., ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 631–56 (6th ed. 2012) (describing *Bivens* and its role in modern civil rights litigation).

83. See Nielson & Walker, *supra* note 13, at 1863 (“*Bivens* is a judicially created cause of action to enforce the Constitution.”).

84. *Bivens*, 403 U.S. at 397 (“The 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.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803))).

85. See, e.g., CHERMERINSKY, *supra* note 82, at 637–38 (noting the “fundamental disagreement about the respective roles of the judiciary and legislature in American society”).

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

87. See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (“Given the notable change in the Court’s approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity.”); Fallon, Jr., *supra* note 14, at 951–54 (discussing pattern).

88. 438 U.S. 478, 504 (1978) (“Accordingly, without congressional directions to the contrary, we deem it 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.”).

89. 457 U.S. 800, 815 (1982).

90. *Id.* at 802.

law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.”<sup>91</sup> But what type of immunity? The Court explained that “a qualified immunity defense for high executives” should “reflect[] an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens but also ‘the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’”<sup>92</sup>

As part of its effort to strike the optimal “balance,” the Court expressly concluded that qualified immunity should be “adjusted” so that it is based on objective, not subjective, reasonableness. To appreciate the *Harlow* Court’s concerns about achieving the right balance, it is worth quoting from the opinion at length:

[I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to “subjective” inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying “ministerial” tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker’s experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.<sup>93</sup>

This objective standard—which asks whether the officer “violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known” at the time of the violation—is intended to make it easier to resolve immunity issues without trial.<sup>94</sup> Two years later, in *Davis v. Scherer*, the Court held that the same objective standard recognized in *Harlow* should apply in § 1983 suits.<sup>95</sup> Since *Harlow*, the Court has emphasized that it bars liability unless “every ‘reasonable official would [have understood] that what he is doing violates’” the “right” at issue, meaning that “existing precedent must have placed the

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91. *Id.* at 806.

92. *Id.* at 807 (quoting *Butz*, 438 U.S. at 504–06).

93. *Id.* at 816–17.

94. *Id.* at 818; *see also id.* (“Reliance on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.”).

95. *See* 468 U.S. 183, 197 (1984).



statutory or constitutional question beyond debate.”<sup>96</sup> Similarly, the Court has stressed that in assessing what is clearly established, a court must pay special attention to the “level of generality.”<sup>97</sup> It is not enough to say that the Fourth Amendment, for instance, is clearly established. Instead, the particular application of the Fourth Amendment must have been clearly established prior to its violation.<sup>98</sup> *Harlow* itself, especially this arguably broader conception of *Harlow*, has generated significant criticism.<sup>99</sup>

There is one more piece of the story that merits discussion: qualified immunity’s procedural requirements. Qualified immunity creates a puzzle: If the alleged right at issue is not clearly established, should a federal court decide the merits? Or, instead, should it simply hold that no liability is possible because of qualified immunity and end the litigation? The ordinary rule is that a court should not decide constitutional questions that do not affect the judgment in the case before it.<sup>100</sup> Yet if courts consistently applied that rule in cases subject to qualified immunity, perhaps some rights would *never* become clearly established, especially rights involving new fact patterns or technologies. For instance, the emerging use of tasers in law enforcement, which may pose different types of dangers than other weapons, has generated a great deal of litigation.<sup>101</sup>

This fear of “constitutional stagnation” led the Supreme Court in 2001 to impose a categorical rule that courts should always first decide whether the right exists, and only if the answer is “yes,” should they then decide whether the right was clearly established at the time of its violation.<sup>102</sup> That decision was short-lived, however, because a wide coalition of judges and Justices concluded that this *per se* rule was a mistake, for instance, in cases where the briefing was poor. Thus, eight years later in *Pearson v. Callahan*, the Supreme Court unanimously overruled that rule and held that courts instead have discretion on whether to resolve the merits or instead simply dismiss the claim on qualified immunity grounds.<sup>103</sup> We have elsewhere discussed how courts use that discretion and what problems it creates.<sup>104</sup>

96. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

97. *Id.* at 742.

98. *See, e.g., City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) (“Qualified immunity is no immunity at all if ‘clearly established’ law can simply be defined as the right to be free from unreasonable searches and seizures.”).

99. *See, e.g., Crocker, supra* note 30, at 1415–21; Fallon, Jr., *supra* note 14, at 956; Rudovsky, *supra* note 5.

100. *See, e.g., Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1277 (2006) (describing the issue).

101. *See, e.g., Nielson & Walker, supra* note 4, at 3, 38.

102. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

103. 555 U.S. 223, 236 (2009).

104. *See Aaron L. Nielson & Christopher J. Walker, Strategic Immunity*, 66 EMORY L.J. 55, 91–94 (2016) (explaining that, especially when combined with the discretion to issue unpublished decisions, the discretion to decide constitutional questions creates strategic opportunities); Nielson & Walker, *supra* note 4, at 43–49 (explaining that discretion to decide constitutional questions may lead to asymmetric development of constitutional law because the views of minimalist jurists are less likely to

## B. RECENT CRITICISMS OF QUALIFIED IMMUNITY

Since *Harlow*, the Supreme Court has regularly applied qualified immunity, often without recorded dissent. Indeed, the Court has applied it more than two dozen times, in opinions written by a wide array of Justices.<sup>105</sup> In 2018, for instance, the Court—echoing a dissent from the denial of rehearing en banc filed by then-Judge Kavanaugh<sup>106</sup>—unanimously reversed the D.C. Circuit’s refusal to award immunity.<sup>107</sup> Thus, from one perspective, it may look like qualified immunity is as entrenched now as any aspect of modern law in the United States. That perspective, however, is incomplete. In recent years, qualified immunity has confronted a new wave of attacks, including calls by Supreme Court advocates and even two Justices to rethink qualified immunity, and the issue has also attracted political attention.<sup>108</sup> Indeed, in the wake of the killing of George Floyd and the nationwide Black Lives Matter protests earlier this year, members of Congress have introduced legislation to amend § 1983 to narrow or outright eliminate qualified immunity.<sup>109</sup>

The two leading attacks on qualified immunity come from William Baude and Joanna Schwartz, who offer different—but synergistic—criticisms. Others, including Katherine Mims Crocker and Alan Chen, have offered additional criticisms that buttress those offered by Baude and Schwartz. The result is that qualified immunity is experiencing greater skepticism now than perhaps ever before.<sup>110</sup>

Baude’s criticism sounds in positive law—is qualified immunity allowed by a federal statute? His conclusion is that it is not.<sup>111</sup> By his account, which has

emerge); *see also* *Camreta v. Greene*, 563 U.S. 692, 716 (2011) (Kennedy, J., dissenting) (explaining oddities created for appellate jurisdiction by discretion to decide constitutional questions that do not affect the judgment).

105. *See, e.g.*, Baude, *supra* note 9, at 82 (observing that, as of 2018, “[i]n 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”); *id.* at 88–90 (appendix of cases); Nielson & Walker, *supra* note 13, at 1858 (“The Court’s embrace of qualified immunity has thus been emphatic, frequent, longstanding, and nonideological.”).

106. *Wesby v. District of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (“[I]n just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeals in qualified immunity cases, including five strongly worded summary reversals.”).

107. *See* *District of Columbia v. Wesby*, 138 S. Ct. 577, 582 (2018).

108. *See supra* notes 5–12.

109. *See* Christopher J. Walker, *Legislating Away Qualified Immunity in Section 1983*, YALE J. ON REG.: NOTICE & COMMENT (June 24, 2020), <https://www.yalejreg.com/nc/legislating-away-qualified-immunity-in-section-1983/> [<https://perma.cc/5SKE-HG8J>] (summarizing the three legislative proposals to reform qualified immunity proposed by members of Congress to date and suggesting three alternative, more incremental reforms that may garner more bipartisan support).

110. *See, e.g.*, *McCoy v. Alamu*, 950 F.3d 226, 237 (5th Cir. 2020) (Costa, J., dissenting in part) (“[W]ith so many voices critiquing current [qualified immunity] law as insufficiently protective of constitutional rights, the last thing we should be doing is recognizing an immunity defense when existing law rejects it.”); Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2094–95 (2018) (arguing that “qualified immunity is an anomaly, in that its basic tenets went largely unchallenged by leading scholars and Justices for decades,” but that “now,” things are changing).

111. *See, e.g.*, Baude, *supra* note 9, at 47 (arguing that “[t]he modern doctrine of qualified immunity is inconsistent with conventional principles of law applicable to federal statutes”).

already attracted some support from jurists,<sup>112</sup> including Justices Thomas and Sotomayor,<sup>113</sup> Congress never authorized qualified immunity for claims brought under § 1983. (Baude, notably, says little about *Bivens*.) His argument is straightforward: qualified immunity is not found in the text of § 1983; using an objective standard that covers all types of claims (rather than a subjective test that may apply at common law as defenses to particular torts) is ahistorical; and reliance on principles such as “fair notice” is misplaced when qualified immunity is compared to criminal law, where criminal defendants are often convicted of crimes despite the absence of “clearly established” standards of criminality.<sup>114</sup> Baude also rejects an argument offered by Justice Scalia and others that, even if Congress did not authorize qualified immunity, it is necessary to correct the earlier error in *Monroe* that (arguably) expanded § 1983 far beyond what Congress had authorized when the Court concluded that even officials who act in ways contrary to state law are nonetheless acting under color of state law for purposes of § 1983.<sup>115</sup> Although Baude’s article itself does not take a firm position on stare decisis, he has since joined several amicus briefs that urge the Supreme Court to reconsider qualified immunity.<sup>116</sup>

Schwartz’s criticism is different. Rather than directly challenge the lawfulness of qualified immunity, she attacks the policy justifications for it.<sup>117</sup> In particular, based on an important empirical study, she argues that the assumption underlying qualified immunity cases—that officers are threatened personally by the risk of adverse judgments—is false. After all, officers are almost always indemnified by their employers.<sup>118</sup> Thus, she argues, the notion that their actions are chilled by the threat of a damages verdict is not grounded in reality.<sup>119</sup> Likewise, based on results from another study, she argues that qualified immunity does not, in fact, consistently prevent litigation, again contrary to the doctrine’s premise.<sup>120</sup> Accordingly, she has begun to sketch alternative regimes for a world without qualified immunity—regimes, she argues, that more

112. See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment); *McCoy*, 950 F.3d at 233 n.8 (majority opinion); *Baldwin v. City of Estherville (Baldwin I)*, 915 N.W.2d 259, 287 (Iowa 2018) (Appel, J., dissenting).

113. See *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting); *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring in part and concurring in the judgment).

114. See, e.g., Baude, *supra* note 9, at 47, 50–51, 53.

115. See *id.* at 63–65.

116. See, e.g., Will Baude, *New Calls for the Supreme Court to Reconsider Qualified Immunity*, VOLOKH CONSPIRACY (July 12, 2018, 7:29 PM), <https://reason.com/2018/07/12/new-calls-for-the-supreme-court-to-recon/> [<https://perma.cc/ZP53-3EKS>].

117. See generally Schwartz, *supra* note 31.

118. Schwartz, *supra* note 32, at 1804–08.

119. *Id.*

120. Schwartz, *supra* note 9, at 51–57; see also Joanna C. Schwartz, *Qualified Immunity’s Selection Effects*, 114 NW. U. L. REV. 1101 (2020) (building on her prior study, see generally Schwartz, *supra* note 9, to assess selection effects).

closely match the empirical reality.<sup>121</sup> Her analysis has also drawn significant judicial attention.<sup>122</sup>

These criticisms have been bolstered by important contributions from others. Crocker, for instance, has argued that the Court erred by transplanting *Harlow*'s objective standard that came out of the *Bivens* context into the § 1983 context, which has a different history as well as a different claim on legitimacy.<sup>123</sup> Similarly, Chen has observed that the objective standard is inconsistent with the subjective standard that would have applied when § 1983 was enacted.<sup>124</sup> Pamela Karlan and others have also argued that qualified immunity is particularly problematic because the Court is also restricting the availability of other remedies, such as the exclusionary rule.<sup>125</sup> Expanding that theme, several other scholars have argued that the standards for qualified immunity and federal habeas relief have wrongly converged.<sup>126</sup> The key takeaway, however, is that, although the chorus of qualified immunity critiques grows louder, Baude's legal arguments and Schwartz's policy arguments remain the primary attacks on qualified immunity.

#### C. PRIOR RESPONSES TO QUALIFIED IMMUNITY'S CRITICS

In 2018, as part of the *Notre Dame Law Review* annual federal courts issue, which that year debated the future of qualified immunity, we were asked to pen a response to the important and thoughtful criticisms of qualified immunity offered by Baude and Schwartz. While agreeing that qualified immunity should be reformed (especially procedurally) to counteract the unintended consequences flowing from *Pearson* and the possibility of substantive and geographic asymmetries in the development of constitutional law, we disagreed that the Supreme Court should overturn qualified immunity in general or *Harlow* in particular.<sup>127</sup>

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121. Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020) (exploring a future without qualified immunity).

122. See, e.g., *Nieves v. Bartlett*, 139 S. Ct. 1715, 1738 n.2 (2019) (Sotomayor, J., dissenting) (citing Schwartz, *supra* note 31); *Cole v. Carson*, 935 F.3d 444, 472 n.10 (5th Cir. 2019) (Willett, J., dissenting) (citing Schwartz, *supra* note 32, at 1800).

123. Crocker, *supra* note 30, at 1410–11.

124. Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1941–51 (2018). *Harlow*'s objective standard “is harder to defend than a good-faith standard.” Nielson & Walker, *supra* note 13, at 1868. That said, even without an objective standard, “[p]resumably, courts often would award qualified immunity through targeted use of summary judgment, as they already do in related contexts.” *Id.* (citing *Crawford-El v. Britton*, 523 U.S. 574 (1998)).

125. See, e.g., Karlan, *supra* note 56, at 882–88; see also Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011) (discussing the narrowing of exclusionary rule); Reinhardt, *supra* note 8, at 1245 (similar). Nancy Leong has done foundational work on the dynamics and tradeoffs of recognizing constitutional rights via § 1983 civil actions and criminal proceedings. See Nancy Leong, *Improving Rights*, 100 VA. L. REV. 377 (2014); Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405 (2012); Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. REV. 306 (2015).

126. See Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1548–52 (2018); Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477 (2018).

127. Like Fallon, we are sympathetic to the argument that courts sometimes apply the clearly established requirement at too low, rather than too high, a level of generality. This concern, however,

Our principal objection sounded in *stare decisis*. Taking the Court's *stare decisis* law as a given, we argued that there is no compelling basis to overrule decades of statutory precedent even if the Court is not convinced that Congress, in fact, intended a qualified immunity defense to a § 1983 claim. Instead, revisiting settled questions of statutory interpretation should be a question for Congress. Hence, even if qualified immunity's critics were correct, *stare decisis* would still channel their objections to legislatures rather than the federal bench.<sup>128</sup>

The basis for our argument in that response, which also is important for understanding aspects of our argument in this Article, is the oft-repeated observation that *stare decisis* is not readily brushed aside, especially for statutory holdings.<sup>129</sup> The Supreme Court, moreover, has underscored that *stare decisis* is especially strong when a statutory holding has induced significance reliance.<sup>130</sup> The Justices have adopted this view because stability is important, and Congress has the power to change the law when the judiciary errs.<sup>131</sup> Whether statutory questions warrant "enhanced" *stare decisis* that goes above and beyond what *stare decisis* requires for constitutional questions is the subject of academic disagreement, but it is the current law.<sup>132</sup>

At least when it comes to § 1983, the existence of qualified immunity is statutory in character.<sup>133</sup> Correctly or incorrectly, the Supreme Court has interpreted Congress's statute to provide for this defense.<sup>134</sup> The Court has not said whether this defense is constitutionally required—a question the Court would have no occasion to reach, in all events, given its conclusion that it is statutorily required. True, qualified immunity is not found in the text of § 1983. A textual absence is quite important when interpreting a statute in the first instance, but under the

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goes to how the doctrine is sometimes applied rather than to the doctrine itself, and the doctrine itself allows judges to prevent egregious behavior even absent prior precedent. *See, e.g.,* *Hope v. Pelzer*, 536 U.S. 730, 745 (2002). Qualified immunity can be misapplied in other ways. *Cf.* David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2024–36 (2018) (offering egregious examples).

128. Nielson & Walker, *supra* note 13, at 1858–59. *But see* Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999 (2018) (arguing that the Supreme Court should act).

129. *See, e.g.,* *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456–57 (2015).

130. *See, e.g., id.* at 2409; *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.").

131. *See* Nielson & Walker, *supra* note 13, at 1856 ("As the Supreme Court recently explained . . . , when it comes to nonconstitutional holdings, '*stare decisis* carries enhanced force' because those who think the judiciary got the issue wrong 'can take their objections across the street, and Congress can correct any mistake it sees.'" (quoting *Kimble*, 576 U.S. at 456)). Whether this standard should be the law is a different question. Although precedent should not lightly be cast aside, the Court's jocular, Spiderman-infused talk in *Kimble* of "superpowered" precedent, 576 U.S. at 458, seems to us to lay it on too thick.

132. *See, e.g.,* Nielson & Walker, *supra* note 13, at 1856 n.18 (noting debate).

133. As to *Bivens*, because the cause of action itself is judicially created, the Justices have more leeway to decide what defenses apply to *Bivens* suits. *See, e.g., id.* at 1863 n.68 (collecting cases).

134. Nor is it clear that qualified immunity is simply supporting a mistake. *See id.* at 1864–68 (discussing the legal history of implied defenses to address the lawfulness of qualified immunity).

current law of statutory *stare decisis*, that fact is not dispositive when it comes to overruling a precedent. As the Court held in *Kimble v. Marvel Entertainment, LLC*, the “enhanced” form of *stare decisis* for statutes applies even if the earlier decision looked beyond the law’s text and instead relied on its sense of “the policies and purposes” behind the statute or even if the earlier decision “announced a ‘judicially created doctrine’ designed to implement a federal statute.”<sup>135</sup> Applying these conceptions of *stare decisis*, we saw no basis for the Court to overrule qualified immunity. We also argued that Congress amending § 1983 in 1996 but doing nothing about qualified immunity or the objective standard used—well after *Harlow*—further supports the application of *stare decisis*.<sup>136</sup>

Others have also risen to qualified immunity’s defense. Notably, for instance, Fallon observes that the Supreme Court has said § 1983 is not a common law statute, but—echoing Hillel Levin and Michael Lewis Wells—he thinks that approach should change. When interpreting § 1983, Fallon argues, courts should have more flexibility, akin to that applied when interpreting the Sherman Act.<sup>137</sup> Likewise, on the Fifth Circuit, Judges James Ho and Andrew Oldham—two

135. *Kimble*, 576 U.S. at 456 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014)).

136. See Nielson & Walker, *supra* note 13, at 1858 & n.37 (citing Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853) (explaining how Congress amended § 1983 with regard to suits against judges); see also *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 244 n.11 (2009) (“When Congress amended [the Individuals with Disabilities Education Act] without altering the text of [the provision at issue], it implicitly adopted [the Court’s prior] construction of the statute.”). In her response, Schwartz notes that “Congress took little action with regards to qualified immunity in the doctrine’s half-century of existence, deferring adjustments to the Court.” Schwartz, *supra* note 46, at 347 n.232. Congress’s 1996 decision to amend § 1983 to make it harder to seek injunctive relief against judges while leaving qualified immunity untouched, however, casts some doubt on the notion that Congress opposes qualified immunity or is unwilling or incapable of amending it. Beyond that, Congress appears to have endorsed qualified immunity in other statutes. In the Prison Litigation Reform Act of 1995, for instance, Congress mandated *sua sponte* dismissal of prisoner or *in forma pauperis* suits that “seek[] monetary relief from a defendant who is immune from such relief.” 28 U.S.C. §§ 1915(e)(2)(B)(iii), 1915A(b)(2) (2018); 42 U.S.C. § 1997e(c)(2) (2018). This language appears to contemplate qualified immunity. See *Redmond v. Fulwood*, 859 F.3d 11, 13 (D.C. Cir. 2017) (explaining that “a prisoner’s civil complaint is properly dismissed *sua sponte* if the person the prisoner seeks to sue is protected by either qualified or absolute immunity”); *Chavez v. Robinson*, 817 F.3d 1162, 1168 (9th Cir. 2016) (“At the time Congress adopted this revision, the distinction between absolute and qualified immunity was well developed in the case law. . . . Although Congress could have limited dismissal . . . to absolute immunity, it did not do so. We conclude that Congress intended § 1915(e) to apply to both types of immunity.”). Notably, § 1997e specifically mentions § 1983 suits in this regard. See 42 U.S.C. § 1997e(c)(1) (2018). Moreover, “since *Harlow* was decided, rather than retreating from qualified immunity, Congress has added it”—indeed, by name—“into the U.S. Code in other places.” Nielson & Walker, *supra* note 13, at 1858 (citing, *inter alia*, 6 U.S.C. § 1104(b)(1) (2012)); see also H.R. REP. NO. 110-259, at 329 (2007) (Conf. Rep.) (“[T]he Conference does not intend to amend, limit, or reduce existing qualified immunity or other defenses pursuant to Federal, State, or local law that may otherwise be available to authorized officials as defined by this section.”).

137. See Fallon, Jr., *supra* note 14, at 993–94; Levin & Wells, *supra* note 13, at 43–47; see also Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 57 (1989) (“In interpreting § 1983, text and history answer so few questions that the Court is forced to look elsewhere, as it sometimes admits.”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 422 (1989) (“Because of the textual silence [in § 1983], judges must fill the gaps. To this extent, the statute delegates power to make common law.”).

recently appointed jurists—have pointedly responded to the criticisms leveled by Judge Willett. Invoking Justice Scalia’s objections to *Monroe*, these judges contend that a half-way originalism is not originalism at all, and if a court is going to attack qualified immunity’s use as a defense to a § 1983 suit, it should also consider whether § 1983 even authorizes such suits.<sup>138</sup> As they put it, “If we’re not going to do it right, then perhaps we shouldn’t do it at all.”<sup>139</sup>

While this debate has been playing out, the Supreme Court has continued to reverse lower courts that it believes misapply qualified immunity. Notably, Justice Thomas, despite his articulated concerns about qualified immunity, has recently penned—in an opinion for the Court—a stern application of the doctrine.<sup>140</sup>

## II. FEDERALISM AND THE MEANING OF § 1983

Should the Supreme Court heed Justice Thomas’s call to reexamine qualified immunity, a core issue will be whether cases such as *Ray* and *Scheuer* correctly recognize implied defenses to § 1983, as well as whether the current standard for qualified immunity is well grounded in law. The correctness of a rule, after all, should be the only relevant consideration when a court is writing on a blank slate. It is also a factor where, as here, the Court is not writing on a blank slate but instead is considering the more significant step of overruling precedent. In this analysis of whether the Court has correctly interpreted § 1983, federalism should play a role. Many believe that § 1983 does not affect the states because state officers are sued in their individual capacities rather than their official capacities. That analysis, however, is oversimplified. It fails to consider the federalism values infused in the doctrine of qualified immunity. In fact, whether § 1983 can impose liability on state officers who do not violate clearly established law (or, indeed, perhaps even act in an objectively reasonable fashion in light of current law) has significant federalism implications. Those implications should affect how § 1983 is interpreted, especially in a world of statutory *stare decisis*.

Here, Section II.A details the simple understanding of § 1983, which may underplay qualified immunity’s federalism dimensions. Section II.B then explores the role of federalism in the Supreme Court’s articulation and defense of qualified immunity. Section II.C builds on that discussion to explain how the federalism canon of interpretation complicates the legal case against qualified immunity.

