# Qualified Immunity's Flawed Foundation

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*ABSTRACT*

*Qualified immunity has faced trenchant criticism for decades, but recent events have renewed focus on this powerful defense to liability for constitutional violations. This Article takes aim at the roots of the doctrine – fundamental errors that have never before been excavated. First, this Article demonstrates that the Supreme Court's qualified immunity jurisprudence is premised on a flawed application of a dubious canon of statutory construction – namely that statutes in "derogation" of the common law should be strictly construed. Applying the Derogation Canon, the Court has held that 42 U.S.C. § 1983's silence regarding immunity should be taken as an implicit adoption of common-law immunity defenses. As this Article shows, the Derogation Canon has no appropriate role to play in interpreting Section 1983. Its viability has been continuously called into question for more than a century. Even when it has been applied, the canon has been used as a reason to disfavor displacement of common-law claims, not common-law defenses. And it is always operating in tension with a contrary canon that remedial statutes, like Section 1983, should be given a broad reading.*

*This Article also identifies a second significant failing in the Court's qualified immunity law. For even if the Derogation Canon were valid, the Reconstruction Congress that passed Section 1983 meant to explicitly displace common-law protections. Most critically, scholars and courts have overlooked the originally-enacted version of Section 1983, which contained a provision that specifically disapproved of any state law limitations on the new cause of action. For unknown reasons, that provision was not included by the Reviser of the Federal Statutes in the first compilation of federal law in 1874. This Article is the first to unearth the lost text of Section 1983 and demonstrate its implications.*

*Taken together, these twin insights show that the problems with the Court's immunity doctrine run deeper than prior scholarly criticism has imagined. Much of current qualified immunity scholarship has addressed, in compelling fashion, how the Court has taken immunity doctrine too far from its common-law origins. But this Article shows that qualified immunity is flawed from the ground up. In other words, the problem with current qualified immunity doctrine is not just that it departs from the common law immunity that existed in 1871. The problem is that the Court has failed to grapple with the strong arguments that no immunity doctrine at all should apply in Section 1983 actions.*

## INTRODUCTION

Qualified immunity—the affirmative defense available to government officials sued in damages for violations of federal law—is under renewed assault. Critics who otherwise share little common ground attack the doctrine on multiple grounds.[1] Scholars and practitioners claim that it imposes insuperable barriers to

1. For example, Justices Sonia Sotomayor and Clarence Thomas have each criticized the doctrine in recent years, albeit on different grounds. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (noting his "growing concern with our qualified immunity jurisprudence."); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Court's "one-sided approach to qualified immunity [which] transforms the doctrine into an absolute shield for law enforcement."). Advocacy organizations with wide-ranging ideological commitments have joined in amicus briefs urging that the doctrine be reconsidered. *See*, *e.g.*, Brief of Amici Curiae Institute for Justice, Cato Institute, American Civil Liberties Union, and American Civil Liberties Union of Colorado in Support of Plaintiff-Appellee 16-21, *Frasier v. Evans*, No. 19-1015 (10th Cir. May 6, 2019), *available at* 2019 WL 2024705 (discussing qualified immunity's failings); Brief

relief in important civil rights litigation brought under 42 U.S.C. § 1983 and other federal law.[2] Others argue that immunity doctrine is inconsistent with Section 1983's text and purpose.[3] Constitutional theorists question the gap it

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of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, *Allah v. Milling*, No. 17-8654 (U.S. July 11, 2018), *available at* 2018 WL 3388317 (arguing that Court should revisit qualified immunity doctrine); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1890–91 (2018) (describing the Cato Institute's "assault" on qualified immunity); 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 [https://perma.cc/9CQM-VGP4] (detailing petitions). And the project to legislatively revise qualified immunity has support beyond Democratic lawmakers. 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/E5H4-W7S7].

2. *See, e.g.*, Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 494-95 (2011) (describing civil rights attorneys' perception that qualified immunity can be a substantial obstacle to success); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1131-38 (2020) (same); Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 TOURO L. REV. 525, 547 (2001) (describing qualified immunity as "potent" defense at trial).

3. Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 57–70 (1989) (criticizing Court's interpretation of Section 1983 in light of its text); Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 774, 794 (1987) (arguing that the Supreme Court obscures Reconstruction Congress's intent in order to hide its own policy preferences).

leaves between rights and remedies,[4] and empiricists call into doubt its effectiveness as a matter of policy.[5] This is only a brief rehearsal of its alleged failings.[6]

This paper adds a heretofore unexplored critique: there is no foundation to the interpretive premise upon which qualified immunity rests. The methodology the Court used to create the doctrine – the canon of construction disfavoring implied repeal of the common law – was never a legitimate ground for importing common-law defenses into newly-created statutory rights. And when the Court

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4. *See, e.g.*, David Achtenberg, *Immunity Under 42 U.S.C. S 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 499–500 (1992) (arguing that Section 1983 should be read to incorporate only those immunities consistent with protecting individual rights); Erwin Chemerinsky, *Closing the Courthouse Doors*, 41 HUM. RTS. 5, 6-7 (2014) (describing barriers imposed by qualified immunity); 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) (arguing that qualified immunity doctrine "unnecessarily subordinates constitutional protections to interests of governmental efficiency.").

5. *See, e.g.*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 891 (2014).

6. For articles questioning the origins of qualified immunity, *see generally* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665 (1986); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018). For a structural critique of qualified immunity, *see* Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405 (2019). For a critique of the practical consequences of qualified immunity, *see* Lynn Adelman, *The Erosion of Civil Rights and What to Do About It*, 2018 WIS. L. REV. 1 (2018); Alan Chen, *The Facts About Qualified Immunity*, 55 EMORY L. J. 229 (2006).

applied this flawed methodology to its interpretive task, it made a second mistake: it disregarded the explicit (albeit obscured) statutory text of the 1871 Civil Rights Act, the original version of Section 1983, that speaks to the Reconstruction Congress's intent to create liability for constitutional violations and displace any common-law immunities in existence. The Supreme Court has never acknowledged this text, let alone explained how it can be squared with the Court's immunity jurisprudence. This is the first scholarly effort to excavate Section 1983's original language and explore its significant implications.

Qualified immunity, as the name implies, is conditional. Unlike absolute immunity, which bars recovery regardless of how egregious the legal violation,[7] qualified immunity contemplates that in some circumstances damages may be recovered against government officials. The doctrine was first introduced in a 1967 decision involving Mississippi police officers, *Pierson v. Ray*.[8] There the Court held that 42 U.S.C. § 1983 incorporated a "good faith" immunity defense that protected government officials from liability at common law in 1871, when Section 1983 was enacted.[9] Much of *Pierson*'s logic flowed from the Court's earlier decision in *Tenney v. Brandhove*,[10] holding that legislative immunity

7. *See Stump v. Sparkman*, 435 U.S. 349 (1978).