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138. *Cole v. Carson*, 935 F.3d 444, 477–78 (5th Cir. 2019) (Ho & Oldham, JJ., dissenting) (citing *Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting)). Judge Willett disagreed with this characterization of his argument. *See id.* at 473 (Willett, J., dissenting) (“My misgivings, I believe, are well advised. But we would be ill advised to treat the reform of immunity doctrine as something for this court rather than that Court.”).

139. *Id.* at 478.

140. *See* *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–93 (2018).

## A. THE SIMPLE VIEW OF § 1983

The federalism dimensions of qualified immunity have been not been widely acknowledged. The reason for this, we submit, is that the simple version of § 1983's role vis-à-vis the states has thus far dominated the scholarly discussion. That simple version focuses on lawsuits against the states themselves and § 1983's relationship with sovereign immunity. To those who subscribe to the simple view of § 1983, it may be surprising to hear that civil actions for monetary relief under § 1983 should be interpreted in light of federalism. After all, in the series of cases discussed below, the Supreme Court has held that § 1983 does not violate state sovereign immunity under the Eleventh Amendment precisely because the state itself, including any state officials acting in their official capacities, cannot be sued for money damages. Given that line of cases, one may well wonder what role federalism could possibly play in § 1983 litigation.

It is true that Congress, when it first enacted § 1983 as part of the Ku Klux Klan Act of 1871,<sup>141</sup> could have attempted to abrogate state sovereign immunity under its Section 5 powers of the Fourteenth Amendment.<sup>142</sup> As one leading casebook recounts, “[g]enerally speaking, § 1983 is used to enforce individual rights derived from the Fourteenth Amendment (or incorporated by that Amendment and applied to the states),” such that “§ 1983 could be seen to fall within Congress’s Fourteenth Amendment power to abrogate the immunity of states and make them liable for money damages.”<sup>143</sup> If that were the path taken, federalism would be front and center in debates about the scope and meaning of § 1983.<sup>144</sup> Yet in interpreting § 1983, the Supreme Court (and, arguably, Congress in enacting § 1983) chose a different path. First, in *Edelman v. Jordan*, the Court rejected out of hand the argument that “§ 1983 was intended to create a waiver of a State’s Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself.”<sup>145</sup> Five years later, in *Quern v. Jordan*, the Court further explained that

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141. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2018)).

142. See, e.g., *Brandon v. Holt*, 469 U.S. 464, 472–73 (1985) (noting “expressly” the distinction “between suits against government officials ‘in their individual capacities’ on the one hand, and those in which ‘only the liability of the municipality itself was at issue,’ on the other” (quoting *Owen v. City of Independence*, 445 U.S. 622, 638 n.18 (1980))).

143. JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 42 (4th ed. 2018).

144. Wayne McCormack, in a two-part series published in 1974, explored what this path would look like and the problems introduced by the Court’s then-emerging approach to the interaction between § 1983 and the Eleventh Amendment. See Wayne McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1 (1974); Wayne McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 VA. L. REV. 250 (1974). McCormack did not explore the federalism implications of qualified immunity—the subject of this Article.

145. 415 U.S. 651, 676–77 (1974).



§ 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.<sup>146</sup>

Accordingly, the Court has held that states are not “persons” who can be sued under § 1983,<sup>147</sup> including for injunctive relief and in suits brought in state court.<sup>148</sup> State agencies<sup>149</sup>—though not municipalities<sup>150</sup>—are also not § 1983 persons. Nor are state officials sued in their official capacities, at least when sued for money damages. As the Court explained in *Will v. Michigan Department of State Police*, “state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office.”<sup>151</sup> As the Court later clarified in *Hafer v. Melo*, this does not mean that state officials cannot be sued for official actions. But they must be “sued in their individual capacities [to be] ‘persons’ for purposes of § 1983.”<sup>152</sup> In other words, the individual official, rather than the state or local government, is sued. The *Hafer* Court expressly rejected an Eleventh Amendment argument against individual-capacity suits. In so doing, the Court conceded that “imposing personal liability on state officers may hamper their performance of public duties,” but the Court suggested that “such concerns are properly addressed within the framework of our personal immunity jurisprudence.”<sup>153</sup>

Accordingly, at first blush, it is quite understandable why federalism concerns have been overlooked regarding § 1983. After all, under § 1983, a plaintiff must sue government officials in their *individual* capacities, not their *official* capacities, for money damages. The state cannot be sued, and thus state sovereign immunity is not directly implicated.<sup>154</sup>

146. 440 U.S. 332, 345 (1979).

147. *Id.* at 342–43.

148. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 67 (1989) (“We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent.”).

149. Indeed, the defendants in *Will* were an agency—the state police department—and the director of that agency, who was sued in his official capacity. *Id.* at 60.

150. *See, e.g.*, Karen M. Blum, *Municipal Liability: Derivative or Direct? Statutory or Constitutional? Distinguishing the Canton Case from the Collins Case*, 48 DEPAUL L. REV. 687 (1999).

151. *Will*, 491 U.S. at 71. *But see id.* at 71 n.10 (“Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State.” (internal quotation marks omitted)).

152. 502 U.S. 21, 23 (1991).

153. *Id.* at 31.

154. *See, e.g.*, *Estrada v. Healey*, 647 F. App’x 335, 339 n.5 (5th Cir. 2016) (“Estrada erroneously confuses a state’s sovereign immunity under the Eleventh Amendment and a government official’s qualified immunity from individual suit.”); Raymond J. Farrow, *Qualifying Immunity: Protecting State Employees’ Right to Protect Their Employment Rights After Alden v. Maine*, 76 WASH. L. REV. 149, 150–51 (2001) (“While sovereign immunity does not protect individual state agents sued in their individual capacities, the doctrine of qualified immunity is available to government officials sued for

## B. WHAT THE SIMPLE VIEW OF § 1983 OVERLOOKS

Given this conventional understanding, arguing that § 1983 has federalism dimensions may seem counterintuitive. When Congress authorized money damages, it did not impose liability directly on the states. So, if state sovereign immunity is not directly implicated by § 1983, how could state sovereign interests nonetheless still be implicated? And if state sovereign interests are not implicated, why talk about federalism at all?

This argument, however, moves too fast. It is myopic to focus on sovereign immunity when the states' ability to enforce their laws is still substantially affected by the availability of § 1983 suits against state officers sued in their individual capacities. That the states themselves are not directly regulated does not mean the states are not indirectly affected.<sup>155</sup> Notably, as the Supreme Court has declared in the context of injunctive relief, § 1983 “was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century.”<sup>156</sup> Indeed, “[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law.”<sup>157</sup> That “transformation” plainly affects the operation of state and local governments even without changing sovereign immunity.

As Justice Sandra Day O’Connor, writing for the Court in *Hafer v. Melo*, suggested, the federalism concerns implicated by § 1983 are fleshed out not in defining the § 1983 “person” but rather “within the framework of our personal immunity jurisprudence.”<sup>158</sup> In other words, outside of the injunctive relief context (where state officials can be sued under § 1983 in their official capacities for injunctive relief<sup>159</sup>), the federalism values of § 1983 money damages actions are addressed by the various immunities that state officials possess against being sued. Our focus here is qualified immunity. But it is worth noting that the Court has also recognized the importance of federalism values with respect to the absolute immunity for state court judges<sup>160</sup> and state prosecutors<sup>161</sup>—though in those

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violating a plaintiff’s constitutional rights when acting within the course of their official duties.” (citations omitted)).

155. See, e.g., CHEMERINSKY, *supra* note 82, at 504 (detailing history and concluding that § 1983 “was meant to substantially alter the relationship of the federal government to the states”).

156. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

157. *Id.*

158. 502 U.S. at 31.

159. See, e.g., *Mitchum*, 407 U.S. at 242.

160. See, e.g., *Forrester v. White*, 484 U.S. 219, 223 (1988) (“When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.”).

161. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976) (“[S]uits [for damages under § 1983 against state prosecutors] could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate.”); see also Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 440–43 (2016)

instances, it is fair to conclude that the importance of judicial (and prosecutorial) independence predominated in the Court's reasoning.

Qualified immunity, however, has even deeper federalism roots. Not by accident, the *Harlow* Court's description of the social costs that qualified immunity is designed to minimize are (at least) as much about states' rights as they are about individual officers' rights. Namely, qualified immunity (1) helps states recruit, hire, and retain the best people; (2) allows officers to go to work rather than go through litigation; and (3) prevents chilling officers' willingness to make tough decisions that faithfully execute the law.<sup>162</sup> Although each of these interests has implications for individual officers (hence the Court's invocation of the fair notice doctrine in qualified immunity cases<sup>163</sup>), it is easy enough to see how the absence of qualified immunity could potentially make it more difficult for state and local governments—often operating with tight budgets and many competing public interest demands for those scarce funds<sup>164</sup>—to hire talented individuals and ensure that those individuals enforce state law rather than shirk from it.

This is not just our opinion. The Supreme Court itself has directly connected qualified immunity with state interests. In *Wyatt v. Cole*, a case that merits much more attention than it has received, the Court pointedly refused to extend a qualified immunity defense to private individuals who attempted to exercise writs of replevin and thus arguably became state actors for purpose of § 1983.<sup>165</sup> Private individuals exercising such power also have interests in predictability and, at common law, arguably “could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause.”<sup>166</sup> Yet the Court held that private defendants are categorically different from government officials.

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(exploring further the “link between sovereignty and individual immunities” and detailing how “individual immunities have roots in *sovereign* immunity”).

162. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (“[I]t cannot be disputed seriously that 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. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there 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.’” (second alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949))).

163. See *Nielson & Walker*, *supra* note 13, at 1872–74; see also *Echols v. Lawton*, 913 F.3d 1313, 1325 (11th Cir. 2019) (observing that “the Supreme Court has long ruled that qualified immunity protects a badly behaving official unless he had fair notice that his conduct would violate the Constitution”).

164. See, e.g., Sydney L. Hawthorne, *Do Desperate Times Call for Desperate Measures in the Context of Democracy? Michigan's Emergency Manager Law & the Voting Rights Act*, 41 N.Y.U. REV. L. & SOC. CHANGE 181, 185 (2017) (observing how the 2007 recession has left “Michigan's municipalities with tight budgets, few resources, and financial stress”); Mayra Rodriguez Valladares, *America's Largest Cities Are Practically Broke*, FORBES (Jan. 29, 2019, 12:00 AM), <https://www.forbes.com/sites/mayrarodriguezvalladares/2019/01/29/americas-largest-cities-are-practically-broke/#273372562ebb> (“Sixty-three, out of America's most populous seventy-five, cities do not have enough money to pay all of their bills.”).

165. 504 U.S. 158, 168–69 (1992).

166. *Id.* at 165.

The Court did so because “the rationales mandating qualified immunity for public officials are not applicable to private parties.”<sup>167</sup>

In particular, Justice O’Connor, writing for the *Wyatt* Court, reasoned that “[q]ualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government’s ability to perform its traditional functions,” and that this tension creates a need for “qualified immunity for government officials where it [is] necessary to preserve their ability to serve the public good or to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.”<sup>168</sup> The Court thus concluded that qualified immunity “acts to safeguard *government*, and *thereby* to protect the public at large” and is not designed to “benefit [governmental] agents” for their own sakes.<sup>169</sup>

Put differently, because “private parties hold no office requiring them to exercise discretion” and are not “principally concerned with enhancing the public good,” there is no unique need to take care that they “are able to act forcefully and decisively in their jobs” or to encourage them to “enter public service.”<sup>170</sup> Building on Justice O’Connor’s analysis for the Court’s majority, Judge Michael Luttig, formerly of the Fourth Circuit, expressly noted the “federalism principles” at issue and stressed the “profound consequences for the principles of federalism that inform application of the doctrine of qualified immunity to state officials subject to [S]ection 1983.”<sup>171</sup>

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167. *Id.* at 167.

168. *Id.*

169. *Id.* at 168 (emphasis added); *see also id.* (“These rationales are not transferable to private parties. Although principles of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do their government counterparts, such interests are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion.”).

170. *Id.*; *see also id.* (“[U]nlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes.”).

171. *In re Allen*, 119 F.3d 1129, 1138–39 (4th Cir. 1997) (Luttig, J., dissenting). Similarly, out of deference to the states, in *Johnson v. Fanknell*, 520 U.S. 911, 913 (1997), the Court refused to require interlocutory appeals of denials of qualified immunity in state court, even though interlocutory appeals are available in federal court. The Court reached that conclusion because requiring states to do “something as fundamental as restructuring the operation of its courts” would be an affront to federalism. *Id.* at 922. In other words, if a state believes that interlocutory appeals are necessary to strike the optimal balance between deterrence and overdeterrence, that state is free to enact such a statute. But if the state believes otherwise, respect for federalism means a federal court should not step in. The law, in other words, is asymmetric; when a state officer is sued in federal court, the officer has a right to interlocutory appeal, but when that same officer is sued in state court, whether an interlocutory appeal is allowed depends on state law. This asymmetry, however, is in favor of state flexibility to structure how best to balance the costs of arranging their own courts. Notably, the Court has allowed states to immediately appeal denials of sovereign immunity in federal court—because of federalism. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (“While application of the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States’ dignitary interests can be fully vindicated.”).

The federalism interests implicated by qualified immunity also emerge when one reads the Court's cases involving qualified immunity and officer liability under § 1983. For instance, in *Camreta v. Greene*, the Justices confronted state officers in Oregon who interviewed a young girl at school who allegedly had been sexually abused by her father.<sup>172</sup> The state officials—a deputy sheriff and a social services caseworker—argued that they did not need a warrant or parental consent to interview a potential victim (rather than a perpetrator) of sexual abuse by one of the parents, and that even if they did need a warrant or permission, they certainly did not know that at the time they intervened to determine if the child was at risk.<sup>173</sup> The girl “eventually stated that she had been abused,” but her mother sued two officers and alleged “that the officials’ in-school interview had breached the Fourth Amendment’s proscription on unreasonable seizures.”<sup>174</sup> The Ninth Circuit held that, absent “exigent circumstances,” interviewing a minor without parental consent or a warrant violates the minor’s constitutional rights<sup>175</sup>—a debatable proposition.<sup>176</sup>

The Ninth Circuit, however, also awarded the officers qualified immunity because “no clearly established law had warned them of the illegality of their conduct.”<sup>177</sup> The Supreme Court eventually concluded that the case was moot because, by the time the officers sought certiorari, the young girl had graduated from high school.<sup>178</sup> Leaving aside the legal merits of this case, however, merely describing its facts illustrates why Oregon had an interest in the dispute. No one doubts that the states, using their sovereign police powers, can legitimately take steps to protect children from sexual assault.<sup>179</sup> Nor is it any secret why Oregon may have been reluctant to require officers to seek parental consent to interview a child about possible sexual assault of that child at home. Seeking a warrant may be impossible without first speaking to the child, “who may be the sole witness to the suspected crime.”<sup>180</sup> Indeed, this interest in protecting children from sexual

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172. 563 U.S. 692, 697 (2011).

173. *See id.* at 699.

174. *Id.*

175. *See Greene v. Camreta*, 588 F.3d 1011, 1030 (9th Cir. 2009), *vacated in part*, 563 U.S. 692 (2011).

176. *See, e.g.*, Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners at 2–8, *Camreta*, 563 U.S. 692 (No. 09-1454), 2010 WL 5168883 (representing the views of a broad coalition of forty states—including California, Hawaii, and Vermont—and arguing that the Ninth Circuit misapplied the Fourth Amendment).

177. *Camreta*, 563 U.S. at 699.

178. *See id.* at 698 (“The case has become moot because the child has grown up and moved across the country, and so will never again be subject to the Oregon in-school interviewing practices whose constitutionality is at issue.”).

179. *See, e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (“There is also no doubt that . . . ‘[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.’ And it is clear that a legislature ‘may pass valid laws to protect children’ and other victims of sexual assault ‘from abuse.’ The government, of course, need not simply stand by and allow these evils to occur.” (second alteration in original) (citations omitted)).

180. Brief for Petitioner Bob Camreta at 11, *Camreta*, 563 U.S. 692 (No. 09-1454), 2010 WL 5087870.

abuse was so strong that the attorney general and solicitor general of Oregon represented the officials before the Supreme Court.<sup>181</sup>

Similar stories could be told about other cases that have reached the Supreme Court where qualified immunity was raised. The Justices have addressed how to balance speech with safety interests at rallies and protests,<sup>182</sup> as well as how to balance a student's right to be free from unlawful searches with efforts to ensure that all students receive a quality education in a safe environment.<sup>183</sup> They have also addressed cases about using force when third parties are at risk,<sup>184</sup> how to ensure government transparency without violating individual privacy,<sup>185</sup> and how far governments can go to make communities safer when weapons are at issue.<sup>186</sup> A state's sovereign interest in such matters is well established.<sup>187</sup> In each context,

181. See Docket, *Camreta*, 563 U.S. 692 (No. 09-1454).

182. Cf. *Wood v. Moss*, 572 U.S. 744, 748–49 (2014) (holding that Secret Service agents were entitled to qualified immunity when keeping different groups of protestors at different distances from the President because such action was not a clearly established violation of the First Amendment); *Reichle v. Howards*, 566 U.S. 658, 663 (2012) (holding that a Secret Service agent was entitled to qualified immunity when the arrest of a protester was supported by probable cause because that arrest was not a clearly established violation of the First Amendment).

183. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368 (2009) (addressing a strip search after school officials found a planner with “several knives” and heard a report that a student was distributing prohibited medicine).

184. See, e.g., *White v. Pauly*, 137 S. Ct. 548, 549 (2017) (per curiam) (“This case addresses the situation of an officer who—having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other officers—shoots and kills an armed occupant of the house without first giving a warning.”); *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (per curiam) (“In this case, [a state trooper] confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road.”); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1770 (2015) (“With the door closed, all that [the officers] knew for sure was that Sheehan was unstable, she had just threatened to kill three people, and she had a weapon.”); *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (“[I]t was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger.”); *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) (per curiam) (noting the officer fired because she was “fearful for the other officers on foot who [she] believed were in the immediate area, [and] for the occupied vehicles in [Haugen’s] path and for any other citizens who might be in the area” (alterations in original)).

185. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 605–06 (1999) (holding that a “media ride-along” in a home violated the Fourth Amendment but that the officers were entitled to qualified immunity because the violation was not clearly established at the time).

186. See, e.g., *Messerschmidt v. Millender*, 565 U.S. 535, 539 (2012) (“The warrant authorized a search for all guns and gang-related material, in connection with the investigation of a known gang member for shooting at his ex-girlfriend with a pistol-gripped sawed-off shotgun, because she had ‘call [ed] the cops’ on him.” (alteration in original)).

187. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (“The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals . . . .”); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443–44 (1827) (explaining that the states retained the sovereign’s “police power,” which allows, among other things, “[t]he removal or destruction of infectious or unsound articles”); THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) (“The powers delegated . . . to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . [and] will extend to *all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.*” (emphasis added)).

the effect of potential officer liability under § 1983—including an officer’s willingness to advance the state’s interest in the face of that potential liability—is not limited to the individual officer. It has significant consequences for public policy within a polity, including within a state’s borders.

### C. IMPLICATIONS: SUBSTANTIVE-FEDERALISM CANON

That potential liability may dissuade a state official from taking steps to advance the state’s sovereign interests has potential implications for how § 1983 is interpreted and what defenses are recognized. As explained in this Part, the chilling effect that the Supreme Court has warned against in enforcing qualified immunity may implicate the federalism canon of interpretation, which counsels against reading statutes to have significant effects on state sovereign interests. The realization that the federalism canon may be implicated, in turn, matters for purposes of *stare decisis* because, to the extent that the case for qualified immunity becomes more legally plausible, the case against a judicial (rather than legislative) response to qualified immunity becomes weaker.

To begin, we agree that just because qualified immunity has federalism implications does not necessarily mean that it is worth retaining or that the Court’s cases recognizing it were rightly decided. Congress may have determined that it makes sense to force states and local governments to bear the full costs of the mistakes made by their officers, even if the officers made reasonable mistakes or at least acted in a way that was not clearly lawful (as opposed to the current test of whether the conduct was clearly unlawful).<sup>188</sup> Indeed, sometimes even strict liability is imposed in the tort context, with no consideration of fault at all<sup>189</sup>—though, notably, tort law shies away from strict liability when a public duty is at stake.<sup>190</sup> Municipal liability under § 1983, for instance, is often referred to as a form of strict liability.<sup>191</sup> Similarly, perhaps a robust principle that it is better that *n* innocent people be harmed by police inaction before the police can act in ways

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188. See, e.g., Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 283 (1988) (“If deterrence of government misconduct is important, one way to promote it is through the traditional tort damages remedy.”). But see Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000) (“Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay.”).

189. See, e.g., RESTATEMENT (SECOND) OF TORTS § 519 (AM. LAW INST. 1977) (“One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.”).

190. See, e.g., *id.* § 521 (“The rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer . . .”).

191. See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 658 (1980) (Powell, J., dissenting) (arguing that “the Court interprets 42 U.S.C. § 1983 to impose strict liability on municipalities for constitutional violations”); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 232 (2013) (“Under current law, strict liability is reserved for municipalities and other local governments that cause constitutional violations through official policy or custom.”).

that are not clearly lawful is correct.<sup>192</sup> The United States, for instance, has rightly sought to stack the deck in favor of liberty in criminal law, where potentially dangerous individuals may go unpunished because of safeguards in the Constitution.<sup>193</sup> That said, even in criminal law, our legal system recognizes the trade-offs at issue and imposes limits.<sup>194</sup>

What matters here, though, is that there *is* a federalism dimension.<sup>195</sup> How to balance competing interests and, perhaps more importantly, identify the best institution to do so are questions that often fall under the federalism label in the Supreme Court's cases.<sup>196</sup> Our point here is only that there *are* federalism interests. Under binding Supreme Court precedent, the existence of federalism interests is relevant (even if not always dispositive) to how a statute should be interpreted<sup>197</sup> and thus to whether the Court's cases recognizing qualified immunity were correctly decided when issued or, at a minimum, should be retained in light of stare decisis.

It is significant that the Supreme Court's explanations for qualified immunity are best understood as reflecting federalism concerns. For instance, the reality that federalism is driving the doctrine implicates rules of statutory construction. For good or ill, which is yet another disputed point,<sup>198</sup> the Court often construes statutes narrowly when a broader construction would infringe on federalism interests.<sup>199</sup> Accordingly, the Court has stated that "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a

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192. Cf. Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173 (1997) (discussing different formulations of the principle that varying number of people should be found innocent before one innocent person is convicted).

193. See, e.g., *Prost v. Anderson*, 636 F.3d 578, 582 (10th Cir. 2011) (Gorsuch, J.) (noting "our society's aspiration to protect the innocent against the possibility of a wrongful conviction" through "a presumption of innocence, a right to trial by jury, and a range of evidentiary and procedural guarantees").

194. See *id.* at 583 (explaining that accuracy must be balanced against "finality" because protections for the accused may be "accompanied by other social costs—to victims, their families, to future potential victims, to the government, and to the courts").

195. See, e.g., Henry J. Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382, 385 (1971) (exploring Justice Harlan's "belief that the founders wished to avoid undue concentration of power anywhere lay at the root of his deep devotion to the federal system").

196. See, e.g., Henry Paul Monaghan, *A Legal Giant Is Dead*, 100 COLUM. L. REV. 1370, 1371 & n.5 (2000) (explaining that the subject of Federal Courts addresses "aspects of American federalism," just as "the basic course in constitutional law" does the same but as to "the legislative and executive aspects").

197. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (explaining that the "plain statement rule" of statutory interpretation is premised on the principle "that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere").

198. See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009) (rejecting the argument that federalism concerns should alter ordinary interpretation).

199. See, e.g., *Bond v. United States*, 572 U.S. 844, 862 (2014) ("[I]t is fully appropriate to apply the background assumption that Congress normally preserves 'the constitutional balance between the National Government and the States.'" (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011))).



federal statute.”<sup>200</sup> That interpretive canon may apply to § 1983. As a matter of statutory draftsmanship, § 1983 is not as precise as it could be. Although the Court has held, for instance, that the phrase “under color of state law” includes state officers who, in fact, acted contrary to state law, the statute is at least somewhat ambiguous on this point.<sup>201</sup> Moreover, § 1983 says nothing about defenses, but it also does not expressly disclaim them, and at least *some* defenses (such as judicial immunity<sup>202</sup>) presumably exist. This failure to disclaim defenses creates some uncertainty about the correct interpretation of § 1983 because Congress does not always place defenses in statutes even when it wants them and intends them to be enforced.<sup>203</sup> Accordingly, there is a plausible argument that § 1983 is ambiguous about whether the statute imposes liability on a state officer who did not clearly violate the law and, indeed, may have made a reasonable mistake about the meaning of uncertain law. The federalism-infused substantive canon that statutes “must be read consistent with principles of federalism inherent in our constitutional structure”<sup>204</sup> thus may support qualified immunity. Indeed, as noted above, the *Hafer* Court expressly observed that “such [state sovereign immunity] concerns are properly addressed within the framework of our personal immunity jurisprudence.”<sup>205</sup> We are not saying that federalism makes the interpretive question an open-and-shut matter; there are still strong arguments against reading a qualified immunity defense into § 1983. But federalism makes the question more difficult.

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200. *Id.* at 859. Federalism may also affect the Court’s interpretation of what is ambiguous. In *Bond*, the statute did not seem especially ambiguous. The Court held that a federal statute prohibiting a nonbenign use of “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals,” 18 U.S.C. § 229F(8)(A) (2018), did not extend to the deliberate use of a “toxic,” “potentially lethal” “arsenic-based compound” as part of an act of personal revenge, *Bond*, 572 U.S. at 851–52. Justice Scalia concluded that this interpretation stretched the words of the statute beyond their breaking point. *See id.* at 867–68 (Scalia, J., concurring in judgment).

201. *See, e.g.,* Nielson & Walker, *supra* note 13, at 1869–70 (discussing, *inter alia*, SAM GLUCKSBERG, UNDERSTANDING FIGURATIVE LANGUAGE 97 (2001) and Zagrans, *supra* note 75, at 502). Winter argues that the term’s meaning is clear from historical usage. *See* Winter, *supra* note 74, at 325, 341. We do not purport to resolve this dispute.

202. *See, e.g.,* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872) (“The principle . . . which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, ‘a deep root in the common law.’”).

203. *See, e.g.,* Baude, *supra* note 9, at 50 (“Legal texts that seem categorical on their faces are frequently ‘defeasible’—that is, they are subject to implicit exceptions made by other rules of law. . . . For example, the common-law [sic] rules of self-defense, duress, and necessity can all apply to criminal statutes that do not even mention them. Similarly, I have elsewhere defended the current doctrine of state sovereign immunity even though it, too, is an unwritten defense that goes almost unmentioned in the text of the Constitution.” (citation omitted)); *see also* United States v. Kirby, 74 U.S. (7 Wall.) 482, 486–87 (1869) (rejecting federal liability as absurd despite the absence of an express defense where a state official was enforcing an important state criminal law).

204. *Bond*, 572 U.S. at 856.

205. *Hafer v. Melo*, 502 U.S. 21, 31 (1991).

Notably, the Supreme Court has used this federalism reasoning for other civil rights questions. Indeed, it has done so with § 1983. Let's return to *Will v. Michigan Department of State Police*, which held that the term "person" in § 1983 does not include states, state agencies, or state officials acting in their official capacities; the Court reached that conclusion because, among other reasons, "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."<sup>206</sup> *Will* was an easier case because it directly involved the states, and questions of state sovereign immunity have a special place in our constitutional law.<sup>207</sup> But it is true, too, that Congress did not state in § 1983 that even a reasonable mistake would ground personal liability for state officers, which also would affect how states are staffed and the vigor with which state officials enforce state law.

To the extent that qualified immunity's critics concede, as Baude does,<sup>208</sup> that Congress acted against a backdrop in which it was permissible for the judiciary to infer defenses, then Congress's failure to declare that even reasonable mistakes by state officers would be grounds for personal liability—with all the

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206. 491 U.S. 58, 65 (1989) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

207. *See, e.g.*, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019) (explaining the history that led to the Eleventh Amendment and the many controversies since its ratification about its meaning).

208. Baude, *supra* note 9, at 50. For many of the reasons Baude has proffered, we are not convinced that § 1983 is or should be treated as a common law statute like the Sherman Act. *See id.* at 54–55, 77–79. Compare Michelman, *supra* note 128, at 2007 (“The Court’s history of taking ownership of this doctrine, together with the constitutional implications of the doctrine itself, should overcome the force of the special ‘statutory stare decisis’ rule.”), with Nielson & Walker, *supra* note 13, at 1856–64 (arguing that ordinary principles of statutory stare decisis should apply when interpreting § 1983). After all, the Court has stated that “[w]e do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy,” *Tower v. Glover*, 467 U.S. 914, 922–23 (1984), and that it looks for immunities that “were so well established in 1871, when § 1983 was enacted, that ‘we presume that Congress would have specifically so provided had it wished to abolish’ them,” *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)). Fallon agrees that the cases say that § 1983 is not a common law statute, but he argues that it would make more sense for that approach to change. *See Fallon, Jr., supra* note 14, at 993–94; 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, 719 n.180 (2014) (observing that the Court has not consistently treated § 1983 as a common law statute). Because the Court does not treat § 1983 like a common law statute and has concluded that the 1871 Congress would have recognized qualified immunity, the federalism dimensions outlined in this Article support stare decisis by strengthening the historical basis for the Court’s conclusion. But even if the Court were to adopt Fallon’s view, the federalism implications we identify would not disappear—though the suggestion that qualified immunity is “unlawful” certainly would. When creating common law, federal courts regularly consider federalism. Indeed, there is an outright presumption in favor of federalism when federal courts develop federal common law. *See, e.g.*, *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). *See generally* Lawrence Rosenthal, *Defending Qualified Immunity*, S.C. L. REV. (forthcoming) (available at <https://ssrn.com/abstract=3559852> [<https://perma.cc/S82R-K2VY>]) (arguing that § 1983 is a common law statute and defending qualified immunity on the federalism-infused policy ground that indemnification in a world without qualified immunity would force state and local governments to either raise taxes or reduce public services).

consequences for state administration that such a rule would entail—suggests that § 1983 should not be read so broadly. In other words, just as the 1869 Supreme Court was willing to conclude that Congress created an implied defense to a federal statute for a state officer enforcing state law,<sup>209</sup> the federalism implications of imposing strict liability on state officers for their reasonable mistakes of law also could be enough to justify another implied defense to a federal statute.

This potential federalism-infused argument for reading § 1983 to encompass qualified immunity is important for *stare decisis*. Even if some judges writing on a blank slate about § 1983 would not conclude that Congress authorized qualified immunity, the Supreme Court has already held for decades that Congress, in fact, did authorize it. To overcome that precedent, the law of *stare decisis* would consider, among other factors, just how wrong the Court's earlier cases really were.<sup>210</sup> To the extent that federalism offers even a plausible basis under ordinary interpretive rules for qualified immunity, those seeking to overcome *stare decisis* have a more difficult task, especially because the Court has expressly grounded its understanding of qualified immunity—at least in the § 1983 context—in federalism.

### III. FEDERALISM AND STATE RELIANCE INTERESTS

Federalism affects qualified immunity in yet another way. Beyond potentially influencing how § 1983 should be interpreted as a textual matter, it has implications for a second key aspect of *stare decisis*: reliance. Against the backdrop of federal qualified immunity, state and local governments have enacted laws and entered into contracts premised on the existence of federal qualified immunity. Indeed, as Schwartz has observed, in a large sample of police departments and because of those state and local laws, contracts, and practices, almost all state officials are fully indemnified.<sup>211</sup> According to Schwartz, the presence of this widespread indemnification cuts against qualified immunity because it means that individual officers are not chilled, contrary to one of the premises of the Supreme Court's cases.<sup>212</sup> In fact, however, the rise of widespread indemnification supports qualified immunity as a *stare decisis* matter because that fact demonstrates deep reliance. The way state and local governments have arranged their affairs, including how resources are allocated to various government functions and services—especially functions and services most susceptible to litigation—is built against a backdrop of qualified immunity. Because of *stare decisis*,

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209. *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486–87 (1869).

210. *See, e.g., Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (overruling “a seriously erroneous interpretation” of statutory law).

211. Schwartz, *supra* note 32, at 1804–08. In her response to this Article, Schwartz notes that she continues to believe that “officers are almost always indemnified,” but that the findings of our Article and her subsequent research have “led [her] to revise that view in an important way”—that is, “cases against individual officers are not functionally equivalent to cases against municipalities[,] and . . . indemnification is less set in stone than Nielson and Walker believe.” Schwartz, *supra* note 46, at 331. We respond to these points in Section III.D.

212. Schwartz, *supra* note 32, at 1804–08.

Schwartz's policy findings thus are best addressed to legislators rather than judges. We explain the rise of indemnification below in Section III.A and then present the findings of our state-by-state survey in Section III.B. Section III.C explores the implications of those findings for state reliance interests, and Section III.D offers a brief reply to some of Schwartz's responses.

A. INDIVIDUAL CAPACITY IN THEORY, OFFICIAL CAPACITY IN REALITY

As noted in Sections I.A and II.A, qualified immunity formally concerns officers sued in their individual capacities.<sup>213</sup> Today, however, there often is little difference functionally between suits against officers in their individual capacities and suits against those same officers in their official capacities. This is so because the government almost always indemnifies the officers, meaning that any judgment and the costs of defending the lawsuit come from government coffers rather than an individual officer's bank account.

We do not mean to call into doubt that "the distinction between official-capacity suits and personal-capacity suits is more than 'a mere pleading device'"—a proposition the Supreme Court has affirmed at least twice.<sup>214</sup> After all, "officers sued in their personal capacity come to court as individuals."<sup>215</sup> And state and local governments could always choose to change their laws and contractual arrangements to *not* indemnify officers. But the financial reality today, as further detailed in this Part, is that state and local governments have structured their laws and contractual arrangements to indemnify their officers when sued in their individual capacities for official actions. This on-the-ground reality of civil rights litigation complicates how one thinks about qualified immunity.

The notion that there are individual suits in theory but official suits in practice is a common one. Anecdotally, many have suggested that qualified immunity does not protect individual officers because of indemnification, and Supreme Court qualified immunity precedent confirms that the Justices are well aware of that common notion.<sup>216</sup> That anecdotal view is now supported by extensive empirical data. In a pathbreaking empirical study, Schwartz investigated how widespread indemnification is by seeking information on indemnification practices from the seventy largest police departments and from seventy small and mid-sized police departments.<sup>217</sup> Of those 140 departments surveyed, 44 large departments and 37 small or mid-sized departments responded.

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213. See, e.g., *Lane v. Franks*, 573 U.S. 228, 243 (2014).

214. *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (quoting and reaffirming *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)).

215. *Id.*

216. *Compare City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) ("Whatever contractual obligations San Francisco may (or may not) have to represent and indemnify the officers are not our concern."), with *id.* at 1179 (Scalia, J., dissenting) ("Today's judgment . . . spares San Francisco the significant expense of defending the suit, and satisfying any judgment, against the individual petitioners.").

217. Schwartz, *supra* note 31, at 889.

Though noting some methodological limitations, Schwartz's bottom line is unequivocal: "Police officers are virtually always indemnified."<sup>218</sup> In other words, "blanket indemnification practices are functionally indistinguishable from respondeat superior."<sup>219</sup> In particular, she found:

Between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over \$730 million spent by cities, counties, and states in these cases. Officers did not pay a dime of the over \$3.9 million awarded in punitive damages. And officers in the thirty-seven small and mid-sized jurisdictions in my study never contributed to settlements or judgments in lawsuits brought against them. Governments satisfied settlements and judgments in police misconduct cases even when indemnification was prohibited by statute or policy. And governments satisfied settlements and judgments in full even when officers were disciplined or terminated by the department or criminally prosecuted for their conduct.<sup>220</sup>

In addition to demonstrating that police departments across the country indemnify virtually all of their officers from all judgments and settlements in § 1983 litigation, Schwartz's study sheds some important light on the costs these lawsuits impose on state and local governments: From 2006 to 2011, forty-four of the seventy largest police departments paid more than \$735 million in judgments and settlements for civil rights lawsuits against their officers.<sup>221</sup> During that same period, the thirty-seven small and mid-sized departments that responded paid more than \$9 million—with nine of those thirty-seven departments responding that they could not report how many civil rights cases plaintiffs had won or how much money had been paid to plaintiffs.<sup>222</sup>

In other words, even though police officers are formally sued in their individual capacities to not formally intrude on state sovereign immunity, in practice, state and local governments collectively pay hundreds of millions of dollars per year through indemnification. These are conservative cost estimates. Schwartz's study captures a snapshot of only fewer than 100 of the nearly 18,000 police departments nationwide.<sup>223</sup> It does not even attempt to calculate the money that state

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218. *Id.* at 890; accord Teresa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 841 (2017) (finding that "indemnification decisions in Philadelphia are seldom dictated by § 1983's elements or indemnification statutes, but instead are guided by policy considerations, which overwhelmingly direct decision-makers towards indemnification").

219. Schwartz, *supra* note 31.

220. *Id.*

221. *See id.* at 913 (reporting "an estimated \$735,270,772 in settlements and judgments involving civil rights claims on behalf of their law enforcement officers between 2006 and 2011").

222. *See id.* at 915 ("Based on available evidence, these thirty-seven departments paid at least \$9,387,611 in at least 183 cases.")

223. Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1159 (2016).

and local governments pay on behalf of their employees in the other contexts where § 1983 lawsuits arise—including state prisons, parole offices, public schools, child services agencies, and a variety of other state and local agencies. These staggering financial figures, which exist in a world where qualified immunity forecloses monetary liability whenever the federal right is not clearly established, raise important questions about funding sources. Do police departments have to pay the settlements and judgments out of their operating budgets, thus potentially limiting resources for other important policy objectives? Do they come out of general funds at the state or local level? Or do police departments and localities purchase outside insurance to cover these expenses? And if so, which budget does the money to pay for insurance come from?

Fortunately, in a subsequent nationwide study, Schwartz has shed some empirical light on these questions.<sup>224</sup> Gathering budgetary information from sixty-two of the seventy largest police departments and thirty-eight small and mid-sized departments, Schwartz found that “settlements and judgments in suits against law enforcement agencies and officers are not always—or even usually—paid from jurisdictions’ general funds.”<sup>225</sup> Of the sixty-two largest departments, thirty-six contribute to these settlements and judgments from their own budgets, whereas the government’s general fund fully covers those costs for the other twenty-six departments.<sup>226</sup> Among the thirty-eight small and mid-sized departments that responded, fourteen contribute, whereas the other twenty-four are covered entirely by the government’s general fund.<sup>227</sup>

All of this funding ultimately is coming from the public fisc. As a matter of federalism, this is key because different funding structures would have significant ripple effects on law enforcement operations on the ground—thereby affecting whether state and local governments have adequate resources to enforce the laws and protect the public. Importantly, Schwartz finds that for many large departments that contribute from their budgets to cover some of the expense, these contributions likely do not affect operations:

They receive an allocation of funds for litigation costs during the budgeting process with the city, county, or state; they cannot use those funds for other purposes if they pay less than anticipated on litigation; and when they spend more than anticipated on litigation, the excess money is paid from the jurisdiction’s general fund.<sup>228</sup>

Critically, however, Schwartz finds that most smaller departments have purchased outside insurance and that “litigation costs can nevertheless affect their

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224. *See id.* at 1148.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 1149.

operations and threaten their very existence.”<sup>229</sup>

Viewed through the lens of federalism, these empirical findings regarding smaller police departments deserve close attention, and Schwartz is right to underscore that “pressures and obligations imposed by outside insurers are an important and underappreciated consequence of liability for smaller law enforcement agencies.”<sup>230</sup> Schwartz’s two studies discussed in this Part focus mostly on several dozen of the largest police departments in the country. With the research questions that Schwartz had in mind for these studies, the decision to focus on the largest departments makes sense. But if the empirical questions are more about states’ reliance interests in the doctrine of qualified immunity—the questions that Part III of this Article seeks to explore—this focus is too narrow. After all, as Schwartz explains, “[t]he one hundred jurisdictions [included in the study] do not, however, reflect the distribution by size of the nation’s approximately 18,000 law enforcement agencies.”<sup>231</sup> The overwhelming majority of police departments in this country are small. Unlike the large departments in Schwartz’s study that self-insure, “the vast majority of small law enforcement agencies across the country appear to rely on some manner of liability insurance.”<sup>232</sup>

Schwartz’s two studies on law enforcement agencies do not undermine the significance of federalism to the debate about qualified immunity. To the contrary, her important findings *confirm* the role of federalism. Because indemnification

229. *Id.* (emphasis added). In her response, Schwartz notes that “there have been instances of small jurisdictions disbanding their police forces following large payouts” but says that those cases “often” involve special circumstances, and that “[m]ost jurisdictions’ financial well-being is not threatened by lawsuits—civil rights or otherwise.” Schwartz, *supra* note 46, at 337. Words like *often* or *most* may not be too reassuring in a nation with nearly 20,000 cities, towns, and villages; without qualified immunity, some places risk suffering catastrophic consequences. And “just a percent or two of a city’s budget,” Schwartz, *supra* note 223, at 1165 n.74, is not always a “modest” expenditure, Schwartz, *supra* note 46, at 338. State and local governments on average are reported to spend two percent of their total budgets on critical public services such as sewers and fire protection and one percent on services such as parks and public buildings. See *State and Local Finance Initiative: State and Local Expenditures*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures#Question1> [https://perma.cc/R674-WVEN] (last visited Oct. 3, 2020). And concerns about state and local government budget constraints “have only been compounded by the devastating effects of the COVID-19 pandemic.” Schwartz, *supra* note 46, at 337 (citing Anshu Siripurapu & Jonathan Masters, *How the Coronavirus Will Harm State and City Budgets*, COUNCIL FOREIGN REL. (May 15, 2020), <https://www.cfr.org/backgrounder/how-coronavirus-will-harm-state-and-city-budgets> [https://perma.cc/PVW9-KBFW]).

230. Schwartz, *supra* note 223, at 1149.

231. *Id.* at 1159 (citing, *inter alia*, BRIAN A. REAVES, U.S. DOJ, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 (2011)). As Schwartz further notes,

Of the 17,985 law enforcement agencies nationwide as of 2008, 86 percent employed fewer than fifty sworn officers, 93 percent employed fewer than one hundred officers, 98 percent employed fewer than 250 officers, and 2 percent employed more than 250 officers. In contrast, 9 percent of the agencies in my study employ fifty or fewer sworn officers; 14 percent employ one hundred or fewer sworn officers; 24 percent employ 250 or fewer officers; and 76 percent employ more than 250 sworn officers.

*Id.* at 1159 n.48 (citation omitted).

232. *Id.* at 1159.

affects state and local budgets, it also necessarily affects the amount and nature of public services provided and the vigor with which those services are provided, especially where litigation is most likely. Section III.C further explores the implications of these findings for *stare decisis*.

#### B. INDEMNIFICATION AS A MATTER OF STATE LAW

Although Schwartz's studies have convincingly demonstrated that § 1983 litigation in practice implicates federalism concerns, we do not mean to suggest that widespread indemnification for such settlements and judgments violates state sovereign immunity. (Nor does Schwartz, of course.) State and local governments have voluntarily chosen to indemnify their officers. States could always reverse field and prohibit (or narrow) indemnification. And such a response would not be improbable if the Supreme Court were to eliminate qualified immunity.

One would expect that eliminating (or narrowing) indemnification protections would increase some of the social costs addressed in *Harlow*, discussed in Part II, that qualified immunity seeks to minimize.<sup>233</sup> In particular, the failure to indemnify (which, in effect, would lower an officer's salary) would make it harder to recruit, hire, and retain the best people. And it would discourage officers from making tough decisions to faithfully execute the law if those decisions could open them up to personal liability. In a world without indemnification, the former social cost would likely be lessened to some degree by officers purchasing outside liability insurance. But to hire and retain competent officers in light of these increased out-of-pocket costs, state and local governments presumably would need to pay them more. If qualified immunity were also gone, this effect should be even more pronounced.

Also important to this discussion is that states could not eliminate indemnification overnight in response to a Supreme Court decision overturning qualified immunity. For decades, state and local governments have acted against the backdrop of the Court's § 1983 and qualified immunity jurisprudence when passing laws and promulgating regulations—and entering into contractual obligations with their employees—regarding the indemnification of those who wield state power. State and local budgets, tax rates, bond obligations, and employee salaries thus have been established in a world with qualified immunity.

These concerns are not just hypothetical. To illustrate the significant reliance interests at stake, we present a state-by-state survey of state laws governing indemnification of government employees.<sup>234</sup> Collecting state indemnification laws is not an easy task, and this survey is no doubt incomplete. For instance, we have limited our search to statutes and do not endeavor to collect the relevant state regulations and policies. We have also limited our state-by-state survey to

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233. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

234. Many thanks to our research assistant Nathan Coyne for taking the laboring oar in summarizing these results and to Moritz librarian Chris Galanos for tracking down the historical state legislative materials to ascertain the first-enactment dates for each statute.

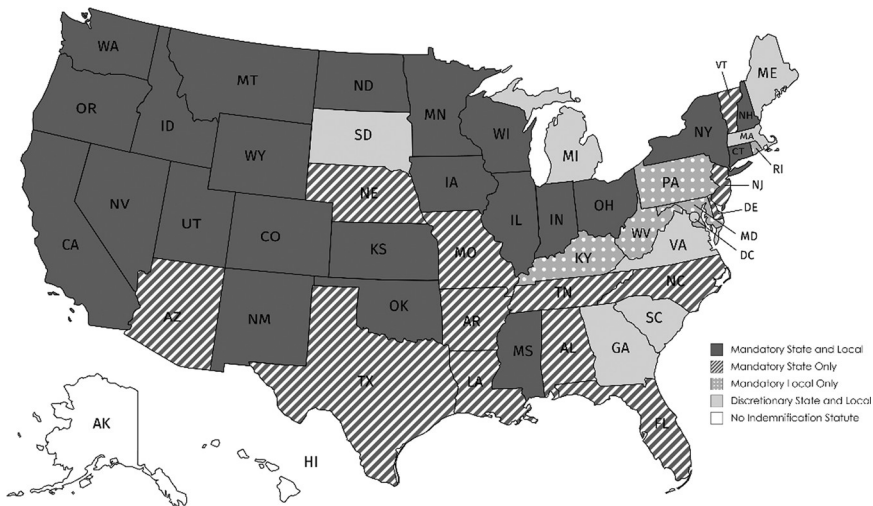


indemnification statutes that could potentially cover § 1983 claims, as opposed to just state law claims. And it turns out that few states’ statutory codes are models of clarity—to put it mildly. Whatever its imperfections and limitations, our survey of indemnification statutes nevertheless demonstrates the extraordinary depth, complexity, and diversity of state indemnification practices at play.