8. 386 U.S. 547 (1967).

9. *Id*. at 557; *see also Rehberg v. Paulk*, 566 U.S. 356, 361–62 (2012) (collecting cases discussing Court's assumption that Congress did not intend Section 1983 to revoke common-law immunities).

10. 341 U.S. 367 (1951).

recognized at common law was not abolished by Section 1983.[11] Since *Pierson*, the Court has modified and extended qualified immunity doctrine, such that it now protects officers regardless of their good faith, so long as they behaved reasonably in light of clearly established law.[12]

Critics have long argued that the modern extension of qualified immunity is an improper form of federal common law-making.[13] These ideas have gained more traction recently, with Justice Clarence Thomas expressing openness to arguments that the Court's immunity doctrine is illegitimate judge-made law that departs from the common-law defense that existed when Section 1983 was enacted.[14] On some accounts, this means that courts must abandon qualified immunity as it currently exists and return to the immunity that existed circa

11. *Id.* at 376; *see also Pulliam v. Allen*, 466 U.S. 522, 529 (1984) ("The starting point in our own analysis is the common law. Our cases have proceeded on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so").

12. *See*, *e.g.*, *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam). I discuss the history of qualified immunity doctrine in greater detail below. *See infra* Part I.

13. *See*, *e.g.*, Rudovsky, *supra* note 4, at 74.

14. *See Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring in part and concurring in the judgment); *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from denial of cert.); *see also Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("As I have observed earlier, our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume.")

1871.[15] These critics accept *Pierson*'s logic –that Congress meant to adopt the good faith immunity that existed at common law, because of what I will call the Derogation Canon -- the canon of statutory interpretation that statutes in "derogation" of the common law should be strictly construed.[16] If Congress meant to overrule the common-law doctrine of qualified immunity, according to this account, it would have done so explicitly.

But this criticism is only half-right. Will Baude, among others, is surely correct to observe that current qualified immunity doctrine departs significantly from common-law principles.[17] But it does not follow that rejecting the Court's current qualified immunity doctrine necessarily requires substituting whatever immunity doctrine existed at common law in 1871. This is so for several reasons that scholars have overlooked.

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15. *Baxter*, 140 S. Ct. at 1864 (2020) (Thomas, J., dissenting from denial of cert.) ("Regardless of what the outcome would be, we at least ought to return to the approach of asking whether immunity was historically accorded the relevant official in an analogous situation at common law.") (internal quotation marks omitted).

16. This canon takes many forms, including that the common law is not to be overruled by implication or the presumption that the common law supplies the "default" rule against which Congress legislates. *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020) (using "default rule" formulation); *United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.") (internal quotation marks omitted). For purposes of this paper these all are considered part of the Derogation Canon.

17. *See, e.g.*, Baude, *supra* note 6, at 77-80.

First, as a matter of interpretive methodology, the Derogation Canon is a tenuous one upon which to base any importation of immunity doctrine into Section 1983. At the time the Civil Rights Acts were passed, influential treatises called the canon into question, rooted as it was in a judicial supremacist world in which courts viewed common law as a font of perfection and were skeptical of parliamentary intervention.[18] That criticism has only grown over time. In 1908, in a Harvard Law Review article, Roscoe Pound amplified the concerns about the canon's legitimacy, concluding that its "archaic notions of interpretation" made it "wholly inapplicable to and out of place in American law of today."[19] And just as the Supreme Court was relying on the canon in its mid-1950s and 1960s decisions regarding immunity and Section 1983, scholars were debating its validity.[20] In modern times, the late Justice Antonin Scalia has been one of many who have criticized application of the canon.[21] The Derogation Canon itself aims to limit the power of the legislature and enhance the power of judges,[22] making it ironic that it has been invoked by Justices who claim that

18. *See infra* Part II.A.

19. Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383, 387-88 (1908).

20. Jefferson B. Fordham and J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VANDERBILT L. REV. 438, 441-44 (1950)

21. Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (West 2012).

22. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873-79 (1987) (identifying the Derogation Canon as rooted in the suspicion that statutes were unseemly intrusions on an idealized common law system). For a description of the distinction between "language" and "substantive" canons

they are giving effect to the Reconstruction Congress's original intent in passing Section 1983.[23]

But even if one accepts that the Derogation Canon should guide statutory interpretation, applying it to Section 1983 of all statutes is questionable. In general, outside of the criminal context, the canon has been used as a reason to disfavor displacement of common-law *claims* or *rights*, not common-law defenses.[24] And the Derogation Canon stands in tension with the presumption that remedial statutes should be read broadly.[25] This is especially so for statutes that, like Section 1983, created rights of action in new substantive areas of law.[26] It is thus no surprise that from the Founding Era until Reconstruction, the

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of construction, *see* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 Tex. L. Rev. 163, 179-80 (2018).

23. To the contrary, as I demonstrate in this Article, there are compelling reasons to believe that the 1871 Congress would have been surprised to learn that the Court has read the immunity defense into the text of Section 1983. *Infra* Part II.A & B.

24. *See infra* Part II.B.

25. Karl Llewellyn noted the tension between these two canons in his classic article on statutory construction. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950); *see also* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 934 (2016) (describing these two canons as dueling substantive canons); Michael Sinclair, *"Only A Sith Thinks Like That": Llewellyn's "Dueling Canons," One to Seven*, 50 N.Y.L. SCH. L. REV. 919, 938–48 (2006) (discussing relationship between canons); Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE U. L. REV. 939, 978–79 (2014) (discussing contrast between canons).

26. *See infra* Part II.C.

Derogation Canon was never used as a means to dilute statutory rights by implying a common-law defense.[27] Even after Reconstruction, the canon was used primarily to protect pre-existing rights at common law from statutory incursion.[28] Reconstruction-era legislators would have had no reason grounded in law to believe that common-law defenses would be incorporated into Section 1983's newly-created cause of action.