Before we report the findings of our state-by-state survey, one final observation on our methodology bears noting. Throughout Section III.B, we discuss the latest versions of each state’s indemnification laws. However, because we are also interested in trying to assess reliance interests, we include in the footnotes of Section III.B the first-enacted year in parentheses for indemnification provisions in each statute—not the current year or the current publisher. After Section III.B.1 presents the findings on which states have enacted laws that provide for indemnification, Section III.B.2 complicates the story by exploring the various exceptions the states have included in their indemnification statutes. Section III.B.3 details which states have codified caps on state liability and indemnification. Section III.B.4 concludes with a discussion of qualified immunity’s potential influence on states’ statutory indemnification schemes.

1. How State Laws Provide for Indemnification

Every state has codified some form of duty-to-defend or indemnification protection for state or local government employees, but the approaches vary. [Figure 1](#) depicts which states have enacted mandatory statutory indemnification schemes for both state and local government employees, mandatory schemes for state government employees only, mandatory schemes for local government employees only, discretionary indemnification for both state and local government employees, and no indemnification statute at all.



**Figure 1. Mandatory and Discretionary Statutory Indemnification Regimes by State**

Among states that require some sort of indemnification of government employees, twenty-three states have enacted statutes that require indemnification of both state employees and employees of local governments.<sup>235</sup> Another thirteen states have enacted indemnification protections for state employees.<sup>236</sup> Of these thirteen states, eleven—Arizona, Arkansas, Delaware, Florida, Louisiana, Missouri, Nebraska, New Jersey, North Carolina, Tennessee, and Texas—require indemnification of state employees but authorize local governments in their discretion to

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235. See CAL. GOV'T CODE § 825(a) (first enacted 1963) (state and local employees); COLO. REV. STAT. § 24-10-110 (1971) (state and local employees); CONN. GEN. STAT. §§ 5-141d (1983) (state employees), 7-101a (1971) (local employees); IDAHO CODE § 6-903(2) (1976) (state and local employees); IND. CODE §§ 34-13-3-5(d) (1976) (general indemnification provision), 34-13-4-1 (1976) (indemnification expressly for civil liability under civil rights laws); IOWA CODE §§ 669.21 (1975) (state employees), 670.8 (1971) (local employees); KAN. STAT. ANN. § 75-6109 (1979) (state and local employees); MINN. STAT. §§ 3.736(9) (1976) (state employees), 466.07 (1963) (local employees); MISS. CODE ANN. § 11-46-7(3) (1993) (state and local employees); MONT. CODE ANN. § 2-9-305(2) (1974) (state and local employees); NEV. REV. STAT. § 41.0349 (1979) (state and local employees); N.H. REV. STAT. ANN. §§ 29-A:2 (1979) (county employees), 31:106 (1973) (local employees for civil rights actions), 99-D:2 (1978) (state employees); N.M. STAT. ANN. § 41-4-4 (1976) (state and local employees); N.Y. PUB. OFF. LAW §§ 17(3) (1978) (state employees), 18(4) (1981) (local employees); N.D. CENT. CODE §§ 32-12.1-04(4) (1977) (local employees), 32-12.2-03(4) (1997) (state employees); OHIO REV. CODE ANN. §§ 9.87(A) (1980) (state employees), 2744.07(b) (1985) (local employees); OKLA. STAT. tit. 51, § 162 (1978) (local employees) (amended in 1986 to include state employees); OR. REV. STAT. § 30.285 (1967) (state and local employees); UTAH CODE ANN. § 63G-7-902 (1953) (state and local employees); WASH. REV. CODE §§ 4.24.490 (1989) (state employees), 4.96.041 (1989) (local employees); WIS. STAT. § 895.46 (1966) (state and local employees); WYO. STAT. ANN. § 1-39-104 (1979) (state and local employees). Illinois law requires indemnification of state employees. 5 ILL. COMP. STAT. 350/2 (1977). But it requires municipalities only to indemnify certain employees for certain actions, while authorizing but not requiring indemnification for other actions. Compare 745 *id.* 10/2-301 (1965) (citing and preserving state laws that require indemnification for certain police officers, teachers, and park rangers), with 745 *id.* 10/2-302 (1965) (authorizing municipalities to indemnify for all employee actions except punitive or exemplary damages). For categorization purposes, we include Illinois in the group of states that require indemnification for both state and local employees. Moreover, we include Washington in this category because state law requires municipalities to indemnify employees for judgments under § 1983 and related civil right actions, whereas it merely authorizes municipalities to indemnify employees for other civil monetary judgments. See WASH. REV. CODE § 4.96.041 (1989). Although our focus is on the states, it is worth noting that Puerto Rico indemnifies its employees, see P.R. LAWS ANN. tit. 32, § 3085 (1975), and the District of Columbia indemnifies certain employees, see D.C. CODE § 2-415 (1976) (medical employees and administrative law judges).

236. See ALA. CODE § 36-1-6.1 (first enacted 1983) (insurance); ARIZ. REV. STAT. ANN. § 41-621(P) (1975); ARK. CODE ANN. § 21-9-203 (1981); DEL. CODE ANN. tit. 10, § 4002 (1978); FLA. STAT. § 284.31 (1972) (insurance for all state employees “unless specifically excluded by the Department of Financial Services”); LA. STAT. ANN. § 13:5108.1 (1975); MO. REV. STAT. § 105.711 (1969); NEB. REV. STAT. § 81-8,239.05 (1981); N.J. STAT. ANN. § 59:10-1 (1972); N.C. GEN. STAT. § 143-300.6 (1973); TENN. CODE ANN. § 9-8-112 (1982) (instructing board of claims to pay final judgments for state employees if “the employee was acting in good faith within the scope of such employee’s official duty and under apparent lawful authority or orders”); TEX. CIV. PRAC. & REM. CODE ANN. § 104.001 (1975); VT. STAT. ANN. tit. 12, § 5606 (1989).

indemnify their employees.<sup>237</sup> The remaining two—Alabama and Vermont—do not appear to address by statute the indemnification of local employees.<sup>238</sup> Conversely, Kentucky, Maryland, Pennsylvania, Rhode Island, and West Virginia require local governments to indemnify their employees, but the states do not appear to require by statute the indemnification of state employees.<sup>239</sup>

By contrast, seven states—Georgia, Maine, Massachusetts, Michigan, South Carolina, South Dakota, and Virginia—do not require indemnification but instead grant discretion to state agencies and local governments regarding whether to

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237. Compare ARIZ. REV. STAT. ANN. § 41-621(P) (first enacted 1975) (requiring indemnification of state employees), and ARK. CODE ANN. § 21-9-203 (1981) (same), and DEL. CODE ANN. tit. 10, § 4002 (1978) (same), and FLA. STAT. § 284.31 (1972) (same), and LA. STAT. ANN. § 13:5108.1 (1975) (same), and MO. REV. STAT. § 105.711 (1969), and NEB. REV. STAT. § 81-8,239.05 (1981) (same), and N.J. STAT. ANN. § 59:10-1 (1972) (same), and N.C. GEN. STAT. § 143-300.6 (1973) (same), and TENN. CODE ANN. § 9-8-112 (1982), and TEX. CIV. PRAC. & REM. CODE ANN. § 104.001 (1975) (same), with ARIZ. REV. STAT. ANN. § 9-497 (1956) (authorizing cities and towns to purchase liability insurance for their employees), and ARK. CODE ANN. § 21-9-304(c) (1983) (indicating state may indemnify certain actions by local employees but only the amount that “exceeds the limits of liability established in the contract of insurance”), and DEL. CODE ANN. tit. 10, § 4003 (1978) (authorizing local governments to indemnify their employees), and FLA. STAT. § 111.071 (1979) (authorizing indemnification of local employees and non-covered state-agency employees if any), and LA. STAT. ANN. § 33:5153 (1976) (authorizing municipalities to purchase liability insurance for their employees), and MO. REV. STAT. § 71.185 (1959) (authorizing municipalities to purchase liability insurance for their employees), and NEB. REV. STAT. § 13-401 (1983) (authorizing political subdivisions to purchase liability insurance for their employees), and N.J. STAT. ANN. § 59:10-4 (1972) (authorizing local governments to indemnify their employees), and N.C. GEN. STAT. § 160A-167 (1977) (same), and TENN. CODE ANN. § 29-20-310(d) (1987) (same), and TEX. CIV. PRAC. & REM. CODE ANN. § 102.002 (1979) (same).

238. See ALA. CODE §§ 36-1-6.1 (first enacted 1983), 11-1-9 (1967) (authorizing counties to defend their employees but not mentioning indemnification); VT. STAT. ANN. tit. 24, § 901a (2003) (creating an exclusive right of action against a municipality for suits against its employees but including no provision to indemnify or hold harmless municipal employees), tit. 12, § 5606 (1989).

239. See KY. REV. STAT. ANN. § 65.2005 (first enacted 1988); MD. CODE ANN., CTS. & JUD. PROC. § 5-303(b) (1973); 42 PA. STAT. AND CONS. STAT. ANN. § 8548 (1980); 45 R.I. GEN. LAWS § 45-15-16 (1986); W. VA. CODE § 29-12A-11(a)(2) (1986); cf. KY. REV. STAT. ANN. § 12.211 (1976) (providing for defense of state employees but not mentioning indemnification); MD. CODE ANN., STATE GOV'T § 12-404 (1984) (authorizing the Board of Public Works to “pay wholly or partly a settlement or judgment against the State or any State personnel”); 42 PA. STAT. AND CONS. STAT. ANN. § 8525 (1978) (providing for defense of state employees but not mentioning indemnification); 9 R.I. GEN. LAWS §§ 9-31-8 (1979) (requiring defense of state employees), 9-31-12 (1979) (making indemnification of state employees discretionary); 1978-1979 Ky. Op. Att’y Gen. 2-251 (1978), 1978 WL 26241 (noting that in 1978 the legislature repealed KY. REV. STAT. ANN. § 12.214 (1976), “which provided for the payment of private judgments against state employees”). Although West Virginia law does not seem to expressly indemnify state employees, it does mandate that the state set up a Board of Risk and Insurance Management that secures insurance against liability for government operations, including liability insurance for county-level schools and their employees. See W. VA. CODE §§ 29-12-1 to -14 (1957); see also *id.* § 7-14A-3 (1977) (requiring county commission purchase of liability insurance for county deputy sheriffs and authorizing contribution from insured). By regulation, Pennsylvania does indemnify state employees in lawsuits for unintentional conduct or good faith actions. 4 PA. CODE §§ 39.2 (1996), 39.3 (1994). As noted at the outset of Section III.B, surveying each state’s regulatory scheme exceeds the ambitions of this Article. There are no doubt regulations throughout the states that affect how and whether states and municipalities indemnify employees, just as many indemnification provisions are included in employment contracts.

indemnify.<sup>240</sup> South Dakota's indemnification law is noteworthy because it provides a menu of options, which range from mere coverage of court costs or attorney fees to coverage of all litigation expenses, including the judgment.<sup>241</sup> In Massachusetts, the indemnification of constitutional officers is mandatory, but all other indemnification is discretionary.<sup>242</sup>

The two states that share no border with another state also appear to be the only two that do not authorize indemnification, though they do provide for a duty to defend in some circumstances. As best we can tell, Hawaii law does not require indemnification of state or local employees. However, it does allow the attorney general to defend any employee of the state and requires the attorney general to defend county lifeguards working at state beaches.<sup>243</sup> Alaska law, moreover, does not appear to provide for any indemnification, and it even excludes from the attorney general's general duty to defend state employees any civil lawsuit "against an employee of the state that is brought for a violation of the Constitution of the United States."<sup>244</sup>

## 2. Statutory Exceptions to Indemnification

As [Figure 1](#) illustrates and Section III.B.1 details, there is great diversity in statutory indemnification schemes across the United States. But there are also pronounced trends: twenty-three states require both state and local governments to indemnify their employees. Another thirteen require indemnification only for state employees, with five requiring indemnification only for local employees. In other words, about four in five states (82%) require some sort of indemnification. Of the remaining nine states, seven authorize but do not require indemnification

240. See GA. CODE ANN. §§ 45-9-1 (first enacted 1977) (state employees), 45-9-22 (1978) (local employees); ME. STAT. tit. 14, § 8112(2-A) (1977) (state and local employees for suits under federal law); MASS. GEN. LAWS ch. 258, § 9 (1978) (state and local employees); MICH. COMP. LAWS § 691.1408 (1) (1964) (same); S.C. CODE ANN. §§ 1-7-50 (1960) (requiring defense for state and local employees), 1-11-140 (1976) (authorizing state and local governments to secure insurance "to protect . . . personnel against tort liability arising in the course of their employment"); S.D. CODIFIED LAWS § 3-19-1 (1969) (state and local employees); VA. CODE ANN. §§ 2.2-1837 (2001) (authorizing state to provide insurance for its employees), 15.2-1518 (1980) (same for local governments); see also MD. CODE ANN., STATE GOV'T § 12-404 (1984) (authorizing the Board of Public Works to "pay wholly or partly a settlement or judgment against the State or any State personnel"). We categorize Massachusetts as discretionary, but note that state law does require indemnification for a minor subset of state employees: "persons holding office under the constitution." MASS. GEN. LAWS ch. 258, § 9 (1978).

241. S.D. CODIFIED LAWS § 3-19-1 (first enacted 1969).

242. MASS. GEN. LAWS ch. 258, § 9 (first enacted 1978). Although indemnification of judgment or settlement may be discretionary, the defense itself appears to be mandatory. See *id.* § 6.

243. HAW. REV. STAT. § 662-16 (first enacted 1976). Hawaii law does grant the state comptroller "discretion to purchase casualty insurance for the State or state agencies, including those employees of the State who, in the comptroller's discretion, may be at risk and shall be responsible for the acquisition of all casualty insurance." *Id.* § 41D-2 (1988). "Casualty insurance" is defined to cover legal liability for injury and damage broadly, see *id.* § 41D-1, such that this authority may be broad enough to grant discretion to the comptroller to purchase liability insurance for state employees generally. Because this provision is vague, we have erred on the side of caution in categorizing Hawaii as not addressing indemnification by statute.

244. ALASKA STAT. § 09.50.253(f) (first enacted 2004).

for both state and local governments, with only Alaska and Hawaii appearing statutorily silent when it comes to indemnification.

Looking only at whether a state requires indemnification by statute, however, obscures much of the great diversity in statutory schemes for indemnification. Most of these statutory indemnification provisions include express exceptions from indemnification based on mental state or bad acts of the government employees.<sup>245</sup> Of the forty-one states that require indemnification for either state or local employees, thirty-five states have enacted such statutory exceptions.<sup>246</sup> And one of the states that merely authorizes indemnification has also enacted exceptions.<sup>247</sup> In addition to the fifteen states that have not enacted exceptions to indemnification<sup>248</sup> (including Alaska and Hawaii, which have no enacted

245. All of these indemnification statutes also exclude any actions by an employee that fall outside the course or scope of employment. Many indemnification statutes also require that the government employee timely notify the government about the lawsuit and that the employee cooperate in good faith with the government to defend against the lawsuit. Our focus in Section III.B.2, however, is to document the exclusions from indemnification based on the alleged conduct at issue.

246. *See* ARK. CODE ANN. § 21-9-203 (first enacted 1981) (state employees); COLO. REV. STAT. § 24-10-110 (1971) (state and local employees); CONN. GEN. STAT. §§ 5-141d (1983) (state employees), 7-101a (1971) (local employees); DEL. CODE ANN. tit. 10, §§ 4002 (1978) (state employees) (referring to exclusions in DEL. CODE ANN. tit. 10, § 4001 (1978)), 4003 (1978) (local employees) (same exclusions); FLA. STAT. § 111.071 (1979) (authorizing indemnification for local employees and state employees not covered by state insurance fund); IDAHO CODE § 6-903(3) (1976) (state and local employees); 5 ILL. COMP. STAT. 350/2 (1977) (state employees); IND. CODE § 34-13-4-1 (1976) (indemnification expressly for civil liability under civil rights laws); IOWA CODE §§ 669.21 (1975) (state employees), 670.8 (1971) (local employees); KAN. STAT. ANN. § 75-6109 (1979) (state and local employees); KY. REV. STAT. ANN. § 65.2005(3) (1988) (local employees); LA. STAT. ANN. § 13:5108.1 (1975) (state employees); MD. CODE ANN., STATE GOV'T § 12-404 (1984) (exclusions in MD. CODE ANN., STATE GOV'T § 12-405 (1984)); MINN. STAT. §§ 3.736(9) (1973) (state employees), 466.07 (1979) (local employees); MISS. CODE ANN. § 11-46-7(2) (1993) (state and local employees); MONT. CODE ANN. § 2-9-305(6) (1974) (state and local employees); NEB. REV. STAT. § 81-8,239.05 (1981); NEV. REV. STAT. § 41.0349 (1979) (state and local employees); N.H. REV. STAT. ANN. §§ 29-A:2 (1979) (county employees), 31:106 (1973) (local employees for civil rights actions), 99-D:2 (1978) (state employees); N.J. STAT. ANN. § 59:10-1 (1972) (state employees) (referencing exclusions in N.J. STAT. ANN. § 59:10A-2 (1972)); N.M. STAT. ANN. § 41-4-4 (1976) (state and local employees); N.Y. PUB. OFF. LAW §§ 17(3) (1978) (state employees), 18(4) (1978) (local employees); N.C. GEN. STAT. §§ 143-300.4 (1973) (state employees), 160A-167 (1977) (authorizing local governments to indemnify their employees); OHIO REV. CODE ANN. §§ 9.87(A) (1980) (state employees), 2744.07(b) (1985) (local employees); OKLA. STAT. tit. 51, § 162 (1986) (state and local employees); OR. REV. STAT. § 30.285 (1967) (state and local employees); 42 PA. STAT. AND CONS. STAT. ANN. §§ 8548 (1980) (local employees), 8550 (1980) (exclusion for willful misconduct); 9 R.I. GEN. LAWS §§ 9-31-12 (1979) (state employees discretionary), 45-15-16 (1986) (local employees); TENN. CODE ANN. § 9-8-112 (1982) (state employees); TEX. CIV. PRAC. & REM. CODE ANN. §§ 102.002 (1979) (local employees discretionary), 104.002 (1975) (exclusions from indemnification); UTAH CODE ANN. § 63G-7-202 (1983) (exclusions from indemnification); VT. STAT. ANN. tit. 12, § 5606 (1989) (state employees); WASH. REV. CODE §§ 4.24.490 (1989) (state employees), 4.96.041 (1989) (local employees); W. VA. CODE § 29-12A-11(a)(2) (1986) (local employees). The District of Columbia and Puerto Rico have also codified exceptions to mandatory indemnification. D.C. CODE § 2-415 (1976) (medical employees and administrative law judges); P.R. LAWS ANN. tit. 32, § 3085 (1975).

247. *See* MASS. GEN. LAWS ch. 258, § 9 (first enacted 1978) (state and local employees).

248. *See* ALA. CODE § 36-1-6.1 (first enacted 1983) (insurance for state employees); ARIZ. REV. STAT. ANN. §§ 9-497 (1956) (authorizing cities and towns to purchase liability insurance for their employees), 41-621(P) (1975) (state employees); CAL. GOV'T CODE § 825(a) (1963) (state and local

indemnification statutes at all),<sup>249</sup> a half-dozen states that have enacted indemnification exclusions for either state or local employees have not enacted similar such exclusions for the other group of employees.<sup>250</sup> As further discussed below, sixteen states also limit or outright prohibit indemnification for punitive damages, including five states (Arizona, California, North Dakota, Missouri, and Wyoming) that require indemnification of either state or local employees but have not yet enacted any other exclusions to indemnification.<sup>251</sup> Figure 2 depicts which states have excluded from indemnification bad acts/mental state, punitive damages, both, and neither.

Under these statutory exclusions, if an employee is determined to have acted with a specified mental state, or if the claim involves a specified bad act, the state or governing unit will no longer defend and indemnify that employee. Illinois is illustrative. Under Illinois law, if the attorney general determines that the state employee's actions giving rise to the suit involved "intentional, wilful [sic] or wanton misconduct," then the attorney general must decline to defend the employee or withdraw from representation.<sup>252</sup> However, if the court finds no "intentional, wilful [sic] or wanton misconduct," the state must indemnify for any costs assessed as part of the final judgment, as well as the employee's reasonable court costs, litigation expenses, and attorney's fees.<sup>253</sup> In addition, in any action where the attorney general defends the employee, if the court finds that there was

employees); GA. CODE ANN. §§ 45-9-1 (1977) (state employees), 45-9-22 (1978) (local employees); ME. STAT. tit. 14, § 8112(2-A) (1977) (state and local employees for suits under federal law); MICH. COMP. LAWS § 691.1408(1) (1964) (state and local employees); MO. REV. STAT. §§ 71.185 (1959) (authorizing municipalities to purchase liability insurance for their employees), 105.711 (1969) (state employees); N.D. CENT. CODE §§ 32-12.1-04 (1977) (local employees), 32-12.2-03(4) (1997) (state employees); 42 PA. STAT. AND CONS. STAT. ANN. § 8548 (local employees); S.C. CODE ANN. § 1-11-140 (1976) (authorizing state and local governments to secure insurance "to protect [] personnel against tort liability arising in the course of their employment"); S.D. CODIFIED LAWS § 3-19-1 (1969) (state and local employees); VA. CODE ANN. §§ 2.2-1837 (2001) (authorizing state to provide insurance for its employees), 15.2-1518 (1980) (same for local governments); WIS. STAT. § 895.46 (1966) (state and local employees); WYO. STAT. ANN. § 1-39-104 (1979) (state and local employees).

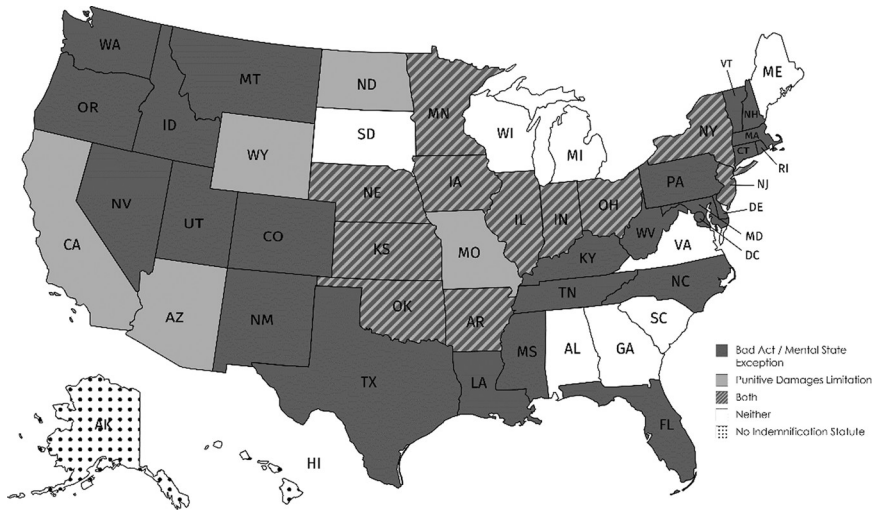
249. *Supra* notes 243-44 and accompanying text.