Putting aside these compelling reasons for concluding that the Derogation Canon is an inappropriate vehicle for importing common-law defenses into Section 1983, there is a second piece of evidence demonstrating that the Court's immunity jurisprudence is a profound misadventure: Even if the canon were valid, and even if it were applicable to a statute like Section 1983, the Reconstruction Congress adopted explicit text that displaced common-law defenses when it enacted the original version of Section 1983. To appreciate this point, one has to dig beyond the conventional analyses of Section 1983. Most critically, scholars and courts have overlooked the version of Section 1983 that

27. *See infra* Part II.B. Indeed, it is noteworthy that when the defendants in *Pierson* pressed their claim that common-law immunities should apply to Section 1983, they could only cite to cases concerning common-law rights of action, not purported general defenses. *Mobile Gas Serv. Corp v. Fed. Power Comm'n*, 215 F.2d 883, 889 (3d Cir. 1954), *aff'd sub nom. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (statute does not displace common-law contract right); *Am. Dist. Tel. Co. v. Kittleson*, 179 F.2d 946, 953 (8th Cir. 1950) (statute does not displace common-law tort action for indemnity); *Scharfeld v. Richardson*, 133 F.2d 340 (D.C. Cir. 1942) (statute does not displace common law's treatment of dog as personal property for purpose of tort damages).

28. See *infra* Part II.C.

was enacted by the Reconstruction Congress. The Civil Rights Act of 1871 created a cause of action for violation of federal law by state actors – what we now call Section 1983 – and made clear that such a claim would be viable notwithstanding "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary."[29] For reasons unknown, this critical clause (for purposes of this paper, I will call it the "Notwithstanding Clause") was omitted when the Reviser of the Federal Statutes – lacking any authority to alter positive law – published the first compilation of federal law in 1874.[30] That error was compounded when the Revised Statutes were collected in the United States Code.[31] And because the common law of immunity for state actors, to the extent any existed, was generally state law immunity, Section 1983's original text conveys congressional intent that immunity defenses should not apply to the newly created civil rights actions. What's more, this reading is confirmed by contemporaneous legislative history and other provisions of the Civil Rights Act of 1871.[32]

In other words, the problem with current qualified immunity doctrine is not just that it departs from the common-law immunity that existed when Section

29. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch.22, §1, 17 Stat. 13 (1871) [hereinafter "Civil Rights Act of 1871"].

30. *See infra* Part III.A.

31. As discussed below, *see infra* notes 230-235 and accompanying text, 42 U.S.C. § 1983 does not include the Notwithstanding Clause in its text.

32. See *infra* Part III.C.

1983 was enacted, as scholars have argued and at least Justice Thomas has hinted. That is true, but only half the story. The real problem is that if we are to be true to text adopted by the enacting Congress and to other evidence of legislative intent, no qualified immunity doctrine at all should apply in Section 1983 actions.

I develop these arguments in four parts. In Part I, I briefly rehearse the history of qualified immunity doctrine and the criticisms that have been leveled against it. In Part II, I excavate *Pierson*'s failure – its unprecedented application of the Derogation Canon to incorporate a common-law defense into a novel remedial statute like Section 1983. In Part III, I show that, even if the Derogation Canon should apply to Section 1983, text and legislative history show that Congress did not intend for common-law immunities to bar actions brought under Section 1983. In Part IV, I turn to the significant implications of this Article, which go beyond qualified immunity doctrine, and I also address anticipated objections.

## I.

## *PIERSON* AND THE EMERGENCE OF MODERN QUALIFIED IMMUNITY DOCTRINE

When civil rights litigants seek damages against state and local officials under 42 U.S.C. § 1983, or against federal officials via *Bivens* actions,[33] there

33. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (implying a private cause of action against federal officials for violation of the Fourth Amendment).

are many barriers to success.[34] Among the most closely scrutinized is the doctrine of qualified immunity, which protects officers from damages liability even when they violate the constitution, if the law was not "clearly established" or if the officers reasonably believed they were not acting unconstitutionally.[35]

The seeds of the qualified immunity defense were sown in *Tenney v. Breedlove*, which concerned whether Section 1983 permitted damages claims against state legislators.[36] The Court started by tracing the long history of legislative immunity, found at common law and in both state and federal constitutions.[37] Federalism and separation of powers principles all suggested that legislative immunity was necessary for a functioning representative democracy.[38] Eeven after making the "big assumption" that Congress had the *power* "to limit the freedom of State legislators acting within their traditional sphere," the Court asked whether it could make "an even rasher assumption to find that Congress thought it had exercised the power."[39] The Court's framing presaged the answer: no, because absent some evidence from the text or "spelled

34. *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 329-34 (2020) (discussing barriers to success in Section 1983 litigation); Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 842-44 (2010) (discussing reasons *Bivens* claims fail).

35. *See*, *e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1152, (2018) (summarizing doctrine).

36. 341 U.S. 367, 369 (1951).

37. *Id.* at 372-75.

38. *Id.* at 372-76

39. *Id.* at 376.

out in debate," the Court could not conclude that Congress contemplated doing away with a "tradition so well grounded in history and reason by covert inclusion in the general language before us."[40] At the same time that the Court upheld absolute immunity for legislators, it recognized that the immunity might not extend to "an official acting on behalf of the legislature," suggesting a potential distinction between legislators and other state officials.[41]

Sixteen years after the Court decided *Tenney*, it addressed the reach of Section 1983 in actions brought against a judge and three police officers, in *Pierson v. Ray*.[42] The plaintiffs were Freedom Riders who were arrested while protesting segregated bus facilities in Jackson, Mississippi in September 1961.[43] The defendants claimed immunity from damages, and while the Court of Appeals found that the judge was entitled to absolute immunity,[44] it interpreted the Supreme Court's decision in *Monroe v. Pape*[45] to preclude any immunity for

40. *Id.*

41. *Id.* at 378-79 (*citing Kilbourn v. Thompson*, 103 U.S. 168, 204–05 (1880)). The *Tenney* Court observed that *Kilbourn* had "allowed a judgment," 341 U.S. at 378, against the Sergeant-at-Arms, acting at the order of the House, even if the legislators who directed him to act could not be held accountable.

42. 386 U.S. 547 (1967).

43. Beginning in 1961, the Congress of Racial Equality's organized a "Freedom Rides" campaign to challenge segregated transportation across the South. *See generally* Diane McWhorter, *The Enduring Courage of the Freedom Riders*, 61 J. Blacks Higher Educ. 66 (2008).

44. *Pierson v. Ray*, 352 F.2d 213, 217 (5th Cir. 1965).

45. 365 U.S. 167 (1961).

Section 1983 claims against police officers.[46] In the Supreme Court, judicial immunity was low-hanging fruit – like the legislative immunity recognized in *Tenney*, judicial immunity was well established at common law, necessary to preserve an independent judiciary, and the Court found no "clear indication" in the legislative record that Congress intended to abrogate "wholesale all common-law immunities."[47] For police officers, however, the Court concluded that while there was no tradition in the common law of an "absolute and unqualified immunity" a more limited good faith immunity was appropriate.[48] The Court rejected the Fifth Circuit's understanding of *Monroe*, noting that *Monroe* stated that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[49] And the background of tort liability, according to the *Pierson* Court, supported a good faith or probable cause defense, at least "in the case of police officers making an arrest."[50] The Court was less clear about the source of that common-law

46. *Pierson*, 352 F.3d at 218. The Fifth Circuit's did not explain its reasoning but claimed that it followed from *Monroe*'s imposition of Section 1983 liability even where officers did not act willfully. *Id.*

47. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

48. *Id.* at 555.