250. *See* FLA. STAT. § 284.31 (first enacted 1972) (insurance for all state employees "unless specifically excluded by the Department of Financial Services"); 745 ILL. COMP. STAT. 10/2-302 (1965) (local employees); LA. STAT. ANN. § 33:5153 (1976) (authorizing municipalities to purchase liability insurance for their employees); MD. CODE ANN., CTS. & JUD. PROC. § 5-303(b) (1973) (local employees); N.J. STAT. ANN. § 59:10-4 (1972) (local employees discretionary); TENN. CODE ANN. § 29-20-310(d) (1987) (same).

251. *See* ARIZ. REV. STAT. ANN. § 41-621(P) (first enacted 1975) (state employees); ARK. CODE ANN. § 21-9-203 (state employees); CAL. GOV'T CODE § 825(a) (state and local employees); 745 ILL. COMP. STAT. 10/2-302 (local employees); IND. CODE § 34-13-4-1 (indemnification expressly for liability under civil rights laws); IOWA CODE § 670.8 (local employees); KAN. STAT. ANN. § 75-6109 (state and local employees); MINN. STAT. § 466.04(1)(b) (local employees); MO. REV. STAT. § 105.711 (state employees); NEB. REV. STAT. § 81-8,239.05(4) (state employees); N.J. STAT. ANN. §§ 59:10-1 (state employees), 59:10-4 (local employees discretionary); N.Y. PUB. OFF. LAW § 18(4) (local employees); N.D. CENT. CODE § 32-12.2-03(4) (state employees); OHIO REV. CODE ANN. §§ 9.87(B) (state employees), 2744.07(b) (local employees); OKLA. STAT. tit. 51, § 162 (state and local employees); WYO. STAT. ANN. § 1-39-118(d) (state and local employees).

252. 5 ILL. COMP. STAT. 350/2(b) (first enacted 1977).

253. *Id.*



**Figure 2. Statutory Exceptions to Indemnification by State**

“intentional, wilful [sic] or wanton misconduct” and it “was not intended to serve or benefit interests of the State,” the state is relieved of its indemnification obligation.<sup>254</sup>

Among states with some sort of mental-state or bad-act exception to indemnification, there is a decent amount of variation. This variation is due at least in part to the state-to-state differences in *mens rea* levels, and it may also be due in part to mental states required for punitive damages under state law. For example, eighteen states have a statutory exception for acts or omissions done with malice.<sup>255</sup> Eighteen states also exclude conduct that is willful, wanton, or intentional.<sup>256</sup> Five

254. *5 id.* 350/2(d).

255. See ARK. CODE ANN. § 21-9-203 (first enacted 1981) (state employees); CONN. GEN. STAT. §§ 5-141d (1983) (state employees), 7-101a (1971) (local employees); IDAHO CODE § 6-903(3) (1976) (state and local employees); KAN. STAT. ANN. § 75-6109 (state and local employees); KY. REV. STAT. ANN. § 65.2005(3) (1988) (local employees); MD. CODE ANN., STATE GOV'T § 12-405 (1984) (exclusions to indemnification); MASS. GEN. LAWS ch. 258, § 9 (1978) (state and local employees); MISS. CODE ANN. § 11-46-7(2) (1993) (state and local employees); MONT. CODE ANN. § 2-9-305(6) (1974) (state and local employees); NEV. REV. STAT. § 41.0349 (1979) (state and local employees); N.H. REV. STAT. ANN. § 31:106 (1973) (local employees for civil rights actions); N.J. STAT. ANN. § 59:10-1 (state employees) (referencing exclusions in N.J. STAT. ANN. § 59:10A-2 (1972)); N.M. STAT. ANN. § 41-4-4 (1976) (state and local employees); N.C. GEN. STAT. §§ 143-300.4 (1973) (exclusions to indemnification), 160A-167 (1977) (local employees discretionary); OHIO REV. CODE ANN. § 9.87(A) (state employees); OKLA. STAT. tit. 51, § 162 (state and local employees); 42 PA. STAT. AND CONS. STAT. ANN. §§ 8548 (1980) (local employees), 8550 (1980) (exclusion for willful misconduct); 9 R.I. GEN. LAWS §§ 9-31-12 (1979) (state employees discretionary), 45-15-16 (1986) (local employees).

256. See COLO. REV. STAT. § 24-10-110 (first enacted 1971) (state and local employees); CONN. GEN. STAT. §§ 5-141d (state employees), 7-101a (local employees); DEL. CODE ANN. tit. 10, §§ 4002 (1978) (state employees) (referring to same exclusions in DEL. CODE ANN. tit. 10, § 4001 (1978)), 4003 (1978) (local employees); FLA. STAT. § 111.071 (1979) (local employees discretionary); 5 ILL. COMP. STAT. 350/2 (state employees); IOWA CODE §§ 669.21 (1975) (state employees), 670.8 (local employees);

states exclude even reckless conduct,<sup>257</sup> with six going so far as to exclude gross negligence.<sup>258</sup>

Seven states have some form of exception for criminal conduct or intent.<sup>259</sup> In Idaho, for instance, it is not criminal conduct but “criminal intent” that relieves the state of its indemnification obligation.<sup>260</sup> Eleven states similarly exclude indemnification for fraud,<sup>261</sup> and eight states exclude malfeasance or misconduct in office.<sup>262</sup>

There are also a handful of states with unique mental-state or bad-act exceptions. Mississippi does not indemnify for defamation.<sup>263</sup> Utah incorporates a

MASS. GEN. LAWS ch. 258, § 9 (state and local employees); MINN. STAT. § 3.736(9) (1973) (state employees); NEV. REV. STAT. § 41.0349 (state and local employees); N.H. REV. STAT. ANN. §§ 29-A:2 (1979) (county employees), 99-D:2 (1978) (state employees); N.J. STAT. ANN. § 59:10-1 (state employees) (referencing exclusions in N.J. STAT. ANN. § 59:10A-2); N.Y. PUB. OFF. LAW §§ 17(3) (1978) (state employees), 18(4) (local employees); OHIO REV. CODE ANN. § 9.87(A) (state employees); 45 R.I. GEN. LAWS § 45-15-16 (1986) (local employees); TENN. CODE ANN. § 9-8-112 (1982) (state employees); TEX. CIV. PRAC. & REM. CODE ANN. §§ 102.002 (1979) (local employees discretionary), 104.002 (1975) (exclusions to indemnification); UTAH CODE ANN. § 63G-7-202 (1983) (state and local employees) (exclusions to indemnification); VT. STAT. ANN. tit. 12, § 5606 (1989) (state employees); *accord* D.C. CODE § 2-415 (1976) (medical employees and administrative law judges).

257. *See* CONN. GEN. STAT. §§ 5-141d (first enacted 1983) (state employees), 7-101a (1971) (local employees); N.H. REV. STAT. ANN. §§ 29-A:2 (county employees), 99-D:2 (state employees); N.Y. PUB. OFF. LAW § 18(4) (local employees); OHIO REV. CODE ANN. § 9.87(A) (state employees); TEX. CIV. PRAC. & REM. CODE ANN. § 104.002 (exclusions to indemnification).

258. *See* DEL. CODE ANN. tit. 10, §§ 4002 (first enacted 1978) (state employees) (referring to same exclusions in DEL. CODE ANN. tit. 10, § 4001 (1978)), 4003 (1978) (local employees); MD. CODE ANN., STATE GOV'T § 12-404 (1984) (exclusions in MD. CODE ANN., STATE GOV'T § 12-405); MASS. GEN. LAWS ch. 258, § 9 (state and local employees); TENN. CODE ANN. § 9-8-112 (state employees); TEX. CIV. PRAC. & REM. CODE ANN. §§ 102.002 (local employees discretionary), 104.002 (exclusions to indemnification); VT. STAT. ANN. tit. 12, § 5606 (state employees).

259. *See* IDAHO CODE § 6-903(3) (first enacted 1976) (state and local employees); IND. CODE § 34-13-4-1 (1976) (indemnification expressly for civil liability under civil rights laws); LA. STAT. ANN. § 13:5108.1 (1975) (state employees); MISS. CODE ANN. § 11-46-7(2) (state and local employees); MONT. CODE ANN. § 2-9-305(6) (state and local employees); N.J. STAT. ANN. § 59:10-1 (state employees) (referencing exclusions in N.J. STAT. ANN. § 59:10A-2); 42 PA. STAT. AND CONS. STAT. ANN. §§ 8548 (local employees), 8550 (exclusion for willful misconduct).

260. IDAHO CODE § 6-903(3) (first enacted 1976).

261. *See* KAN. STAT. ANN. § 75-6109 (first enacted 1979) (state and local employees); KY. REV. STAT. ANN. § 65.2005(3) (1988) (local employees); MISS. CODE ANN. § 11-46-7(2) (state and local employees); MONT. CODE ANN. § 2-9-305(6) (state and local employees); N.J. STAT. ANN. § 59:10-1 (state employees) (referencing exclusions in N.J. STAT. ANN. § 59:10A-2); N.M. STAT. ANN. § 41-4-4 (1976) (state and local employees); N.C. GEN. STAT. §§ 143-300.6 (1973) (state employees) (referencing exclusions in N.C. GEN. STAT. § 143-300.4), 160A-167 (1977) (local employees discretionary); OKLA. STAT. tit. 51, § 162 (1986) (state and local employees); 42 PA. STAT. AND CONS. STAT. ANN. § 8550 (exclusion for willful misconduct such as fraud); 9 R.I. GEN. LAWS § 9-31-12 (1979) (state employees discretionary); UTAH CODE ANN. § 63G-7-202 (exclusions to indemnification).

262. *See* IOWA CODE § 669.21 (first enacted 1975) (state employees); MINN. STAT. §§ 3.736(9) (1973) (state employees), 466.07 (1979) (local employees); NEB. REV. STAT. § 81-8,239.05 (1981); OR. REV. STAT. § 30.285 (1967) (state and local employees); 42 PA. STAT. AND CONS. STAT. ANN. §§ 8548 (local employees), 8550 (exclusion for willful misconduct); 9 R.I. GEN. LAWS § 9-31-12 (state employees discretionary); TEX. CIV. PRAC. & REM. CODE ANN. § 102.002 (local employees discretionary); VT. STAT. ANN. tit. 12, § 5606 (state employees).

263. *See* MISS. CODE ANN. § 11-46-7(2) (first enacted 1993) (state and local employees).



number of exceptions to its indemnification law, including acts committed while under the influence of an inebriant, intentionally or knowingly committing perjury, or intentionally or knowingly fabricating or failing to disclose evidence.<sup>264</sup> Montana will not indemnify acts of oppression.<sup>265</sup> And three states—Ohio, Washington, and West Virginia—have one sole, amorphous exclusion for conduct that constitutes bad faith (or lack of good faith).<sup>266</sup>

Most states that include a mental-state or bad-act exception do not address punitive damages. Depending on how each state has set up these provisions, the probability of any of these states being obliged to pay an award of punitive damages for an employee's acts varies. Pennsylvania's indemnification law is illustrative. It provides that the "local agency shall indemnify the employee for the payment of *any* judgement on the suit."<sup>267</sup> Pennsylvania law also provides an exception where "it is judicially determined" that the act "constituted a crime, actual fraud, actual malice or willful misconduct," in which case the indemnification provision does not apply.<sup>268</sup> In *Smith v. Wade*, the Supreme Court held that, in an action under § 1983, punitive damages are available where the conduct involved "reckless or callous indifference" to the plaintiff's rights.<sup>269</sup> Therefore, in Pennsylvania, if a jury awards punitive damages with or without a finding of recklessness, the local entity is obliged to pay the punitive damages.<sup>270</sup>

Sixteen states, however, make it explicit that they do not indemnify for punitive damages.<sup>271</sup> Six of those states, however, have enacted exceptions to the absolute bar on punitive damages. California allows for the payment of punitive damages if the governing body determines that the employee acted "in good faith, without actual malice and in the apparent best interests of the public entity" and that "[p]ayment of the claim or judgment would be in the best interests of the public entity."<sup>272</sup> In other words, punitive damages apparently can be paid when the government disagrees with the jury. Ohio law similarly allows—for state employees, but not local employees—the attorney general or employer of the officer to approve the indemnification of punitive damages if the attorney general determines that the employee did not act "with malicious purpose, in bad faith, or in a wanton or reckless manner."<sup>273</sup> New Jersey has a similar rule for both state and local employees.<sup>274</sup> Indiana similarly allows the payment of punitive damages if

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264. UTAH CODE ANN. § 63G-7-202(3)(c) (first enacted 1983).

265. See MONT. CODE ANN. § 2-9-305(6) (first enacted 1974) (state and local employees).

266. See OHIO REV. CODE ANN. § 2744.07(b) (first enacted 1985) (local employees); WASH. REV. CODE §§ 4.24.490 (1989) (state employees), 4.96.041 (1989) (local employees); W. VA. CODE § 29-12A-11(a)(2) (1986) (local employees); accord P.R. LAWS ANN. tit. 32, § 3085 (1975).

267. 42 PA. STAT. AND CONS. STAT. ANN. § 8548(a) (first enacted 1980) (emphasis added).

268. *Id.* § 8550 (first enacted 1980).

269. *Smith v. Wade*, 461 U.S. 30, 56 (1983).

270. *Pettit v. Namie*, 931 A.2d 790, 804 (Pa. Commw. Ct. 2007).

271. See *supra* note 251 (collecting relevant statutes).

272. CAL. GOV'T CODE § 825(b) (first enacted 1963) (state and local employees).

273. OHIO REV. CODE ANN. § 9.87(B) (first enacted 1980) (state employees).

274. See N.J. STAT. ANN. §§ 59:10-1 (first enacted 1972) (state employees), 59:10-4 (1972) (local employees discretionary).

the governor or governing body of the political subdivision determines that such payment “is in the best interest of the governmental entity.”<sup>275</sup> Nebraska requires the state legislature to approve any payments of punitive damages.<sup>276</sup> Iowa has an exception to the bar on punitive damages to allow municipalities to purchase insurance that covers punitive damages.<sup>277</sup>

Moreover, Minnesota law expressly allows for the defense against claims for punitive damages,<sup>278</sup> but the liability cap statute excludes punitive damages from the government’s liability.<sup>279</sup> Finally, New Mexico requires both the state and local governments to indemnify punitive damages<sup>280</sup>—though the government has the right to recover the costs of the defense and refuse to indemnify a judgment or settlement if “the public employee acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death or property damage resulting in the settlement or final judgment.”<sup>281</sup>

### 3. Statutory Caps on Liability

Another way in which states can potentially limit indemnification is to enact caps on liability or indemnification amounts. By our count, at least sixteen states have enacted by statute some version of a liability or indemnification cap. Seven of those states—Indiana, Massachusetts, Maryland, Minnesota, Oregon, Texas, and Vermont—appear to have hard caps without exceptions for either state or local employees and with maximum liability ranging from as little as \$100,000 per plaintiff and \$300,000 per occurrence for local government employees in Texas to \$2 million per plaintiff and \$4 million per occurrence (as of 2015 and administratively adjusted annually) in Oregon.<sup>282</sup> Whereas Minnesota has a hard cap for indemnification of local employees, there is no indemnification cap for state employees if the limits are “found to be inapplicable,” as they would be for a federal § 1983 action.<sup>283</sup>

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275. IND. CODE § 34-13-4-1 (first enacted 1976) (indemnification expressly for civil liability under civil rights laws).

276. NEB. REV. STAT. § 81-8,239.05(4) (first enacted 1981) (state employees).

277. See IOWA CODE § 670.8 (first enacted 1971) (local employees).

278. See MINN. STAT. § 466.07 (first enacted 1979) (local employees).

279. *Id.* § 466.04(1)(b) (first enacted 1963) (local employees).

280. N.M. STAT. ANN. § 41-4-4(C) (first enacted 1976) (state and local employees).

281. *Id.* § 41-4-4(E).

282. See IND. CODE § 34-13-4-1 (first enacted 1976) (referencing IND. CODE § 34-13-3-4 (\$700,000 per plaintiff, \$5 million per occurrence)); MD. CODE ANN., CTS. & JUD. PROC. § 5-303(b) (1973) (\$400,000 per plaintiff, \$800,000 per occurrence for local employees); MASS. GEN. LAWS ch. 258, § 9 (1978) (\$1 million per occurrence for state and local employees); MINN. STAT. ANN. § 466.04(1)(a)(7) (1979) (\$1.5 million per occurrence for local employees); OR. REV. STAT. §§ 30.272 (2009) (local government liability cap as of 2015 and adjusted administratively thereafter of \$667,700 per plaintiff, \$1,333,300 per occurrence), 30.285 (1967) (referencing OR. REV. STAT. ANN. § 30.271 (state employee cap as of 2015 and adjusted administratively thereafter of \$2 million per plaintiff, \$4 million per occurrence)); TEX. CIV. PRAC. & REM. CODE ANN. § 102.003(1) (1979) (\$100,000 per plaintiff, \$300,000 per occurrence); VT. STAT. ANN. tit. 12, § 5606 (1989) (\$500,000 per plaintiff, \$2 million per occurrence for state employees).

283. MINN. STAT. § 3.736(9) (first enacted 1973).

The other states have various exceptions to the statutory maximum recovery. A number of states allow indemnification to exceed the statutory maximum with approval of the legislature (Louisiana, Maine, South Dakota, and Texas), the local government's governing body (Oklahoma and South Dakota), or another government body (Tennessee).<sup>284</sup> Wyoming law allows government entities to purchase insurance that exceeds the statutory cap, but "the increased limits [via insurance] shall be applicable only to claims brought under the federal law."<sup>285</sup> Ohio law does the same at the state level.<sup>286</sup> Missouri indemnifies all economic losses incurred but limits noneconomic damages by statute to \$350,000 per occurrence, adjusted administratively each year.<sup>287</sup>

#### 4. Qualified Immunity's Influence on States' Statutory Indemnification Schemes

This state-by-state survey merely scratches the surface of the state laws and regulations and local ordinances and policies (as well as the myriad employment contracts and union agreements nationwide) that govern the indemnification of state and local government officials. As further discussed in Section III.C, we do not endeavor here to demonstrate that states enacted their indemnification statutes in sole response to, or primary reliance on, the Supreme Court's expansion of the scope of § 1983 to include state actors' conduct that is contrary to state law<sup>288</sup> and subsequent recognition of qualified immunity as a defense in § 1983 actions<sup>289</sup>—both of which occurred in the 1960s. Such an inquiry would require a much deeper dive into the legislative materials surrounding the enactment of, and amendments to, each state's indemnification statutes. Given the condition of these legislative records, which are often not easy to locate, sparse, and unilluminating even when found, we are not confident such investigation would be

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284. See LA. STAT. ANN. § 13:5108.1(B)(7) (first enacted 1975) (requiring legislature to approve state employee indemnification of \$500,000 or more); ME. STAT. tit. 14, § 8112(5) (1977) (referencing ME. STAT. tit. 14, § 8105 (capping indemnification for state and local employees at \$400,000 per action unless plaintiffs obtain legislative authorization for more)); OKLA. STAT. ANN. tit. 51, § 162 (1986) (referencing OKLA. STAT. ANN. tit. 51, § 154(A) (setting liability caps ranging between \$125,000 and \$1 million for local employees but allowing municipalities to do higher limits by ordinance)); S.D. CODIFIED LAWS § 3-19-2 (1969) (setting cap for state and local employees at \$25,000 cap per employee but allowing legislature to approve greater amounts or local governments to establish higher amounts); TENN. CODE ANN. § 9-8-112 (1982) (referencing TENN. CODE ANN. § 9-8-307(e) (setting cap of \$300,000 per plaintiff, \$1 million per occurrence for state employees), and stating that "the board of claims may pay any of the amounts in excess of those limits where such reimbursement is found to bear a reasonable relationship to the officer's or employee's liability or the injury or damage caused"); TEX. CIV. PRAC. & REM. CODE ANN. § 104.003(a) (1975) (\$100,000 per plaintiff, \$300,000 per occurrence unless legislature appropriates more in given case).

285. WYO. STAT. ANN. §§ 1-39-104, -118 (first enacted 1979).

286. OHIO REV. CODE ANN. § 9.87(C) (first enacted 1980) (allowing the state director of administrative services to purchase insurance to cover claims in excess of the \$1 million statutory cap).

287. MO. REV. STAT. § 105.711(5) (first enacted 1969).

288. See *Monroe v. Pape*, 365 U.S. 167, 168–69, 187 (1961).

289. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967); see also *Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974). The origins of qualified immunity are fleshed out in Section I.A above.

fruitful. The statutes themselves, however, do provide some clues. We focus on two sets of clues here.

First, indemnification statutes in at least twenty states expressly mention that indemnification covers violations of civil rights or violations of federal law. In fact, Indiana (in 1976), New Hampshire (in 1973), and Vermont (in 1989) enacted indemnification statutes specific to civil rights violations under federal law,<sup>290</sup> and Maine (in 1977) enacted a statute exclusive to claims “under any federal law.”<sup>291</sup> As noted in Section III.B.3, Wyoming (in 1979) enacted a statute to allow state and local governments to obtain insurance to cover judgments and settlements above the statutory caps—but only for claims under federal law.<sup>292</sup> Similarly, Florida (in 1979) created an exception to its statutory cap on local government indemnification “[i]f the action is a civil rights action arising under 42 U.S.C. s. 1983, or similar federal statutes.”<sup>293</sup> Texas (in 1985) elevated indemnification for state employees to mandatory if

the damages arise out of a cause of action for deprivation of a right, privilege, or immunity secured by the constitution or laws of this state or the United States, except when the court in its judgment or the jury in its verdict finds that the person acted in bad faith, with conscious indifference or reckless disregard.<sup>294</sup>

The remaining states expressly include violations of civil rights or federal law among various claims that can be indemnified—with Florida (in 1972), Iowa (in 1971), Montana (in 1974), and New York (in 1978) mentioning § 1983 by name.<sup>295</sup> That political will existed to enact provisions that specifically addressed

290. IND. CODE § 34-13-4-1 (first enacted 1976) (indemnifying state and local employees for violations of “civil rights laws of the United States”); N.H. REV. STAT. ANN. § 31:106 (1973) (indemnifying local employees for violations of “civil rights . . . under any federal law”); VT. STAT. ANN. tit. 12, § 5606 (1989) (indemnifying state employees when “the right of action is based upon 42 U.S.C. § 1983, or under a similar federal statute”).

291. ME. STAT. tit. 14, § 8112(2-A) (first enacted 1977) (indemnifying state and local employees from suits “under any federal law”).

292. WYO. STAT. ANN. § 1-39-104 (first enacted 1979) (referencing WYO. STAT. ANN. § 1-39-118).

293. FLA. STAT. § 111.071(1)(a) (first enacted 1979). The exception to this exception is if the employee “has been determined in the final judgment to have caused the harm intentionally.” *Id.* In light of this exception, we do not categorize Florida as having a statutory indemnification cap in Section III.B.3.

294. TEX. CIV. PRAC. & REM. CODE ANN. § 104.002(a)(2) (first enacted 1985).

295. See CONN. GEN. STAT. §§ 5-141d(a) (first enacted 1983) (including “civil rights”), 7-101a(a) (1971) (same); DEL. CODE ANN. tit. 10, § 4002 (1978) (including claims under “provision of the Constitutions or laws of the United States”); FLA. STAT. § 284.31 (1972) (including “federal civil rights actions under 42 U.S.C. s. 1983 or similar federal statutes”); GA. CODE ANN. § 45-9-20 (1974) (providing local insurance for claims “whether state, federal, or local”); IOWA CODE § 670.8(2) (1971) (including cases “arising under 42 U.S.C. § 1983”); LA. STAT. ANN. § 13:5108.1(A)(1) (1975) (including “any demand under any federal statute”); MASS. GEN. LAWS ch. 258, § 9 (1978) (including “by reason of any act or omission which constitutes a violation of the civil rights of any person under any federal or state law”); MONT. CODE ANN. § 2-9-305(6)(2) (1974) (including “alleged violations of civil rights pursuant to 42 U.S.C. 1983”); N.J. STAT. ANN. §§ 59:10-1 (1972) (including “civil violation

lawsuits under federal law suggests that state legislators were mindful of the risk of federal liability and the factors surrounding it.