49. *Monroe*, 365 U.S. at 187 (*quoted by Pierson*, 386 U.S. at 556).

50. *Pierson*, 386 U.S. at 556-57. *Pierson*'s reliance on that particular sentence from *Monroe* is puzzling, in the context of immunities. First, read literally – that a defendant should be "responsible for the natural consequences of his actions" – it undermines any argument for immunity. Immunity functions in exactly the opposite fashion – it renders a defendant unaccountable for the consequences of his actions, so long as he meets certain conditions of the defense. Second, when read in the context of

immunity for officers – unlike with legislative or judicial immunity, it did not canvass the common law of the eighteenth and nineteenth centuries, but instead referred to contemporaneous Mississippi common-law doctrine from the 1950s.[51]

Whether the *Pierson* Court had intended that its good faith immunity be limited or adjudicated on a case-by-case basis, it soon became clear that the immunity had a broad reach. First, it was applied across the board to state officials who exercised non-ministerial functions. In *Scheuer v. Rhodes*,[52] the Court relied on *Pierson* to find that Ohio's governor and other state officials, sued after the National Guard shot and killed four students during anti-war

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*Monroe* itself, it is clear that the Court was referring to background principles of tort law to contrast Section 1983 with the Civil Rights Act's criminal analog, now codified at 18 U.S.C. § 242. The Court relied on background principles of tort law to justify its holding that it should be easier to establish civil liability under Section 1983 than criminal liability under Section 242. *See Monroe*, 365 U.S. at 188 (contrasting Section 1983 with criminal civil rights statute interpreted in *Screws v. United States*, 325 U.S. 91, 101-103 (1945)).

51. The *Pierson* court relied on the Court of Appeals application' of Mississippi's good faith immunity for state law claims for false arrest and imprisonment to support its holding that a good faith defense also applies to Section 1983 claims arising out of the same facts. 365 U.S. at 557 ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983."). Justice Douglas dissented, relying on the text, purpose, and legislative history of Section 1983 to conclude that Congress did not mean to import common-law doctrines of judicial immunity or good-faith immunity for police officers. *Id*. at 564–66 (Douglas, J., dissenting).

52. 416 U.S. 232 (1974).

protests at Kent State University,[53] were all entitled to qualified immunity of varied scope.[54] And in *Wood v. Strickland*,[55] the Court relied on *Pierson*, *Scheuer*, and state common law to extend a good faith immunity to school board members sued for damages arising from student disciplinary proceedings.[56] After *Pierson*, the Court consistently relied on the presumptions against implied repeal of the common law in the context of Section 1983 immunities.[57]

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53. The shootings at Kent State took place on May 4, 1970, during a demonstration opposing the expansion of American military presence into Cambodia and protesting the National Guard's presence on campus. *See* John Fitzgerald O'Hara, *Kent State/May 4 and Postwar Memory*, 58 AM. QUARTERLY 301, 302 (2006). Criminal charges against eight national guardsmen were dismissed, *id.* at 302-03, and the civil rights action in *Scheuer* was eventually settled after a trial and subsequent appeal, *Yale Preserves History of Kent State Tragedy*, N.Y TIMES, May 6, 1990, 12CN, at 6 [https://perma.cc/U6XH-ADS2].

54. 416 U.S. at 247 (noting that the scope of immunity would depend "upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.").

55. 420 U.S. 308 (1975).

56. *Id*. at 318.

57. *Malley v. Briggs*, 475 U.S. 335, 339–42 (1986) (looking to common law to determine context of officer seeking an arrest warrant but recognizing that policies of Section 1983 could displace common law's guidance;); *Briscoe v. Lahue*, 460 U.S. 325, 337 (1983) ("[W]e find no evidence that Congress intended to abrogate the traditional common-law witness immunity in § 1983 actions."); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) ("Although the Court has recognized that in enacting § 1983 Congress must have intended to expose state officials to damages liability in some circumstances, the section has been consistently construed as not intending wholesale revocation of the common-law immunity afforded government officials."); *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) ("The

Second and most consequentially, in *Harlow v. Fitzgerald*, decided in 1982, the Court rejected the common-law "good-faith" version of qualified immunity applied in *Pierson* and its progeny, choosing instead an objective test that focused on the reasonableness of the officer's behavior in light of "clearly established" law.[58] The Court saw the good-faith standard, with its emphasis on the subjective intentions of the defendant, as insufficiently protective against "ingenious plaintiff's counsel" who could create material issues of fact based on little evidence, thereby surviving summary judgment and forcing a trial or settlement.[59] Instead, an "objective reasonableness" standard was necessary to "permit the resolution of many insubstantial claims on summary judgment."[60] Much of *Harlow*'s basic structure survives to this day. If an official can establish either that the relevant constitutional law was not clear enough, *or* that she reasonably believed her conduct was lawful in light of clearly established law, under the circumstances as she understood them,[61] then she is immune from damages liability.

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decision in *Tenney* established that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.").

58. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Malley*, 475 U.S. at 341.

59. *Harlow*, 457 U.S. at 817 n.29 (internal quotation marks omitted).

60. *Id.* at 818.

61. Qualified immunity has been described as an affirmative defense, *see Gomez v. Toledo*, 446 U.S. 635, 640 (1980), but not every circuit consistently allocates to the defendant the burdens of establishing the defense. *See* Alexander A. Reinert, *Qualified immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2071-72 (2018) (describing different approaches to allocating burdens).

*Harlow* expressly sought to mediate the tension between providing citizens with a remedy for constitutional violations while recognizing 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."[62] Over time, even though *Harlow*'s basic standard has survived, the Court has slowly come to emphasize almost exclusively the latter over the former – protecting defendants from suit appears to be the Court's prime directive.

One can see this in the procedural accommodations made to defendants who raise the immunity defense. Qualified immunity can be invoked at any time: at the motion to dismiss stage, after limited or full discovery through summary judgment, and at trial.[63] The Court has directed lower court judges to resolve qualified immunity, if possible, prior to trial, for the value of the immunity is "effectively lost if a case is erroneously permitted to go to trial."[64] Defendants may seek protection from discovery until the threshold legal question of qualified immunity is resolved.[65] And defendants sued in federal court may seek interlocutory appeals when the defense is rejected – sometimes triggering multiple appeals in a single case -- of otherwise unappealable denials of motions to dismiss or summary judgment, so long as the appeal is confined to law-based

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

63. *See Behrens v. Pelletier*, 516 U.S. 299, 306–07 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

64. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (*quoting Mitchell*, 472 U.S. at 526).

65. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

qualified immunity arguments.[66] This exception to the final judgment rule is justified as one more tool for public officials to terminate insubstantial suits promptly.[67]

The defendant-friendly trend in qualified immunity is also reflected in the gradual narrowing of what constitutes "clearly established" law for the purposes of the defense. Over the years, the Court has insisted on more and more factual similarity between prior cases and the defendants' alleged conduct to overcome the immunity defense. Only a few decisions break this monotony, and those are exceptions that prove the rule because they involve the rare case in which a constitutional violation is so obvious that one would not need a prior case to establish it with clarity.[68] But in the main, the Court has spent the past three decades progressively and forcefully emphasizing that that, for law to be "clearly

66. *See Behrens*, 516 U.S. at 307–09; *Mitchell*, 472 U.S. at 526–27. Not every issue raised in the district court will be reviewable by an appellate court, however. In general, what is immediately appealable in a qualified immunity case is the "essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell*, 472 U.S. at 526.

67. *See Behrens*, 516 U.S. at 306.

68. *Hope v. Pelzer*, 536 U.S. 730, 741-44 (2002) (holding that qualified immunity was inappropriate where plaintiff was tied to a hitching post for hours and denied access to water); *see also Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam) (citing *Hope* and holding that qualified immunity was unavailable on "the particularly egregious facts of this case [. . .]").

established," prior cases must speak with such clarity that only a "plainly incompetent" official would fail to see the unlawfulness of their conduct.[69]

Finally, one can see the Supreme Court's solicitude for defendants in its tinkering with the mechanism for how "clearly established" law develops over time. As law develops and becomes better established, qualified immunity becomes a less effective defense. But law cannot become "clearly established" unless courts resolve the predicate, merits-based question, of whether a plaintiff's constitutional rights were even violated by the defendant's conduct. In the absence of initial guidance from the Supreme Court, some courts tended to resolve the merits question first, turning to qualified immunity only if necessary.[70] Other courts, however, found it convenient at times to resolve qualified immunity first, for if the law was not clearly established, it was unnecessary to determine whether any constitutional violation was stated.[71] The Supreme Court intervened in 1999 and 2001, directing lower courts that there was a mandatory two-step analysis that governed motions seeking qualified

69. The "plainly incompetent" language originated more than three decades ago. *See Malley*, 475 U.S. at 349. But it echoes throughout the entirety of modern qualified immunity jurisprudence. *See*, *e.g.*, *Kisela*, 138 S. Ct. at 1152.

70. *See, e.g.*, *Jones v. Shields*, 207 F.3d 491, 494–95 (8th Cir. 2000); *Kitzman–Kelley v. Warner*, 203 F.3d 454, 457 (7th Cir. 2000); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000); *Hartley v. Parnell*, 193 F.3d 1263, 1270–71 (11th Cir. 1999).

71. *See, e.g.*, *Horne v. Coughlin*, 191 F.3d 244, 248 (2d Cir. 1999); *Somers v. Thurman*, 109 F.3d 614, 617 (9th Cir. 1997).

immunity.[72] Defendants were first required to show that, after drawing all factual inferences in plaintiffs' favor, plaintiffs have not alleged facts which "show the officer's conduct violated a constitutional right."[73] If defendants could not meet this burden, they then were required to show that they nonetheless were entitled to qualified immunity under either of the two prongs identified above.[74]

Almost immediately, members of the Court and some lower court judges criticized this mandatory sequencing rule for unnecessarily forcing judges to decide difficult constitutional questions.[75] So in 2009, in *Pearson v. Callahan*, the Court abandoned its rule and gave lower courts discretion to decide for themselves whether to address the merits question or the immunity question first.[76] The shift was driven by the Court's concern that the *Saucier* two-step analysis posed the risk that courts would issue advisory opinions by unnecessarily deciding whether the plaintiff's allegations established a violation

72. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Conn v. Gabbert*, 526 U.S. 286, 290 (1999).

73. *Saucier*, 533 U.S. at 201. This is essentially the same inquiry that is required by any Rule 12(b)(6) motion.

74. *Id.*

75. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in judgment in part and dissenting in part) ("I would end the failed *Saucier* experiment now"); *Brosseau v. Haugen*, 543 U.S. 194, 201–202 (2004) (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring) (urging Court to reconsider *Saucier*'s "rigid 'order of battle'); *Purtell v. Mason*, 527 F.3d 615, 622 (7th Cir. 2008) (collecting criticisms); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275, 1277 (2006) (criticizing *Saucier* as "a new and mischievous rule" that amounts to "a puzzling misadventure in constitutional dictum").

76. *Pearson*, 555 U.S. 223, 234–36 (2009).

of the law.[77] In taking account of this fear, however, the Court opened itself up to a different criticism, namely that skipping *Saucier*'s first step raises the concern that constitutional law will become static because courts will focus on whether particular rights were clearly established at the time of alleged violations, rather than whether the right exists at all.[78] And if, as empirical evidence suggests,[79] courts do not decide whether the right exists at all, no new clearly established law will be created, leaving victims of constitutional violations unprotected.

The Court's strengthening of qualified immunity's protections over time has generated significant academic attention.[80] Commentators have criticized the gradual ratcheting up of the protections offered by the defense.[81] Many

77. *Id.* at 240-41.

78. *Id.* at 242-43.

79. *See* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009) (finding that judicial avoidance decreased when courts were required to follow the two-step approach of *Saucier*); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 49 (2015) (finding that judges are less likely to decide constitutional questions when the rights at issue are not clearly established).

80. A comprehensive discussion of qualified immunity scholarship would test the patience of even the most devoted reader. By way of illustration, Westlaw reports that as of December 20, 2021, since 1980 there are 427 law review articles with the words "qualified immunity" in the title. This is surely a significant underestimate of the articles devoting substantial discussion to the doctrine—Westlaw reports that there are at least 1,650 law review articles in which the phrase "qualified immunity" is used ten times or more over the same time period.

81. *See* sources cited *supra* notes 4 & 6.

scholars, most notably Joanna Schwartz, have provided empirical evidence that undermines the Court's assumption that qualified immunity is necessary to protect government officials from the threat of civil liability.[82] Perhaps most significantly, scholars have questioned the very genesis of the doctrine, arguing that the Court misconstrued the common law at the time Section 1983 was enacted.[83]

This fundamental assault on the Court's use of common-law immunity doctrine to inform its reading of Section 1983 has been maintained over decades, but has earned renewed attention in the past few years.[84] Many years ago,

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82. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2 (2017).