Second, the rise of the indemnification statutes nationwide started to take off in the late 1960s and 1970s—after the Supreme Court’s broad reading of *Monroe* (1961) and, for some, after the recognition of qualified immunity in *Pierson* (1967). With respect to the indemnification of state employees, twenty-seven states first enacted their statutory provisions in the 1970s, with another dozen in the 1980s, and another four after that.<sup>296</sup> Only six states enacted indemnification statutes for state employees prior to the 1970s—all did so in the 1960s: California (in 1963), Michigan (in 1964), Wisconsin (in 1966), Oregon (in 1967), Missouri (in 1969), and South Dakota (in 1971).<sup>297</sup> The temporal trend is similar for the enactment of statutes indemnifying local government employees.<sup>298</sup> Some states did offer a limited form of indemnification before *Monroe v. Pape* (in 1961). For instance, Connecticut (in 1959) required complaints against state employees to be presented as claims against the state.<sup>299</sup> North Carolina (in 1957) authorized the defense of election officials.<sup>300</sup> And Virginia (in 1926) required government payment of bond premiums for certain officers enforcing traffic laws.<sup>301</sup> However, statutory enactment of indemnification regimes appears to be the exception rather than the rule prior to *Monroe* and the rise of qualified immunity. And the broad indemnification schemes we have across the country today are creatures of the 1970s. This too seems significant.

It is also important to underscore that fixating on first-enactment dates of indemnification statutes does not tell the whole story. After all, states have amended their statutory indemnification regimes over the years, sometimes in

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of State or federal law”), 59:10-4 (1972) (same); N.M. STAT. ANN. § 41-4-4(B)(2) (1976) (including violations of “any rights, privileges or immunities secured by the constitution and laws of the United States”); N.Y. PUB. OFF. LAW § 17(3)(2)(a) (1978) (including claims brought under “section nineteen hundred eighty-three of title forty-two of the United States code”); OKLA. STAT. tit. 51, § 162 (1978) (local employees) (amended in 1986 to include state employees) (including “any rights, privileges or immunities secured by the Constitution or laws of the United States”); 45 R.I. GEN. LAWS § 45-15-16 (1986) (“under any federal or state law”); TENN. CODE ANN. § 29-20-310(d) (1987) (“under state or federal law”).

296. See *supra* notes 235–44 (collecting indemnification statutes for all states with first-enacted dates).

297. See CAL. GOV’T CODE § 825(a) (first enacted 1963) (state and local employees); MICH. COMP. LAWS § 691.1408(1) (1964) (state and local employees); MO. REV. STAT. § 105.711 (1969) (state employees); OR. REV. STAT. § 30.285(1) (1967) (state and local employees); S.D. CODIFIED LAWS § 3-19-1 (1969) (state and local employees discretionary); WIS. STAT. § 895.46(1)(a) (1966) (state and local employees).

298. See *supra* notes 235–44 (collecting indemnification statutes for all states with first-enacted dates). One somewhat noteworthy difference is that two states, Arizona and Missouri, enacted statutes in the 1950s to provide blanket authority for local governments to purchase liability insurance to cover the local governments and their employees—without any mention of civil rights or federal law and without imposing any exceptions to liability coverage. ARIZ. REV. STAT. ANN. § 9-497 (first enacted 1956); MO. REV. STAT. § 71.185 (1959).

299. Act of July 1, 1959, No. 685, § 25, 1959 Conn. Pub. Acts 1370, 1376.

300. Act of Apr. 24, 1957, ch. 436, § 1, 1957 N.C. Sess. Laws 413, 413.

301. Act of Mar. 29, 1926, ch. 565, § 1, 1926 Va. Acts 941, 941.

substantial ways. For instance, Iowa enacted its torts claim act in 1965, but it did not expressly provide for defense or indemnity of state employees.<sup>302</sup> The state legislature amended the statute in 1975 to require defense and indemnity, including a provision expressly calling for the defense and indemnification of state employees under § 1983.<sup>303</sup> Similarly, North Dakota first provided a duty to defend state employees in 1987 but did not add an indemnification requirement until 1997.<sup>304</sup> And Wisconsin first enacted a statute in 1943 that indemnified government employees but only in their *official* capacities, amending the statute in 1966—relatively soon after *Monroe v. Pape*—to also indemnify employees in their *individual* capacities.<sup>305</sup>

### C. IMPLICATIONS: RELIANCE AND STATUTORY STARE DECISIS

Based on our state-by-state survey and Schwartz's prior empirical work, we agree with Schwartz that "[t]he prevalence of indemnification is a critical—and previously unknown—factor relevant to the design of civil rights doctrine."<sup>306</sup> But even if the Supreme Court had not recognized qualified immunity, we are not sure which way Schwartz's findings cut. As Schwartz notes, that officers are often indemnified does undermine to some degree the idea that they will be chilled, which is a rationale for immunity.<sup>307</sup> That nominally individual suits are really suits against the government, at least in financial effect, also heightens the federalism concerns implicated by a broad reading of § 1983.<sup>308</sup> Although Schwartz disagrees that this risk is weighty,<sup>309</sup> there is at least a reasonable chance that fear of liability—which will be paid for out of the public fisc—may *sometimes* cause governments to adopt policies that favor less aggressive action for fear of crossing constitutional lines that cannot be identified *ex ante*—even where aggressiveness may be valuable (such as in situations involving the potentially

302. See Iowa Tort Claims Act, ch. 79, 1965 Iowa Acts 104.

303. Act of June 30, 1975, ch. 80, § 7, 1975 Iowa Acts 152, 153 ("The state shall defend, indemnify and hold harmless an employee of the state in any action commenced in federal court under section one thousand nine hundred eighty-three (1983), Title forty-two (42), United States Code, against the employee for acts of the employee while acting in the scope of employment."). The current version no longer mentions § 1983 expressly but instead requires indemnification against any claim, "including claims arising under the Constitution, statutes, or rules of the United States or of any state." IOWA CODE ANN. § 669.21(1) (West 2020).

304. See Risk Management Fund Records and Claims, ch. 286, § 3, 1997 N.D. Laws 1119, 1122; Defense of State Employees, ch. 351, 1987 N.D. Laws 872.

305. Act of June 27, 1966, ch. 603, 1966 Wis. Sess. Laws 1071; Act of June 28, 1943, ch. 377, 1943 Wis. Sess. Laws 693.

306. Schwartz, *supra* note 31, at 937.

307. See *id.* at 938–43. *But see id.* at 942 ("A critical question, then, in determining whether qualified immunity is necessary to protect against officer overdeterrence is the extent to which officers' behavior is influenced by the threat of being sued despite the near certainty that they will be indemnified.").

308. Cf. CHEMERINSKY, *supra* note 82, at 453 ("The Supreme Court is very concerned about federal court relief against state officers that has the effect of forcing state governments to pay money damages. Thus, the Court has held that the Eleventh Amendment prevents an award of monetary relief from the state treasury even when the individual officer is the named defendant in the lawsuit." (discussing *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945))).

309. See, e.g., Schwartz, *supra* note 31, at 952–60.

ongoing sexual abuse of a child) and a court would not find a constitutional violation if the matter were pursued through litigation. The Supreme Court has highlighted the danger of this chilling effect and the impact that it may have on effective government and on vulnerable populations in need of government protection.<sup>310</sup>

To be clear, we do not believe that anyone should be allowed to knowingly violate constitutional rights, and we agree that robust enforcement of *Hope v. Pelzer* is necessary to prevent abuses of authority.<sup>311</sup> Accordingly, we agree with Schwartz that qualified immunity should not allow “government officers and officials . . . to be shielded from *any* possibility of liability.”<sup>312</sup> Instead, our more modest point is that the Supreme Court has held that federalism is implicated

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310. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); Mark G. Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1396–98 (1976) (arguing that the risk of liability may lead educators to make decisions driven to prevent liability rather than to benefit school children); see also Jeffries, Jr., *supra* note 191, at 244 (discussing possible chilling effects). Because she does not believe the evidence supports them, Schwartz says little about chilling effects. She argues, for instance, that “hiring and retaining officers is difficult for reasons that have nothing to do with being sued.” Schwartz, *supra* note 46, at 339. No doubt. But such additional difficulties presumably should make qualified immunity more necessary, not less—things can always become worse. Similarly, her claim that “the threat of being sued is not among officers’ top ten considerations when stopping vehicles, engaging in personal interactions, or performing emergency duties,” *id.* at 341 n.201, is not dispositive. That some officers “did not consider the threat of a lawsuit among their ‘top ten thoughts’ when stopping a vehicle or engaging in a personal interaction,” Schwartz, *supra* note 32, at 1812 n.98 (emphasis added) (quoting Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 POLICE STUD.: INT’L REV. POLICE DEV. 19, 26 (1995)), does not mean that officers also do not worry about it in emergency situations of the sort that qualified immunity often captures, see, e.g., *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775 (2015) (“[The officers] knew that Sheehan had a weapon and had threatened to use it to kill three people.”). Indeed, “46 percent of the respondents indicated that the threat of civil liability was among the top ten thoughts they had when performing emergency duties.” Schwartz, *supra* note 32, at 1812 n.98 (quoting Daniel E. Hall, Lois A. Ventura, Yung H. Lee & Eric Lambert, *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 529, 542 (2003)). That fear of litigation risk, moreover, might be even higher for police chiefs—who presumably care more about budgets and systemic effects. See Schwartz, *supra* note 32, at 1812 n.98 (citing Michael S. Vaughn, Tab W. Cooper & Rolando V. del Carmen, *Assessing Legal Liabilities in Law Enforcement: Police Chiefs’ Views*, 47 CRIME & DELINQUENCY 3 (2001)).

Regardless, after the Supreme Court decides a statutory question, empirical claims about the judiciary’s answer are—as the Court has counseled—best directed to legislatures, not courts. This is especially true for a doctrine such as qualified immunity that has been “reaffirmed [by] a long line of precedents,” has formed a “backdrop” against which “contracts” have been negotiated, and can be changed at any time by Congress, which “exercises primary authority in this area.” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798–99 (2014). That the evidence cuts both directions further confirms that this is a question for legislators who have fact-finding abilities beyond the judiciary’s competence. But it does not require a great leap to suppose that risk of liability would play an even more significant role without qualified immunity.

311. 536 U.S. 730, 741 (2002) (holding that “general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful” (internal quotation marks and alterations omitted)).

312. Schwartz, *supra* note 46, at 341.

when a state or local government has less ability to protect the public due to liability risk, which is a problem *when the conduct at issue is lawful* but an officer cannot know that with certainty before acting.<sup>313</sup> Qualified immunity is a difficult issue with imperfect solutions precisely because there is not just one interest; chilling officers reduces the risk that they will violate someone else's rights but increases the risk that other individuals may go unprotected.<sup>314</sup>

Smaller governments in particular may be especially subject to such concerns. This risk, even if perhaps sometimes overstated, cannot be entirely brushed aside because government action may lead to liability, but government inaction generally will not.<sup>315</sup> For example, an officer (and so, through indemnification, the government) cannot be liable for injuring a suspect as part of a chase if all police chases cease for fear of liability. As a policy matter, this asymmetry may suggest that qualified immunity is worthwhile precisely because it is about more than just officers and concerns the public (and public safety). Maybe it would be better policy if officers cared more about the threat of liability and so were more cautious. But perhaps it would not be better; perhaps that chill would result in serious public harm. As the Supreme Court explained in *Harlow*, striking the correct balance between deterrence and overdeterrence is difficult.<sup>316</sup> Given the different conclusions to draw from Schwartz's findings about the role indemnification plays—which cut both ways on immunity as a policy matter—we doubt those findings would be much help to the Supreme Court, even if the Justices were writing on a blank slate. Legislators, not judges, are best able to resolve empirical questions and strike more nuanced balances between competing policy interests.

The Justices, however, are not writing on a blank slate—which makes the *judicial* relevance of Schwartz's findings even less apparent. Instead, when it comes to statutory *stare decisis*, one of the most important considerations is whether overruling a decision would undermine significant reliance interests.<sup>317</sup> Reliance

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313. See *supra* Section II.B (discussing, *inter alia*, *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)).

314. Cf. *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring) (observing the tension between vindicating rights and serving a “protective function” and agreeing that qualified immunity is warranted in the context of secret service protection).

315. See, e.g., *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197–98 (1989) (explaining that the Constitution “imposes no affirmative obligation on the State to provide the general public with adequate protective services”).

316. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (explaining that qualified immunity reflects an “accommodation of competing values”).

317. See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800–01 (2014) (“Congress, we said—drawing an analogy to its role in shaping foreign sovereign immunity—has the greater capacity ‘to weigh and accommodate the competing policy concerns and reliance interests’ involved in the issue.” (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998)); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (“*Stare decisis* has added force when the [state] legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision . . .”). See generally RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 47–49, 116–18 (2017) (detailing the Supreme Court's decisions on the role of reliance interests in *stare decisis*).



interests are particularly significant where they are grounded in contracts.<sup>318</sup> And they are also particularly significant where they are grounded in state law.<sup>319</sup> These observations matter because the Court's qualified immunity cases have generated significant reliance in the states. As explained in Section III.B, every state has adopted and retained individualized statutory indemnification schemes against the uniform backdrop of qualified immunity's existence. If qualified immunity were to disappear, one of the legal premises against which the schemes were framed would also disappear. Those schemes, moreover, are reflected in long-term contracts.<sup>320</sup> The upshot is that if qualified immunity were to disappear, the logical implication of the Supreme Court's many pronouncements about the effect of qualified immunity would be that state and local governments should be expected to experience real upheaval.<sup>321</sup> Taking the Supreme Court's cases on their own terms, it is plain that there are significant reliance interests associated with retaining qualified immunity as it has existed now for decades.

#### D. A BRIEF REPLY TO SCHWARTZ ON RELIANCE INTERESTS

In her response to this Article, Schwartz disagrees with our conclusion that there are significant reliance interests here. This disagreement merits a more extended reply. Even if her objections—which challenge the Supreme Court's analysis in its statutory decisions<sup>322</sup>—were relevant to whether the Court should overrule a statutory precedent,<sup>323</sup> we nevertheless would not be persuaded.

318. See, e.g., *Bay Mills Indian Cmty.*, 572 U.S. at 799 (“As in other cases involving contract and property rights, concerns of *stare decisis* are thus ‘at their acme.’” (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997))).

319. See *Bush v. Vera*, 517 U.S. 952, 985 (1996) (plurality opinion) (applying precedent where legislators “have modified their practices . . . in response”).

320. See, e.g., Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1221 & n.135 (2017) (examining 178 police union contracts and finding that “a significant number of contracts require the municipality to indemnify officers in cases of civil judgments”); see also Schwartz, *supra* note 46, at 332 (“[P]olicies may be the product of contract negotiations with police union representatives, may be codified by city councils, or may be unwritten practices followed by the local government attorney.”). We are puzzled by Schwartz's disagreement with our claim that there is a “uniform backdrop” and that “the test for qualified immunity is the same throughout the United States.” Schwartz, *supra* note 46, at 315 n.36 (first quoting *supra* p. 285, and then quoting *supra* p. 236). In the context of § 1983, qualified immunity applies everywhere in the United States, as do the Supreme Court's cases establishing the test for qualified immunity. We agree with Schwartz that some aspects of its application may vary from place to place, including how willing courts are to grant qualified immunity. See *id.* (noting variations by circuit in qualified immunity's application); see also Nielson & Walker, *supra* note 4, at 39–42 (same). But the core issues—whether qualified immunity exists and what test applies—are uniform and form the backdrop against which laws and contracts are drafted.

321. See, e.g., *Harlow*, 457 U.S. at 814 (“These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there 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.” (alteration in original) (internal quotation marks omitted)).

322. See, e.g., Schwartz, *supra* note 46, at 336 (“But just because the Supreme Court has predicted something does not mean that it will come to pass.”).

323. In particular, Schwartz's objections are difficult to square with statutory *stare decisis*, which minimizes the relevance of empirical disagreements. See, e.g., *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 462 (2015) (“[E]ven assuming that [the Court] relied on an economic misjudgment, Congress is the

First, Schwartz argues that qualified immunity does not have the sort of real-world effects that qualified immunity's critics (and defenders) usually cite.<sup>324</sup> As Howard Wasserman observes, Schwartz's empirical work does not provide empirical support for the "critical scholarly narrative" that qualified immunity itself is what "slam[s] the courthouse doors on injured plaintiffs" and "insulates all but the 'plainly incompetent' and those who knowingly violate the law."<sup>325</sup> Nor, Wasserman concludes, does Schwartz's empirical work provide support for the justifications that the Court has provided for qualified immunity, such as "protecting government officials from the cost, burden, expense, and distraction of discovery and litigation" and "avoiding over-detering law enforcement for fear of personal liability."<sup>326</sup> This argument, though, would seem to cut in favor of the Court not disturbing qualified immunity. If qualified immunity does not have meaningful real-world effects, then there may not be compelling state or local reliance—but only because there is no meaningful systemic effect at all.<sup>327</sup> Why then jettison qualified immunity? Indeed, Daniel Epps has leveraged this view of Schwartz's empirical work to argue that "eliminating qualified immunity is no surefire solution to police misconduct."<sup>328</sup>

Schwartz has sought to reconcile the seemingly great tension between these two lines of attack on qualified immunity. As she notes in her response, Schwartz

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right entity to fix it."). This point is especially strong because empirical evidence cuts both ways. *See supra* note 310. At any rate, this empirical disagreement has even less force under the doctrine of statutory stare decisis for a second reason. As explained above, it appears that Congress has repeatedly endorsed qualified immunity and, rather than backing away, even added it to the U.S. Code. *See supra* note 136.

324. *See, e.g.*, Schwartz, *supra* note 46, at 311 (disagreeing with our assertion that "qualified immunity 'regularly shields government officials from monetary liability'" (quoting *supra* p. 231)).

325. Howard M. Wasserman, *The Empirical Truth About Qualified Immunity*, JOTWELL: CTS. L. (Feb. 23, 2018), <https://courtslaw.jotwell.com/empirical-truth-qualified-immunity/> [<https://perma.cc/SE48-T3VD>] (reviewing Schwartz, *supra* note 9).

326. *Id.*

327. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018) (overruling constitutional precedent, which is easier to overrule than statutory precedent, in large part because the decision's "systemic" effect had become increasingly "harmful"). As we have detailed elsewhere, "the data [in Schwartz's study] show that qualified immunity does not leave the [courthouse] doors wide open, as some may mistakenly read Schwartz's study to suggest. A qualified immunity grant rate (in full, part, or the alternative) of around 29.3% strikes us [as] substantial." Nielson & Walker, *supra* note 13, at 1880. And Schwartz is not the only one to have studied this issue. For example, a team of researchers recently engaged in a massive empirical review and concluded that qualified immunity is critically significant. *See Six Takeaways from Reuters Investigation of Police Violence and 'Qualified Immunity.'* REUTERS (May 8, 2020, 12:06 PM), <https://www.reuters.com/article/us-usa-police-immunity-scotus-snapshot/six-takeaways-from-reuters-investigation-of-police-violence-and-qualified-immunity-idUSKBN22K1AM> [<https://perma.cc/6W3V-VD7W>] ("Reuters conducted the first-ever comprehensive review of hundreds of appeals filed in excessive force cases in federal courts. We found that police won 56% of cases in which they claimed qualified immunity from 2017 through 2019."). Under Supreme Court precedent, empirical disagreements bolster the case for stare decisis. *See, e.g.*, *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 457–58 (2015) (holding that "uncertainty" favors stare decisis). Indeed, as the Court emphasized in *Kimble*, "even assuming that [the Court] relied on an economic misjudgment, Congress is the right entity to fix it." *Id.* at 462.

328. Daniel Epps, Opinion, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/opinion/police-qualified-immunity.html>.

has previously argued that qualified immunity *does* impose harmful effects, just not the ones that are typically cited.<sup>329</sup> And, importantly for the purposes of this Article, Schwartz agrees that qualified immunity reduces the total number of cases brought because it discourages some attorneys from bringing cases where qualified immunity might be raised and discourages other attorneys from bringing civil rights cases altogether.<sup>330</sup> She acknowledges that if qualified immunity were gone, “the total number of suits filed and damages paid would likely increase.”<sup>331</sup> That *dynamic* effect, however, is central; after all, plaintiffs make decisions in the shadow of the law.<sup>332</sup>

Even if qualified immunity does not commonly influence case outcomes,<sup>333</sup> that would tell us little about how many claims were not brought in the first place because of qualified immunity. Attempting to address these selection effects, Schwartz relies on a survey and follow-up interviews of plaintiffs’ lawyers in civil rights cases.<sup>334</sup> Although responding to that study exceeds the scope of this Article, Schwartz correctly notes one significant methodological limitation: the incentives plaintiffs’ attorneys may have to give inaccurate responses. Schwartz suggests that “attorneys might exaggerate the damaging effects of qualified immunity to build a case against the doctrine, or underplay the disruptive effect of qualified immunity as a way of demonstrating their skillfulness as litigators.”<sup>335</sup> We could similarly imagine plaintiffs’ attorneys underplaying the disruptive effect of qualified immunity to help build the case against qualified immunity. In all events, of the eighty-five attorneys who answered the survey question to identify the “biggest obstacle to bringing police misconduct cases,” nearly one in five respondents (18.4%) named “Qualified Immunity” as the *biggest* obstacle—only behind “Juries/communit[ies]” (23.7%) and “Judges” (19.3%).<sup>336</sup>

Likewise, Schwartz’s contention that there are regional differences does not undermine our point that there is reliance in at least *some* places.<sup>337</sup> To the

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329. See Schwartz, *supra* note 46, at 317–20 (summarizing and building on Schwartz, *supra* note 121). For instance, Schwartz believes that eliminating qualified immunity “would decrease the cost, risk, and complexity of civil rights litigation” and “offer more clarity about the scope of constitutional rights.” *Id.* at 317, 319.

330. See Schwartz, *supra* note 46, at 319–20.

331. *Id.* at 337.

332. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979).

333. As discussed in note 327 above, we have explained elsewhere that it is imprecise to say that qualified immunity matters less than four percent of the time based on the 1,183 cases in Schwartz’s prior study. See Schwartz, *supra* note 46, at 314. In all events, even a small percentage can still amount to a great many cases. Looking at percentages alone glosses over the tens of thousands of civil rights cases filed each year. In 2019, more than 40,000 civil rights cases were filed in the federal courts. See *U.S. District Courts—Judicial Business 2019*, U.S. COURTS, <https://www.uscourts.gov/us-district-courts-judicial-business-2019> [https://perma.cc/775Y-YFP5] (last visited Oct. 9, 2020). Even if qualified immunity matters in only three percent of those cases, that would still be at least 1,200 qualified immunity cases in a single year.

334. Schwartz, *supra* note 46, at 315–16 (discussing findings from Schwartz, *supra* note 120).

335. Schwartz, *supra* note 120, at 1117.

336. *Id.* at 1168 tbl.6.