83. This argument was recently endorsed by Justice Clarence Thomas in concurrence in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). In his opinion, Justice Thomas openly invited argument that the Court's qualified immunity doctrine has gone off the rails. Citing Will Baude's law review article, *see supra* note 6, Justice Thomas notes his "growing concern with our qualified immunity jurisprudence." 137 S. Ct. at 1870 (Thomas, J., concurring in part and concurring in the judgment).

84. *See* Achtenberg, *supra* note 4, at 499–500 (arguing that Section 1983 should be read to incorporate only those immunities that are consistent with protecting individual rights); Beermann, *supra* note 3, at 57–70 (discussing Court's approach to immunities in Section 1983, sourcing it in the canon of construction that strictly construes statutes in derogation of common law, and criticizing Court for failing to explain its dissonant treatment of gaps in Section 1983's text); Coleman, *supra* note 6, at 676-77 (arguing that the Court's reliance on common law of 1871 is fraught because of difficulty of ascertaining content of the common law); *id.* at 686 (criticizing *Pierson* because no good faith immunity for officers existed and Court was creating defense on its own); Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 609-10 (1985) (explaining how Court's immunity defense is detached from 1871 common law); Matasar, *supra* note 3, at 747 ("The Court believes these hundred-year-old variances are critical because it assumes the

scholars observed both that the Court's original conception of qualified immunity was untethered from the common law of 1871,[85] and that even had the Court correctly described that common law when it first adopted the doctrine in *Pierson*, by the time the Court transformed the defense into an objective one based on "clearly established law," the Court had departed significantly from the

drafters of section 1983 incorporated and froze common law rules current in 1871 into section 1983, despite adopting language which seemed to obliterate official immunity."); *id.*at 758-59 (arguing that judicial immunity at common law differed from what Court has adopted).

85. In one case from Maine, for example, a plaintiff brought suit after he had been held in solitary confinement in prison for longer than his original sentence. *Gross v. Rice*, 71 Me. 241 (1880). The Warden defended against the action by pointing to a statute which permitted prison officials to hold someone beyond their criminal sentence if they had been disciplined with solitary confinement for violating prison rules. *Id.* at 252. The Warden acknowledged that the statute had subsequently been declared unconstitutional, but argued that he had presumed it was valid when he applied it to the plaintiff, in effect raising what we would now call a qualified immunity defense. *Id.* The 1880 court rejected the Warden's argument with little trouble, based both on Maine jurisprudence and other authorities. *Id.* at 252. This was the dominant rule in both state and federal courts during the nineteenth century. *See* James E. Pfander, *Zones of Discretion at Common Law*, 116 Nw. U. L. rev. Online 148, 167-168 & n. 111 (collecting authority). Today's Supreme court, by contrast, would be far more friendly to defendants. In *Heien v. North Carolina*, 574 U.S. 54 (2014), for example, the Court held that no Fourth Amendment violation occurred when an officer made a reasonable mistake of law, including in cases in which the officer relied upon a law that was subsequently declared unconstitutional, and stated that the qualified immunity analysis is even more "forgiving" towards an officer. *Id*. at 64, 67.

common law roots. This criticism has come into sharper focus ever since Supreme Court Justice Clarence Thomas referred to it in a concurrence in 2017.[86]

Citing a law review article by Will Baude, Justice Thomas noted his "growing concern with our qualified immunity jurisprudence."[87] As Justice Thomas explained, when qualified immunity doctrine was first identified, the Court based the doctrine on its understanding of the common-law immunity in existence when Congress enacted the 1871 Act.[88] As summarized above, the Court claimed that a subjective good-faith immunity existed at common law for law enforcement officers sued in tort.[89] The contours of that immunity, Justice Thomas maintained, was context-dependent – for example, the good-faith immunity applied in *Pierson* was tied to the specific false arrest and imprisonment claim brought by the plaintiffs in that case.[90] *Harlow*, however, transformed qualified immunity from a contextual, subjective good-faith defense to a broad objective reasonableness standard based on the content of "clearly established" law.[91] From Justice Thomas's perspective, this change was not a product of statutory interpretation but a "freewheeling policy choice" associated

86. *See Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring in part and concurring in the judgment).

87. *Id.* (*citing* Baude, *supra* note 6).

88. *Id.*

89. *Supra* notes 43-52 and accompanying text.

90. *See Ziglar*, 137 S. Ct. at 1870-71 (Thomas, J., concurring in part and concurring in the judgment) (citing *Pierson*, 386 U.S. at 555-57).

91. 137 S. Ct. at 1871.

with federal common law.[92] In the wake of Justice Thomas's concurrence, scholars and advocates have openly mused about the end of qualified immunity.[93] But there is no indication that a majority of the Supreme Court shares Justice Thomas's skepticism.[94]

Even were a majority to coalesce around Justice Thomas's suggestion that defenses available at common law in 1871 should also be available in Section 1983 actions, the Court would have to confront many difficult questions. Civil

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92. *Id.*

93. *See* Schwartz, *supra* note 6, at 1802-03; Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2095-96 (2018); *see also* Perry Grossman, *Clarence Thomas to the Rescue?*, SLATE (June 21, 2017), https://slate.com/news-and-politics/2017/06/in-ziglar-v-abbasi-clarence-thomas-signals-his-support-for-civil-rights-plaintiffs.html [https://perma.cc/8JDL-W2JF].

94. None of Justice Thomas's "conservative" colleagues on the Court has joined in his call for revisiting qualified immunity, and while Justice Sotomayor has frequently criticized the Court's immunity doctrine, her objections appear grounded in how the doctrine has been applied, not in a general objection to federal-judge-made law. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Court's "one-sided" application of qualified immunity). And while bipartisan enthusiasm for reforming qualified immunity has at times appeared high in the Senate and House of Representatives, no politically viable option has yet emerged. *See* Marianne Levine & Nicholas Wu, *Lawmakers Scrap Qualified Immunity Deal in Police Reform Talks*, POLITICO (Aug. 17, 2021, 05:38 PM EDT), available at https://www.politico.com/news/2021/08/17/lawmakers-immunity-police-reform-talks-505671 [https://perma.cc/9RET-3HU7]. More innovation, instead, has taken place at the state level, in the form of the creation of state law analogues to Section 1983 that do not include any qualified immunity defense. *See* Alexander A. Reinert, Joanna C. Schwartz, & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 758-63 (2021).

rights actions against federal officials are not based in Section 1983, but instead are implied directly from the constitution under *Bivens* and its progeny[95] – for these claims, the Court could claim greater authority to craft judge-made defenses that depart from common law principles.[96] As for Section 1983 actions, turning directly to the common law that existed in 1871 skips at least two analytical steps. It assumes that the gap in Section 1983 will be filled by a uniform "common law," when in other contexts (statutes of limitations, for example), the law governing Section 1983 varies depending on the law of the forum state.[97] More problematically, it assumes that Congress meant for common-law defenses to be incorporated sub silentio into Section 1983.