337. Schwartz, *supra* note 46, at 314–15.

contrary, Schwartz's fascinating exploration of what she terms distinct "civil rights ecosystems" across states and localities<sup>338</sup> reinforces the importance of state and local government reliance interests. If it is true (and we think it is) that "indemnification coverage—like qualified immunity—is the product of interactions between multiple state, local, and nongovernmental people, rules, and practices,"<sup>339</sup> then disrupting qualified immunity, which is a part of those ecosystems, would upset the reliance interests of all of those stakeholders who helped pass laws, regulations, and ordinances and entered into contractual arrangements against that backdrop. And, importantly, under Schwartz's ecosystems theory, there should be great regional differences in the effects of the elimination of qualified immunity.<sup>340</sup> Assessing and balancing these geographically diverse policy interests is much better left to state and federal legislators than to Supreme Court Justices.

Second, Schwartz attempts to minimize the prospect of state and local reliance on the reduced threat of liability caused by qualified immunity by observing that there is "no reason to believe that states were motivated primarily by liability in § 1983 cases."<sup>341</sup> But we do not argue that the content of state and local indemnification law should be attributed solely or even primarily to qualified immunity, nor must we defend that aggressive premise for our argument to hold. No doubt countless factors go into an indemnification provision or contract. For our purposes here, however, it is enough that *one* of those factors is the diminished risk of liability that qualified immunity creates.<sup>342</sup> Taking seriously what the Supreme Court has repeatedly said about the effects of qualified immunity, it follows that because state and local governments know that their risk is reduced, the backdrop against which they enact laws, negotiate contracts, and create government policies and programs is necessarily different. Eliminating qualified immunity thus should be expected to unscramble at least some bargains and policy choices that were influenced by the risk against which decisions were made. In other words,

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338. See generally Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020). Schwartz defines a "[c]ivil rights ecosystem[]" as the

interconnected and interactive collections of people (including plaintiffs' attorneys, community organizers and activists, state and federal judges, state and federal juries, local government officials, and defense counsel), legal rules and remedies (including state tort law, § 1983 doctrine and defenses, and damages caps), and informal practices (including litigation, settlement, and indemnification decisions)

that affect outcomes in civil rights lawsuits and the vindication of civil rights violations more generally within that particular ecosystem. *Id.* at 1543.

339. Schwartz, *supra* note 46, at 331.

340. In light of these complex and geographically diverse civil rights ecosystems, we do not share Schwartz's confidence that eliminating qualified immunity would have little effect on state and local governments. See, e.g., Schwartz, *supra* note 46, at 320.

341. *Id.* at 325.

342. There is reason to believe that policymakers think about litigation risk. *Cf.*, e.g., Schwartz, *supra* note 32, at 1812 n.98 ("[A]nother study found that a higher percentage of police chiefs were influenced by the threat of litigation when making decisions affecting the public." (citing Vaughn et al., *supra* note 310)). There is also reason to believe that at least some states were aware of qualified immunity when they enacted their indemnification laws. See *supra* Section III.B.4.

state and local law is affected by innumerable things, *including qualified immunity*, which suggests that the specific content of at least some state and local indemnification laws exists in their current form because of qualified immunity. And if qualified immunity were gone, resulting in a greater number of suits filed and damages paid,<sup>343</sup> those laws would change. We do not need dramatic effects in individual jurisdictions for our argument to hold. If many jurisdictions have to revise their laws, renegotiate their contracts, or even change their programs in small ways, the argument for *stare decisis* is still quite strong.<sup>344</sup>

Third, Schwartz also attempts to minimize the reliance interests here by arguing that state and local governments could easily respond—without significant changes to their budgets—to a world without qualified immunity. She observes that they could “adjust[] the frequency with which they indemnify . . . or chang[e] local policies.”<sup>345</sup> But her argument does not disprove reliance. After all, a key premise of the Supreme Court’s cases is that exposing officers to greater individual liability through such means is not costless in terms of an officer’s willingness to protect the public.<sup>346</sup> That state and local governments could avoid increased financial burdens in a world without qualified immunity thus overlooks a key point: the *means* of avoiding those burdens is not costless. Schwartz’s claim that “the discretion and subjective judgment built into state and local indemnification provisions and practices makes them far more flexible than Nielson and Walker suggest” is not to the contrary.<sup>347</sup> Even if that claim were true in all cases,<sup>348</sup> Schwartz’s proposed use of that flexibility would come, at least sometimes, at the expense of vigorous enforcement of a (constitutionally valid) law. Yet in *Harlow*, the Supreme Court stated that qualified immunity exists to encourage officers in the “unflinching discharge of their duties.”<sup>349</sup> The flip side of that observation is

343. Schwartz, *supra* note 46, at 321.

344. *See, e.g.*, *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991) (relying on *stare decisis* even though only some states would have had to change their laws by removing a single exclusion for “railroad workers,” a small percentage of the population). Schwartz also suggests that it is difficult “to imagine how a state’s prohibition on indemnification or grant of discretion to local governments to craft indemnification policies could be the product of state legislators’ reliance on the protections of qualified immunity.” Schwartz, *supra* note 46, at 321 n.82. Although reliance interests seem strongest when indemnification is required by state law, states may rely also on the existence of qualified immunity when prohibiting indemnification or when allowing but not requiring it. For example, the policy effect of eliminating indemnification is less significant in a world with qualified immunity than in a world without it. After all, it should be easier to attract talented officers if officers still have *some* financial protection as opposed to *no* financial protection.

345. Schwartz, *supra* note 46, at 343.

346. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *cf. Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 108–09 (2d Cir. 1999) (Sotomayor, J.) (awarding qualified immunity in a case involving alleged sexual abuse of children).

347. Schwartz, *supra* note 46, at 344.

348. As detailed in Section III.B above, thirty-six states require by statute that the state indemnify its employees, and twenty-eight states require by statute that local governments indemnify their employees. Those state legislatures would need to revisit those statutory schemes to create the flexibility to respond to the elimination of qualified immunity.

349. *Harlow*, 457 U.S. at 814.

that state and local governments can (and now, have) relied on qualified immunity when assigning duties to their officers to unflinchingly discharge.

Especially when these points are combined, Schwartz has not shown that there is not even “a reasonable possibility” of reliance—which is all the law of stare decisis requires to defeat an empirical argument like hers.<sup>350</sup> Of course, the existence of reliance interests does not end the discussion. After all, sometimes the Supreme Court overrules precedent notwithstanding reliance.<sup>351</sup> The Court’s recent decision in *Janus v. American Federation of State, County, & Municipal Employees, Council 31* comes immediately to mind.<sup>352</sup> There, a closely divided majority overruled the 1977 decision in *Abood v. Detroit Board of Education*, which had allowed state and local governments to require public employees who did not wish to join a union to nonetheless pay certain “service fees.”<sup>353</sup> The *Janus* Court concluded that such fees violate the First Amendment and refused to allow them any longer, even though numerous governments and employees had relied on *Abood* in their laws and contracts.<sup>354</sup>

*Janus*, however, was a constitutional case, where stare decisis is not as strong.<sup>355</sup> Statutory stare decisis is different, and even more so when contracts are involved.<sup>356</sup> Consider *Bank of America, N.A. v. Caulkett*.<sup>357</sup> There, the Court did not second-guess what even an outright majority of the Justices agreed was a derided statutory precedent involving mortgage contracts,

350. See *Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 457–58 (2015) (“To be honest, we do not know (nor, we suspect, do Marvel and Kimble) [who is right about reliance]. *But even uncertainty on this score cuts in Marvel’s direction.* So long as we see a reasonable possibility that parties have structured their business transactions in light of [a challenged precedent], we have one more reason to let it stand.” (emphases added)).

351. See KOZEL, *supra* note 317, at 117 (arguing in favor of treating government reliance interests meaningful in stare decisis, but noting that the Supreme Court has not always done so, especially in the context of constitutional precedents).

352. 138 S. Ct. 2448 (2018).

353. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1977).

354. See *Janus*, 138 S. Ct. at 2484 (“In some cases, reliance provides a strong reason for adhering to established law, and this is the factor that is stressed most strongly by respondents, their *amici*, and the dissent. They contend that collective-bargaining agreements now in effect were negotiated with agency fees in mind and that unions may have given up other benefits in exchange for provisions granting them such fees.” (citation omitted)).

355. See *id.* (explaining that “it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years’ time”). *But see id.* at 2487–88 (Kagan, J., dissenting) (“More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*.”). The same is true of *Citizens United v. FEC*, 558 U.S. 310 (2010), which rejected as “not a compelling interest for *stare decisis*” that “[l]egislatures may have enacted bans on corporate expenditures believing that those bans were constitutional.” *Id.* at 365.

356. See generally BRYAN A. GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, *THE LAW OF JUDICIAL PRECEDENT* 333–37 (2016) (detailing how stare decisis is strongest with statutory precedents that have encouraged contractual or property reliance interests).

357. 135 S. Ct. 1995 (2015).

*Dewsnup v. Timm*.<sup>358</sup> Since then, the Court has denied a petition squarely asking it to revisit *Dewsnup* without even calling for a response.<sup>359</sup> When a statute is involved, especially a statute on which contracting parties have relied, the Court is much less likely to overrule precedent.<sup>360</sup> To the extent that state laws and contracts around the country may exist—or, no less importantly, may exist in their current form—only because of qualified immunity, overruling cases like *Ray*, *Scheuer*, and *Harlow* at a minimum would be like overruling *Dewsnup*—a tall order.

On the other hand, unlike a mortgage relationship, qualified immunity affects third parties—namely, ordinary people whose constitutional and statutory rights have been violated and who are left without compensation for their injuries. This point is well taken. Indeed, one commentator has argued that state officers have no “[l]egitimate” reliance interests because “protection of government coffers occurs only where a government officer has in fact violated the Constitution” and “actors cannot legitimately rely on a privilege to violate constitutional rights.”<sup>361</sup> But this argument also should not be taken too far. True, constitutional rights can be violated without remedy because of qualified immunity—a prospect that,

358. 502 U.S. 410 (1992); see also *Caulkett*, 135 S. Ct. at 2000 n.† (describing *Dewsnup* as “the target of criticism” “[f]rom its inception”); David Gray Carlson, *Bifurcation of Undersecured Claims in Bankruptcy*, 70 AM. BANKR. L.J. 1, 16 (1996) (deriding *Dewsnup* as plainly contrary to the statute).

359. See *Ritter v. Brady*, 139 S. Ct. 1186 (2019) (denying certiorari); see also Donna Higgins, *High Court Lets Stand Ruling That Relied on ‘Widely Criticized’ Lien Avoidance Precedent*, 15 WESTLAW J. BANKR. 4 (explaining that the Court denied the petition without comment even though it directly presented the question and had “received amicus support from a group of bankruptcy law professors and retired bankruptcy judges”).

360. See, e.g., Brief for Petitioner at 44, *Caulkett*, 135 S. Ct. at 1995 (No. 13-1421), 2015 WL 137523 (“For decades, secured credit has been extended and priced based on *Dewsnup*’s holding that liens, including underwater liens, ride through chapter 7 bankruptcy unaffected. It would be an enormous and unwarranted disruption of settled expectations for the Court to reverse course now.”).

361. Michelman, *supra* note 128, at 2017 (citing, *inter alia*, *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 700 (1978)). Indeed, in *Monell*, in which the Court held that “municipalities can assert no reliance claim which can support an absolute immunity” under § 1983, the Court expressly noted that “commercial” interests would be legitimate reliance interests if “individuals may have arranged their affairs in reliance on the expected stability of decision.” 436 U.S. at 699–700. As this Part details, state and local governments and their employees have substantial reliance interests in contractual indemnification arrangements, which are reinforced by state law. Moreover, *Monell* does not even stand for the proposition that “actors cannot legitimately rely on a privilege to violate constitutional rights.” Michelman, *supra* note 128, at 2017. Instead, the *Monell* Court held that municipalities cannot “violate constitutional rights *indefinitely* since injunctive suits against local officials under § 1983 would prohibit any such arrangement.” 436 U.S. at 700 (emphasis added). Qualified immunity, of course, does not permit violating constitutional rights *indefinitely*; it protects state officers from monetary liability when they do not have fair notice that their actions are unconstitutional. The law of qualified immunity further allows—and, indeed, encourages—courts to prevent indefinite violations of rights. See, e.g., Nielson & Walker, *supra* note 4, at 7, 63 (explaining that courts have tools to prevent “constitutional stagnation” and that the Supreme Court has specifically urged them to do so for issues “that do not frequently arise in cases in which a qualified immunity defense is unavailable” (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014))). The threat of liability for reasonable mistakes, moreover, may chill officers from acting in ways that benefit the public but are *not* unconstitutional.

without question, is disconcerting.<sup>362</sup> But the Constitution does not require Congress to provide a cause of action for suits against state officers for money damages, much less a cause of action against state officers for good faith mistakes. As a thought experiment, if Congress were to expressly enact qualified immunity into federal statutory law, it is difficult to see how someone could argue that such an express statute would be unconstitutional. Congress, after all, enacted § 1983 and could repeal it altogether. Likewise, before *Monroe*, § 1983 was rarely used, and nothing in *Monroe* suggests that Congress's failure to enact a statute like the post-*Monroe* version of § 1983 would be unconstitutional. Moreover, the Fourth Amendment itself is not violated by reasonable mistakes of law,<sup>363</sup> and Congress has long created defenses where the defendant made a reasonable mistake of law.<sup>364</sup> The notion that Congress could not grant immunity where an officer violated the Constitution in a way that was not clear at the time of the violation is in considerable tension with the common law principle that, as even Baude accepts, acts that wrongly caused harm did not *always* ground liability.<sup>365</sup>

At the same time, concern for third parties should cut both ways. As noted in Part II, qualified immunity is not just about minimizing monetary liability for state actors. It is about providing the right incentives for state and local governments to hire and retain confident officers and, perhaps more importantly for reliance purposes, reducing the risk that those officers will be chilled by fear of liability from faithfully executing state and local laws and policies that do *not* violate the Constitution. As the Supreme Court's cases recognize (which, again, is sufficient for purposes of statutory *stare decisis*), that risk of a chilling effect has significant implications for third parties whose health and safety depend on the faithful execution of those state and local laws and policies. Because the financial repercussions for the states could be significant if qualified immunity were to disappear, state and local governments presumably would be forced to reallocate funding. To the extent that such governments have allocated money to programs on the assumption that it would be available, shifting that money to account for increased civil liability would harm the beneficiaries of those programs.<sup>366</sup>

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362. Notably, as discussed in Part IV, state and local governments can address this lack of compensation, and some already do so. This important nonfederal means for remedying misconduct by state and local officials makes the lack of a federal constitutional right to compensation somewhat less disconcerting.

363. See, e.g., *Heien v. North Carolina*, 574 U.S. 54, 60–61 (2014).

364. See *id.* at 63 (“[A] certificate of probable cause functioned much like a modern-day finding of qualified immunity . . .”); see also Nielson & Walker, *supra* note 13, at 1864–68 (discussing these provisions but also urging greater study).

365. See Baude, *supra* note 9, at 59 (explaining that “bad faith and flagrancy” were elements of certain torts but that “[i]t did not follow that they were elements of all torts or all constitutional claims against public officials”).

366. Nor is it an easy answer to say that governments should just raise taxes. Although a weaker reliance interest, many have planned their lives around tax liability, especially those with fixed incomes



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In sum, a judicial decision invalidating qualified immunity would be extraordinarily disruptive to reliance interests. Acting against a backdrop of decades of consistent cases from the Supreme Court,<sup>367</sup> state governments have created their own schemes for compensating officers, and as detailed in Section III.B, a key part of virtually all those schemes is indemnification. Eliminating qualified immunity thus would require massive changes in state law. It is one thing for the Supreme Court to interpret federal statutory law in a way that increases costs for

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(for example, because they are retired or receive disability payments) and may have even moved to certain locations *because* of lower tax burdens.

367. In her response, Schwartz disputes that the Supreme Court's cases have been consistent for decades. Schwartz, *supra* note 46, at 326–30. She claims, for instance, that the Court has “backed away” from language in *Wilson v. Layne* about the ability of “controlling [circuit] authority” or “a consensus of cases” to create clearly established law. *Id.* at 327; see *Wilson v. Layne*, 526 U.S. 603, 617 (1999). We are not so sure. To begin, because the Supreme Court affirmed dismissal in *Wilson*, that language may not be a holding. Regardless, the Court does not seem to have backed away from it. It has continued to refer to circuit precedent but sometimes has indicated that it was “[a]ssuming, arguendo,” that circuit precedent would be sufficient. *Reichle v. Howards*, 566 U.S. 658, 665 (2012) (emphasis omitted); see also *Taylor v. Barks*, 135 S. Ct. 2042, 2045 (2015) (per curiam). It is difficult to see how this marks a change in the doctrine. Notably, *Reichle* and *Taylor*, the two cases that Schwartz cites, were both unanimous decisions, and no Justice suggested that the doctrine had been changed. Schwartz also points out that earlier the Court said “a reasonable official” but later said “every ‘reasonable official.’” Schwartz, *supra* note 46, at 327. But the standard for qualified immunity is *objective*, so why would there be a difference between “a” and “every” reasonable official in terms of perceiving the state of the law? Notably, again, the Supreme Court has unanimously applied the “every” formulation without any Justice suggesting a change has occurred. See *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). Schwartz next cites several articles that argue, among other things, that the Court has “*sub silentio*” expanded qualified immunity in recent years. See Schwartz, *supra* note 46, at 328 n.128 (quoting Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 64 (2016)). Once more, however, the Court has not purported to change the doctrine and has continued to issue unanimous decisions applying it. See, e.g., *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam). The Court's use of its summary reversal docket to reinforce *Harlow's* objective reasonableness standard, moreover, does not strike us as the Court's attempt to signal a shift in doctrine but, instead, to reaffirm existing precedent. See, e.g., *Maryland v. Dyson*, 527 U.S. 465, 467 n.\* (1999) (per curiam) (noting that “a summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law”). When it comes to evaluating whether doctrine has changed, it is difficult to brush off a line of unanimous decisions from the Supreme Court—all the more so when even scholarship arguing in favor of that supposed change concedes that it may be only “a shift in tone” rather than in substance. Kinports, *supra*, at 68.

Moving away from the substance of qualified immunity, Schwartz also cites the Court's shift from a two-step procedural test (whether the right was violated, and if so, whether it was clearly established) in *Saucier v. Katz*, 533 U.S. 194 (2001), to a discretionary standard (courts have discretion whether to reach the merits question) in *Pearson v. Callahan*, 555 U.S. 223 (2009). See Schwartz, *supra* note 46, at 327. But *Pearson* involved the Court's *supervisory* power and was not tied to § 1983's substantive scope. See *Nielson & Walker*, *supra* note 13, at 1860. That is why the *Pearson* Court explained, again unanimously, that its decision did *not* implicate the rule that “considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.” *Pearson*, 555 U.S. at 233; see also *id.* at 233–34 (distinguishing for *stare decisis* purposes “*Saucier's* two-step protocol” as merely a matter of “internal Judicial Branch operations” from substantive rules upon which “parties order their affairs”). Schwartz's list of cases that the Court could overrule “[j]ust as” it did in *Pearson*, Schwartz, *supra* note 46, at 350, thus overlooks what the Court did in *Pearson*. The Court did not say that it would be permissible to apply a relaxed form of *stare decisis* to substantive issues. Just the opposite; the Court said that it could not do that.

the states. It is something else for the Court to reject such an interpretation for decades and then reverse course only after the states have organized their own laws and personnel contracts around the Court's string of decisions.

To be sure, as Schwartz observes, “[w]e are in the midst of a national conversation about how much money and power local governments should allocate to the police,” with a number of state and local governments considering steps to address law enforcement operations and funding, as well as the scope of officer liability and indemnification.<sup>368</sup> As we argue in Part IV, such lawmaking at the state and local level is a feature of federalism. This national conversation may also lead to reforms at the federal level—reforms that may reshape how state and local law enforcement operates in ways that could substantially upset states’ reliance interests in their indemnification laws, policies, and contractual obligations. Nothing in this Article should be read to suggest that any reform that upsets states’ reliance interests should not take place at the federal level. Our argument, instead, is that the Article I legislature—not the Article III judiciary—is the more appropriate federal actor to reverse long-standing statutory interpretations in light of states’ reliance interests, especially under the Supreme Court’s *stare decisis* jurisprudence.<sup>369</sup> Because Congress provides all states a seat at the negotiating table, that branch of the federal government is best positioned to consider states’ reliance interests and competing policy considerations when revising statutes. If nothing else, Congress could “grandfather” in certain types of laws, at least temporarily, to give state and local governments time to adjust. An Article III court is much less able to do so.

#### IV. STATE LAW LIABILITY AND LABORATORIES OF DEMOCRACY

There is yet another federalism dimension to qualified immunity: state experimentation. Qualified immunity, at first blush, looks the same everywhere. In reality, however, qualified immunity is not a unitary concept. State and local governments can and do respond to the existence of federal qualified immunity in crafting their own laws. Nor is this variation limited to indemnification—though Section III.B demonstrates just how varied state indemnification laws are. Rather, state variance also extends to substantive liability itself. Some states have used this freedom to essentially eliminate qualified immunity for certain claims by creating overlapping state causes of action that are not subject to such a defense. Other states, by contrast, have made it easier to find officers liable yet have not gone so far as to eliminate qualified immunity. The result is robust policy experimentation—a classic benefit of federalism.<sup>370</sup> This diversity of locality-tailored

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368. Schwartz, *supra* note 46, at 338.

369. Cf. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020) (arguing that Congress should return to its primary lawmaking role under the Constitution and should more regularly revisit statutory delegations granted to federal agencies).

370. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens

policies also supports legislative rather than judicial action.<sup>371</sup>

In some ways, Part IV is a Sutton-esque call for states to treat federal law as the floor—not the ceiling—and to provide additional rights and remedies for their citizens.<sup>372</sup> In others, it is a Gerken-ized federalism call for states to dissent by deciding to hold their officers liable for constitutional wrongs and to take “federalism all the way down” to the state and local levels where states and municipalities can also experiment.<sup>373</sup> Section IV.A briefly describes how, in theory, federal qualified immunity is a floor, not a ceiling. Section IV.B explores how states have experimented at the state level with broadening officer liability and narrowing immunities in state law. Section IV.C concludes by discussing the implications that flow from this aspect of qualified immunity’s federalism.

#### A. FEDERAL QUALIFIED IMMUNITY AS A FLOOR, NOT A CEILING

The qualified immunity literature is focused on federal rights, federal courts, and federal causes of action. This focus is unsurprising. Congress enacted § 1983, after all, because state and local governments were not enforcing federal rights. And the legal academy in the United States, perhaps by dint of training and professional experience, often focuses on the federal level rather than more local ones.<sup>374</sup> Thus, it is unsurprising that civil rights scholarship sometimes treats federal liability—often in federal court—as the only way to remedy wrongs.<sup>375</sup>

Although perhaps understandable, this focus on all things federal is incomplete. In truth, “[h]istory is also replete with examples of states enacting laws to

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choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

371. In her response, Schwartz identifies another way in which the scope of qualified immunity could differ by state: state and local governments who are defending their officers in § 1983 lawsuits could establish policies or practices not to raise the defense of qualified immunity in some cases. *See* Schwartz, *supra* note 46, at 316–17. The practice of federal qualified immunity waiver merits further attention and may well be another effective means for states to experiment to increase liability above the federal qualified immunity floor. *See, e.g.,* Alex Reinert, *We Can End Qualified Immunity Tomorrow*, BOS. REV. (June 23, 2020), <https://bostonreview.net/law-justice/alex-reinert-we-can-end-qualified-immunity-tomorrow> [<https://perma.cc/AV4Q-Z8S4>] (“A city could decline to invoke qualified immunity in suits against police officers accusing them of excessive force, and still argue that officers have behaved within constitutional bounds.”).

372. *See, e.g.,* SUTTON, *supra* note 42, at 16–21.

373. *See, e.g.,* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

374. *See, e.g.,* SUTTON, *supra* note 42, at 6 (lamenting an underappreciation of state constitutional law); Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 485 (2017) (observing that the legal academy has focused too much on federal executive action and too little on state executive action).

375. *See, e.g.,* Tyler Anderson, *Balancing the Scales: Reinstating Home Privacy Without Violence in Indiana*, 88 IND. L.J. 361, 384 (2013) (explaining that “when plaintiffs cannot meet the ‘clearly established’ standard, they are theoretically barred from suit and are left with no remedy for the alleged violation”); Tyler Finn, Note, *Qualified Immunity Formalism: “Clearly Established Law” and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 474 (2019) (“Although the right is protected under the First Amendment, there is no remedy for a violation.”).

protect individual rights in response to federal inaction.”<sup>376</sup> As Justice Brennan once observed, state law can be “a font of individual liberties, [with] protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”<sup>377</sup> For example, although there is no federal right to equal funding of public schools, many states have created “equal-funding remedies” as a matter of state law.<sup>378</sup>

Lauren Robel has helpfully examined a similar dynamic in the context of state sovereign immunity. In light of the Eleventh Amendment line of cases,<sup>379</sup> it can be difficult to *force* a state to submit to the jurisdiction of a court, either state or federal.<sup>380</sup> But that does not mean that states cannot voluntarily *submit* to suit; “states are free to waive their immunity from suit under federal statutory law.”<sup>381</sup> And, in fact, some states have done so.<sup>382</sup> Similarly, although states have no “constitutional duty” to affirmatively protect individuals against violence from third parties, “[a] State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes.”<sup>383</sup> And some state and local governments have done so: “In numerous cases, battered women have been successful in bringing tort actions against police in state courts.”<sup>384</sup> The same analysis can and should apply to qualified immunity.

#### B. STATE LAW EXPERIMENTATION

Indeed, it is more than just a possibility that states experiment regarding liability for officers. It is a fact. This experimentation demonstrates one of the most important virtues of a federalist nation.

California is a prime example because the entire concept of qualified immunity “does not extend to state tort claims against government employees.”<sup>385</sup> Nor does it “apply to state civil rights claims.”<sup>386</sup> Thus, in California, “qualified immunity

376. Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1377 (2005); see also *id.* (“[S]tates also led the way in enacting laws to create a social safety net and to prohibit race discrimination. Both Aid to Families with Dependent Children and the 1964 Civil Rights Act were patterned after existing state legislation.”).

377. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

378. SUTTON, *supra* note 42, at 3 (discussing state law innovation following the Supreme Court’s rejection of a federal constitutional right to equal educational funding in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)).

379. See, e.g., *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

380. See, e.g., Lauren K. Robel, *Sovereignty and Democracy: The States’ Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543, 543 (2003).

381. *Id.*

382. See Morgan & Zietlow, *supra* note 376, at 1378.

383. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 202 (1989).

384. Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After DeShaney v. Winnebago County Department of Social Services*, 75 CORNELL L. REV. 1393, 1422 (1990); see *id.* at 1422 n.203 (collecting cases).

385. *Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009) (quoting *Venegas v. County of Los Angeles*, 63 Cal. Rptr. 3d 741, 751 (Ct. App. 2007)).

386. *Id.*

is a doctrine of *federal* common law and, as such, has no application to . . . *state* claims, which are subject only to *state* statutory immunities.”<sup>387</sup> Those state immunities, moreover, are less protective of officers than federal qualified immunity. For instance, no immunity under California law “applies to a false imprisonment claim” or to “other, related state causes of action.”<sup>388</sup> Given that more than twelve percent of the U.S. population is in California,<sup>389</sup> focusing simply on federal qualified immunity rather than on the actual right to recovery is shortsighted. Similarly, in *Mattos v. Agarano*, which involved officers in Seattle who had tased a pregnant woman, the Ninth Circuit sitting en banc awarded qualified immunity under federal law to the officers because, the court concluded, the relevant Fourth Amendment principle was not clearly established.<sup>390</sup> The court also recognized, though, that a jury should decide the state law claims against those same officers for the same conduct because the state law standard was less forgiving.<sup>391</sup>

California and Washington are not alone in these efforts. For instance, in Colorado, qualified immunity is not available as of June 2020 to “local law enforcement officers, sheriff’s deputies, and Colorado State Patrol officers.”<sup>392</sup> This new Colorado law further modifies Colorado indemnification law by declaring that a special indemnification formula applies if the “officer did not act upon a good faith and reasonable belief that the action was lawful.”<sup>393</sup> Similarly, the Ohio General Assembly has statutorily eliminated immunity for employees of political subdivisions whose “acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.”<sup>394</sup> In other states, state courts of last resort have interpreted their state constitutions, statutes, and common law to narrow or eliminate qualified immunity. The Maryland Court of Appeals (the state’s highest court), for example, has held that state officers enjoy no qualified immunity for violations of state constitutional rights.<sup>395</sup> So has the Montana Supreme Court.<sup>396</sup> Additionally, the Minnesota Supreme Court has interpreted “official immunity” under Minnesota law to be distinct from federal qualified immunity, in

387. *Id.*

388. *Id.* at 1071 (citing *Sullivan v. County of Los Angeles*, 527 P.2d 865, 867–72 (Cal. 1974)).

389. See *QuickFacts: California; United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/CA,US/PST045218> [<https://perma.cc/JDE8-D9KG>] (last visited Oct. 12, 2020) (detailing population estimates as of July 1, 2019).

390. 661 F.3d 433, 437–38, 448 (9th Cir. 2011) (en banc). By way of disclosure, one of us (Nielson) worked on this matter on behalf of the plaintiff during the certiorari process and argued that the Ninth Circuit misapplied federal qualified immunity.

391. See *id.* at 448 n.8.

392. See Sibilla, *supra* note 41 (discussing S.B. 20-217, 72d General Assemb., 2d Reg. Sess. (Colo. 2020)).

393. Colo. S.B. 20-217 § 3; see also *id.* (“[A] peace officer’s employer shall indemnify its peace officers for any liability incurred by the peace officer . . . except that, if the peace officer’s employer determines that the officer did not act upon a good faith and reasonable belief that the action was lawful, then the peace officer is personally liable and shall not be indemnified by the peace officer’s employer for five percent of the judgment or settlement or twenty-five thousand dollars, whichever is less.”).

394. OHIO REV. CODE ANN. § 2744.03(A)(6)(b) (West 2020).

395. See, e.g., *Ritchie v. Donnelly*, 597 A.2d 432, 446 (Md. 1991).

396. See, e.g., *Dorwart v. Caraway*, 58 P.3d 128, 140 (Mont. 2002).

that “subjective intent” still matters.<sup>397</sup> The Texas Supreme Court has similarly adopted a narrower immunity under state law.<sup>398</sup>

Moreover, the Mississippi Supreme Court has held that “public official immunity” under state law is different from federal qualified immunity because the former type of “immunity is limited and applies only when the official is engaged in a discretionary decision-making role. It does not apply if the action is merely ministerial.”<sup>399</sup> The Connecticut Supreme Court, by contrast, has recognized a similar difference between the state and federal standards yet has interpreted its law to afford absolute immunity for discretionary acts, with three exceptions.<sup>400</sup> And the Wyoming Supreme Court has held that qualified immunity under state law is narrower than federal qualified immunity.<sup>401</sup>

In 2018, the Iowa Supreme Court, in response to a question certified from a federal district court, issued an erudite decision on whether qualified immunity shields state officials from monetary liability in claims brought for the violation of state constitutional rights.<sup>402</sup> After extensively canvassing how other states have answered the question (similar to what we have done above), the court held that some sort of qualified immunity does apply, but that *Harlow*’s objective reasonableness standard was too strong:

As we have noted, a number of states allow *Harlow* immunity for direct constitutional claims. In those jurisdictions, there cannot be liability unless the defendant violated “clearly established . . . constitutional rights of which a reasonable person would have known.” *Harlow* examines objective reasonableness; thus, in some ways it resembles an immunity for officials who act with due care. However, it is centered on, and in our view gives undue weight to, one factor: how clear the underlying constitutional law was. Normally we think of due care or objective good faith as more nuanced and reflecting

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397. See, e.g., *Rico v. State*, 472 N.W.2d 100, 108 (Minn. 1991) (refusing to incorporate federal qualified immunity’s objective reasonableness standard as set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 816–18 (1982)); *Elwood v. County of Rice*, 423 N.W.2d 671, 677 (Minn. 1988).

398. See *City of Lancaster v. Chambers*, 883 S.W.2d 650, 656 (Tex. 1994) (granting immunity where “a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing the pursuit”).

399. *Barrett v. Miller*, 599 So. 2d 559, 567 (Miss. 1992).

400. See, e.g., *Fleming v. City of Bridgeport*, 935 A.2d 126, 147–48 (Conn. 2007) (“[A] municipal official is otherwise generally immune from liability for discretionary—as opposed to ministerial—acts, unless the plaintiff can show that the circumstances fit under one of three exceptions: [(1)] where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm[; (2)] where a statute specifically provides for a cause of action against a municipality or municipal official for failure to enforce certain laws[; and (3)] where the alleged acts involve malice, wantonness or intent to injure, rather than negligence.” (internal quotation marks omitted)).

401. See, e.g., *Kanzler v. Renner*, 937 P.2d 1337, 1344 (Wyo. 1997) (“The standard of qualified immunity established under our common law is distinct from the federal standard.”).

402. *Baldwin v. City of Estherville (Baldwin I)*, 915 N.W.2d 259, 260 (Iowa 2018).

several considerations. Factual good faith may compensate for a legal error, and factual bad faith may override some lack of clarity in the law.<sup>403</sup>

Relying on John Jeffries's critique of *Harlow*, the majority of the Iowa Supreme Court concluded that "to be entitled to [state] qualified immunity a defendant must plead and prove as an affirmative defense that she or he exercised all due care to comply with the law."<sup>404</sup> The majority opinion drew a thorough dissent, which relied on the academic critics of qualified immunity discussed in Section I.B (Baude, Schwartz, and others) and argued that no immunity should shield officers from monetary liability for violating state constitutional rights.<sup>405</sup>

These are remarkable examples of state courts of last resort interpreting their state constitutions, statutes, and common law in ways that differ from the federal qualified immunity standard. Judge Sutton would be proud.<sup>406</sup> Of course, not all states have begun to experiment with adjustments to liability and immunity for state actors that depart from the federal standard. Indeed, as the Iowa Supreme Court observed, some state courts of last resort have adopted the *Harlow* objective reasonableness standard for qualified immunity as part of their law.<sup>407</sup> And others have gone even further to immunize state actors. Arkansas, for instance, provides by statute for a blanket immunity of state employees, "except to the extent that they may be covered by liability insurance, for damages for acts or omissions, other than malicious acts or omissions, occurring within the course and scope of their employment."<sup>408</sup> Section 1983, with qualified immunity as a defense, thus plays an important role in civil rights enforcement. But states can go beyond that federal floor to tailor the law to their own circumstances. This is federalism in action.

403. *Id.* at 279 (alteration in original) (citations omitted).

404. *Id.* at 280–81 (discussing and citing Jeffries, Jr., *supra* note 191, at 242, 258–60). In a fascinating subsequent decision in the case, the Iowa Supreme Court also held, contrary to the federal approach to municipal liability under § 1983, that a state statute's "due care" exemption from liability extends to the municipality itself and not only to municipal employees. *Baldwin v. City of Estherville (Baldwin II)*, 929 N.W.2d 691, 697–98 (Iowa 2019). *But see id.* at 704–10 (Appel, J., concurring in part and dissenting in part) (arguing that municipalities are not entitled to any type of qualified immunity under state law).

405. *Baldwin I*, 915 N.W.2d at 281–302 (Appel, J., dissenting).

406. *See* SUTTON, *supra* note 42 (arguing that state courts can and should interpret their own state constitutions to provide greater civil rights protections than those that the Supreme Court has interpreted the Constitution to provide).

407. *See, e.g.*, *Moresi v. State*, 567 So. 2d 1081, 1094 (La. 1990); *Duarte v. Healy*, 537 N.E.2d 1230, 1232–33 (Mass. 1989); *Morillo v. Torres*, 117 A.3d 1206, 1214 (N.J. 2015); *Stevens v. Stearns*, 833 A.2d 835, 839 (Vt. 2003) (holding that, for collateral estoppel purposes, the state and federal qualified immunity standards are the same); *cf. Romero v. Sanchez*, 895 P.2d 212, 218 (N.M. 1995) (raising but not deciding whether federal qualified immunity applies to state tort law). The North Carolina Supreme Court has similarly dodged the question. *See* Matthew R. Gauthier, *Kicking and Screaming: Dragging North Carolina's Direct Constitutional Claims into the Twenty-First Century*, 95 N.C. L. REV. 1735, 1747–48 (2017).

408. ARK. CODE ANN. § 19-10-305(a) (West 2020); *see also Rainey v. Hartness*, 5 S.W.3d 410, 417 (Ark. 1999) ("This court has interpreted [§ 19-10-305] to mean that state officers and employees acting without malice and within the course and scope of their employment are immune from an award of damages in litigation.").

## C. IMPLICATIONS: LABORATORIES OF DEMOCRACY

The foregoing demonstrates the robustness of experimentation when it comes to money damages in suits against government officials. This point—which both qualified immunity’s defenders and critics have overlooked—matters because it means state and local governments can essentially eliminate qualified immunity if they desire. Almost all violations of a federal right could also violate a state right,<sup>409</sup> especially if a state designs its substantive law to mirror federal rights, as it has a right to do. And state and local governments can then disallow the use of qualified immunity as a defense to that state cause of action. In this way, states can go beyond the floor set by Congress and impose greater liability than what is available under the current § 1983 scheme, which includes qualified immunity. State and local governments can thus operate as laboratories of democracy, subject to a federal floor that ensures that clear violations of federal law will result in liability, but otherwise are free to tailor policy to their particular needs and to learn from the efforts of others about how to best strike the optimal balance.

This extensive experimentation is often a good thing. As the Supreme Court has recently explained, this important aspect of federalism “allows local policies ‘more sensitive to the diverse needs of a heterogeneous society,’ permits ‘innovation and experimentation,’ enables greater citizen ‘involvement in democratic processes,’ and makes government ‘more responsive by putting the States in competition for a mobile citizenry.’”<sup>410</sup> Hence, this freedom to experiment not only can result in better policy through tailoring and learning but also can increase the perceived legitimacy of law. That state and local governments can do this—and, indeed, *are* doing this—is important in assessing the policy case for federal qualified immunity. This is true especially because many of the most important federal rights are clearly established and, as time passes, more rights are becoming so.<sup>411</sup> Thus, the federal floor can be quite high.

It is possible to overstate the depth and magnitude of state experimentation.<sup>412</sup> And it is also possible to recognize that experimentation is not *always* a good thing,<sup>413</sup> especially for rights that exist precisely *because* states sometimes have

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409. See, e.g., *Castro v. United States*, 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting) (“It is difficult to conceive of a violation of a constitutional right that does not also give rise to a state cause of action.”), *rev’d en banc*, 608 F.3d 266 (5th Cir. 2010).

410. *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)); see *id.* (“Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.”).

411. See, e.g., *Nielson & Walker*, *supra* note 4 (identifying examples of decisions that clearly establish new rights through *Pearson* discretion).

412. See generally Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 U.C. DAVIS L. REV. 1119 (2018) (casting doubt on experimentation); Fernando R. Laguearda, Note, *Federalism Myth: States as Laboratories of Health Care Reform*, 82 GEO. L.J. 159 (1993) (same).

413. See, e.g., *Landell v. Sorrell*, 406 F.3d 159, 178 (2d Cir. 2005) (Jacobs, J., dissenting from the denial of rehearing *en banc*) (“States may be laboratories of democracy, and they should have leeway to experiment, but innovation is limited by the Constitution. The Act at issue in this case is as



proven themselves unworthy of trust.<sup>414</sup> Accordingly, we understand that some will conclude that relying on state law to play *any* role here is wrongheaded at best and perverse at worst. This is true especially because—absent supplemental jurisdiction, which may not exist if there is not a good faith allegation of a federal cause of action<sup>415</sup>—a state law claim will be heard in state court. Some may also object to moving civil rights claims outside of federal court.<sup>416</sup> We are sympathetic. Yet ours is a big country, with many unique circumstances, problems, and resources to address those problems. Accordingly, there is much to be said for establishing a federal floor of liability for clear violations of federal law, but allowing states to go beyond that floor according to their unique conditions—always remembering that if states do not sufficiently protect federal civil rights, Congress is free to step in and do so through appropriate legislation.<sup>417</sup>

All of these federalism concerns further counsel in favor of leaving qualified immunity up to legislatures<sup>418</sup>—either in the states (or localities, if state law allows) or Congress. State and local legislatures understand their communities best and can tailor policy to their specific needs. And where they fail to do so, Congress can step in to ensure that federal rights are protected after carefully assessing the specific evidence. Indeed, in the wake of the killing of George Floyd and the accompanying Black Lives Matter protests across the country this year, members of Congress have already introduced targeted legislation that would apply different qualified immunity standards to different types of conduct.<sup>419</sup> It

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unconstitutional as if Vermont were to create a dukedom, apply the thumbscrew, or tax Wisconsin cheese.”); Morgan & Zietlow, *supra* note 376, at 1381 (“[A] federal floor of individual rights is essential: it ensures that state and local governments can *only* act to enhance those federal rights.”).

414. See, e.g., CHEMERINSKY, *supra* note 82, at 504 (“Following the Civil War and the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, violence against blacks was endemic throughout the South.”).

415. See Harper, *supra* note 384, at 1422–23 (noting a case where a federal court declined to exercise supplemental jurisdiction over a state tort claim). See generally 28 U.S.C. § 1367 (2018) (establishing supplemental jurisdiction).

416. Cf. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105–06 (1977) (“I suggest that the assumption of parity is, at best, a dangerous myth. . . . At worst, it provides a pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine.”). But see SUTTON, *supra* note 42, at 16–21 (providing reasons why state courts may be effective guardians of both state and federal constitutional rights).

417. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (“Congress must have wide latitude. . . . [But] [t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”); see also *Tennessee v. Lane*, 541 U.S. 509, 522–34 (2004) (holding that Title II of the Americans with Disabilities Act of 1990 satisfied that test).

418. There is a role for judges, who are free to examine the state laws that already exist. See, e.g., SUTTON, *supra* note 42, at 16–21. Of course, that state courts are not subject to Supreme Court review for questions of state law does not give them a license to ignore the law of their own state. But by moving the discussion away from federal reform, state courts perhaps will be further prompted to examine whether qualified immunity is authorized by state law.

419. See, e.g., Walker, *supra* note 109; cf. Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1540–47 (2019) (surveying a variety of incremental reforms to the doctrine of qualified immunity, and arguing that the Supreme Court should reform the doctrine to consider “the possibility that certainty-based considerations could, and should, play a significant role in ascertaining the scope of clearly established case law”). Re suggests that, for instance, “rather than finding qualified immunity

would be difficult for the Supreme Court to act in such a context-specific fashion when interpreting a statute that makes no such distinction among state officers or types of conduct. At the same time, because different localities strike the balance differently, if and when a civil rights law is adopted, the relevant legislature can learn from other areas to assess what works in the real world. A key benefit of federalism is experimentation, and that experimentation is best served by a legislative rather than judicial response to calls to revisit qualified immunity.<sup>420</sup>

#### CONCLUSION

An increasing number of scholars, policymakers, and even judges now openly criticize qualified immunity as a weapon against civil rights. Yet another group of scholars, policymakers, and judges defend it as a tool for states to help protect vulnerable individuals and communities. After all, the theory goes, qualified immunity encourages officers to protect “society as a whole” by reducing the chilling prospect of liability for guessing wrong about what a judge might conclude with the benefit of hindsight.<sup>421</sup> This important argument is unlikely to end anytime soon. Nor should it. Liberty is essential. How to protect liberty without unduly imposing harms on third parties is one of the most difficult questions in all of public law.

The forum for this argument, however, should change—*because of federalism*. Rather than attack qualified immunity in the Supreme Court, as many do today, the question of whether to retain qualified immunity—and if so, in what form—more properly belongs to legislatures at both the state and federal levels. Because qualified immunity has significant effects on state interests, the Court has understood the defenses available under § 1983 through the lens of federalism,<sup>422</sup> and

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unless the answer is obvious to all, the court would deny qualified immunity unless the court itself viewed the question as difficult.” Re, *supra*, at 1544.

420. Indeed, the current legislative debate about the future of qualified immunity underscores why Congress, rather than the Supreme Court, is better positioned to make this important policy decision. See Walker, *supra* note 109 (describing various legislative proposals short of outright eliminating qualified immunity). Congress has the institutional ability to consider many more factors than the judiciary and is more attuned to the real-world needs of state and local governments. In her response, Schwartz agrees that “states are better suited than courts to balance competing interests related to officer liability” and similarly appreciates the value of state and local experimentation. Schwartz, *supra* note 46, at 347. But she argues that better experimentation would take place if states were working from “a clean slate” after Congress or the Supreme Court eliminated federal qualified immunity. *Id.* at 344–45. She also says that “[e]liminating qualified immunity might even improve governments’ ability to hire and retain officers.” *Id.* at 340. Yet if a state wants a clean state or believes that it could better hire and retain officers without qualified immunity, it *already* can effectively eliminate qualified immunity within its borders. There is no need to wait for action by Congress or the Supreme Court. At any rate, that states can experiment above the current floor of federal qualified immunity reinforces that Congress (rather than the Court) should be the federal branch to decide whether—and if *so, how*—to raise § 1983’s qualified immunity floor.

421. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); see also *id.* (explaining the “social costs” that arise when “claims . . . run against . . . innocent” officers, including “the danger that fear of being sued” will lead to socially harmful inaction).

422. See, e.g., Wyatt v. Cole, 504 U.S. 158, 167 (1992) (“[W]e have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to

in light of statutory *stare decisis*, policy reconsideration of that federalism-infused reading of § 1983 better belongs to Congress.<sup>423</sup> Because state and local governments have acted against the backdrop of federal qualified immunity in structuring their laws and contractual obligations to their employees, the force of *stare decisis* should be particularly strong. And because state and local governments can *and do* create liability beyond the floor set by Congress, respect for federalism counsels in favor of that experimentation. All of this supports a legislative rather than judicial forum (or, indeed, forums) for deciding the future of qualified immunity.

We do not believe that qualified immunity is perfect. It is not. Nor, frankly, is federalism. That is why we do not argue that Congress should take “federalism all the way down” here, which would require repealing § 1983 altogether so that state and local governments would be entirely free to strike their own balances between liability and immunity without any federal interference. Ours is a middle position. For good reason, federalism is very much part of our law, and it counsels against a judicial response that eliminates qualified immunity in the context of § 1983. In assessing the future of qualified immunity, federalism should no longer be overlooked.

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ensure that talented candidates were not deterred by the threat of damages suits from entering public service.”).

423. *See, e.g.,* *Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 456–57 (2015).