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95. For a discussion of *Bivens* doctrine, *see generally* James E. Pfander, Alexander A. Reinert, & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 569-71 (2020); Joanna C. Schwartz, Alexander A. Reinert, and James E. Pfander, *Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based* Bivens *Claims*, 96 NOTRE DAME L. REV. 1835, 1839-47 (2021).

96. Mims-Crocker, *supra* note 6, at 1458-59. As a result, *Bivens* claims might end up bearing even less resemblance to constitutional claims brought against state actors.

97. A separate provision of the Civil Rights Act of 1871 directs courts to look to state law as a gap-filler when federal law does not speak to issues arising in Section 1983 litigation or when they are "deficient in the provisions necessary to furnish suitable remedies." *See* 42 U.S.C. § 1988(a). The Supreme Court has relied upon Section 1988 to determine that, while the applicable statute of limitations for Section 1983 claims is a matter of federal law, it may look to state personal injury statutes of limitations because doing so is not inconsistent with federal law. *Wilson v. Garcia*, 471 U.S. 261, 268-70 (1985).

This Article focuses on the second, more important, analytical question by asking why one should even turn to the common law of 1871 to understand Section 1983. After all, the statute itself makes no reference to any immunity and appears to provide for liability whenever a state actor causes injury by violating federal law.[98] The Court has settled on its answer – the Derogation Canon, which it takes to mean that absent clear language, statutes in "derogation" of the common law should be strictly construed.[99]

In the immunity context, the Court has applied this canon to look beyond the text of Section 1983, finding implicit Congressional intent to codify the common-law good faith defense that the Court found to be extant when Section 1983 was originally enacted.[100] Over time, the Court has confirmed again and again that it is this canon that took it down the road of finding absolute and qualified immunity defenses available to people sued under Section 1983.[101]

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98. *See* 42 U.S.C. § 1983 (stating that "*[e]very* person" who violates the constitutional rights of another "*shall* be liable to the party injured") (emphasis added).

99. The Court did not refer specifically to the Derogation Canon in *Tenney* or in *Pierson*, but both decisions emphasized the assumption behind the Canon: that had Congress meant to abrogate common-law principles via Section 1983 it would have stated so explicitly. *See Pierson*, 386 U.S. at 554-55; *Tenney*, 341 U.S. at 376. Moreover, the dissent in *Pierson* recognized the majority's reasoning as based on the Derogation Canon, *see Pierson*, 386 U.S. at 561 (Douglas, J., dissenting), the parties' arguments centered on the Canon, *see* Br. For Respondents, Pierson v. Ray, at 34 (U.S. Nov. 11, 1996), available at 1966 WL 115420, and subsequent cases have clarified that the current Court grounds its immunity doctrine on the Canon, *see supra* note 58 (collecting cases).

100. *See Pierson*, 386 U.S. at 554-55

101. *See supra* note 57 (collecting cases).

The remainder of this Article is devoted to why the Court's reliance on this canon is misplaced and what consequences flow from that conclusion.[102] As I show below, using the canon to import a common-law defense for a novel remedial statute like Section 1983 is unprecedented, and even were the Derogation Canon appropriate for the task, explicit text makes clear that the Reconstruction Congress meant to displace state law immunities such as the one initially applied in *Pierson*. The upshot is that, rather than mediate Section 1983 liability against the backdrop of the common-law immunities extant during Reconstruction, as Justice Thomas and some academics might argue,[103] qualified immunity and some aspects of absolute immunity[104] simply are not applicable in any form in Section 1983 litigation. The Court's continued application of the defense has no basis in text, history, or doctrine – it is an example of the exercise of illegitimate judicial power in the face of contrary legislative text and intent.

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102. Of course, one might argue that the Derogation Canon is misplaced for different reasons. We might choose to understand Section 1983 as a statute in furtherance rather than in derogation of the common law, seeking to secure the effective enforcement of law against government officers who were already subject (in theory) to its limitations. If so, perhaps different canons, with different implications for the role of common law, would follow, but this exploration is beyond the scope of this paper.

103. Baude, *supra* note 6, at 77 (2018) (describing as "extreme" the argument that Section 1983 permits no immunities and making the more limited argument that the Court's qualified immunity doctrine departs "from ordinary principles of legal interpretation.")

104. As I discuss below, there are colorable arguments that both legislative and judicial immunities stand on distinct and more secure footing than qualified immunity or absolute prosecutorial immunity. *See infra* notes 235-237.

Significantly, this means that no action by Congress is necessary to reform Section 1983, even if it would be welcomed by many advocates.[105]

## II.

## AN INTELLECTUAL AND DOCTRINAL HISTORY OF THE DEROGATION CANON

The Derogation Canon has a checkered history. Criticized by commentators since the mid-nineteenth century, it nonetheless has played a meaningful, albeit limited, role in the Supreme Court's statutory interpretation jurisprudence. In this Part, I first trace the history of scholarly treatment of the canon before turning to how it has been deployed by the Supreme Court. Both commentary and case law demonstrate that, even had Reconstruction legislators been aware of the Derogation Canon, they would have had no reason to think that it would apply to incorporate common-law defenses into Section 1983. Nor have developments subsequent to Reconstruction made the canon any more applicable to the Civil Rights Act of 1871.

### *A. Scholarly Treatment of the Derogation Canon*

For more than a century, the Derogation Canon has been subjected to trenchant criticism. Whether viewed as a substantive means to privilege common

105. As I discuss *infra* notes 282-285 and accompanying text, stare decisis principles are at their peak when the question involves one of longstanding statutory interpretation. But there are notable examples, including from Section 1983, of the Court overcoming this "super" stare decisis. *See*, *e.g.*, *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978) (overruling 1961 decision interpreting Section 1983, in absence of legislative action).

law because of its superiority to statutory law or as a tool for discerning legislative intent, commentators have found little to defend. The late Justice Antonin Scalia, writing with Bryan Garner, rejected it as "a relic of the courts' historical hostility to the emergence of statutory law."[106] But Justice Scalia's view was as common during Reconstruction as it was when he wrote almost 150 years later. Theodore Sedgwick's influential 1874 treatise on interpretation criticized the canon as a creature of the judicial belief that common law was "the perfection of human wisdom," to be jealously guarded against parliamentary intrusion.[107] In Sedgwick's view, "modern courts and judges" should realize that the doctrine does not account for the "enormous changes in the relations between the courts and the Legislature which have taken place since the rule was promulgated." [108]

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106. Scalia & Garner, *supra* note 21, at 318.

107. Theodore Sedgwick, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 270 (1874). Sedgwick's treatise was the first American text addressing the topic of statutory interpretation and remained influential into the mid-20th century. Jack L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47, 76 & n.92 (1997).

108. Sedgwick, *supra* note 107, at 270. Well before Sedgwick lodged his criticism of the common law, David Dudley Field was prompted to codify New York civil procedure in part because of emerging displeasure with common law rulemaking. *See* Kellen Funk, *Equity without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. LEGAL HIST. 152, 159-60 (2015). New York's eponymously named Field Code emerged from these efforts in 1848 and would go on to influence procedure throughout the United States. *Id.* at 152-53; *see also Kellen*

If ever the Derogation Canon served a purpose, Sedgwick maintained, it had "entirely passed away" by the time of Reconstruction.[109] The better rule, per Sedgwick, and one that courts had coalesced around, was that remedial statutes, even ones in derogation of the common law, should be liberally construed,[110] and that if the Derogation Canon had any value at all, it was only to protect personal liberty.[111] Otherwise "the rule has become obsolete; the form of verbal reasoning which once supported it has vanished; and the rule itself should be

*Funk & Lincoln A. Mullen, The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132, 149-150 (2018) (using digital text analysis to map influence of Field Code).

109. Sedgwick, *supra* note 107, at 270.

110. *Id.* As one example, Sedgwick argued that the Married Women's Property Acts, which were adopted in many jurisdictions between 1870-1880 to expand the property rights of married women, should be applied "fairly and reasonably according to their spirit" because of their remedial nature. *Id.* at 271.

111. *Id.* (**"**To this extent the rule is in the highest degree valuable, not because such statutes 'are in derogation of the common law,' but because they oppose the overwhelming power of the government to the feeble power of resistance of the individual, and it is the duty of courts under such circumstances to guard the individual as far as is just and legal, or, in other words, to preserve the individual from having his personal rights taken away by any means that are not strictly legal.")

abolished."[112] This also was the position advanced in the first American treatise on negligence law, published during Reconstruction.[113]

Even treatise authors who were more generous to the canon, and who saw it as a means to discern unclear legislative intent, such as Sir Fortunatus Dwarris,[114] opined that statutes that are directed to "public utility" (by which Dwarris seems to be referring to the general public welfare) "ought to receive the most liberal and benign interpretation, in accordance with the maxim *ut res magis valeat quam pereat*."[115] Dwarris recognized that, where legislation

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112. *Id.* at 271; *see also id.* at 274 **(**"It would appear, therefore, that the doctrine that statutes in derogation of the common law are to be strictly construed, has now truly no solid foundation in our jurisprudence; and, though it will long, no doubt, be familiar to the forensic ear, that there is really no reason whatever why the innovating statutes of our day should be regarded with any peculiar severity.").

113. *See* Thomas G. Shearman & Amasa A. Redfield, TREATISE ON THE LAW OF NEGLIGENCE §300, at 367-68 (1st ed. 1869) (arguing that wrongful death statutes which provided cause of action unknown at common law "should be liberally construed in furtherance of [their] object, which is to prevent wrongdoers from escaping through the death of their victims."). As one court explained, even if instantaneous death extinguished a wrongful death cause of action at common law, this limitation did not survive the passage of a wrongful death statute. Murphy v. New York & N.H.R. Co., 30 Conn. 184, 188 (1861).

114. Although Dwarris was not American, his treatise was also considered influential in the United States in the nineteenth century. Richard A. Danner, *Justice Jackson's Lament: Historical and Comparative Perspectives on the Availability of Legislative History*, 13 DUKE J. COMP. & INT'L L. 151, 174 (2003).

115. Sir Fortunatus Dwarris, A GENERAL TREATISE ON STATUTES, 203 n.20 (1871); *see also id.* at 186 ("When a statute alters the common law, the meaning shall not be strained beyond the words, except in cases of public utility . . . "). The maxim referred to by Dwarris is Latin for the proposition that

addressed an issue not covered by the common law, as did Section 1983, determining the ends of the act can be discovered "from the cause or necessity of making the act; hence the direction to inquire into the *mischief* against which the common law had not provided."[116]

J.G. Sutherland's 1891 treatise on statutory interpretation, like Dwarris', gave the canon some credence, but consistent with the case law summarized below, focused on statutes that "take away a common-law right, remove or add to common-law disabilities, or provide for proceedings unknown . . . to [the common law]."[117] Sutherland included numerous cites at each point, but did not discuss common-law defenses; his focus instead was on common-law "rights"

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it is better for a thing to have effect than to be made void. Although Dwarris does not define what is encompassed by statutes directed to "public utility," in other parts of his treatise he appears to distinguish between laws which are in the public interest and laws which are meant to favor "particular individuals." *See id*. at 141 (summarizing "Domat's Rules" of interpretation); *id*. at 405 (in the context of takings of private property, referring to "[t]he support of government, and other objects of public utility promoted by taxation. . . .").

116. *Id.* at 186 (emphasis in original). Samuel Bray argues that the "mischief rule" has been widely misunderstood but that it serves two useful purposes: (1) it helps provide a justification for how broadly to interpret the statutory text; and (2) it helps advance interpretations that "prevent a clever evasion that would perpetuate the mischief." Samuel L. Bray, *The Mischief Rule*, 109 GEO. L. J. 967, 970 (2021).

117. J.G. Sutherland, STATUES AND STATUTORY CONSTRUCTION (1st ed. 1891), Vol. 2, §400, at 510.

and "proceedings."[118] The former included property rights and rights of action, while the latter principally referred to common-law rules of evidence.[119]

Twentieth century commentators were no more enamored with the Derogation Canon.[120] Roscoe Pound, writing in 1908, recognized its obsolescence and its grounding in an era of judicial supremacy. He defended it in limited application, say to guide courts away from giving a statute an interpretation that would make it unconstitutional.[121] Beyond that, he wrote "it is without excuse and is merely an incident of the general attitude of courts toward legislation."[122] From Pound's perspective, its survival was rooted in "judicial jealousy of the reform movement; and . . . it is wholly inapplicable to and out of place in American law of today."[123]

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118. *See* id. at 510-13.

119. *See id.*

120. *See also* Sinclair, *supra* note 25, at 939-40 (describing weakening of support for canon since the turn of the 20th century).

121. Pound, *supra* note 19, at 387.

122. *Id.*

123. *Id.* at 388; *see also* Charles D. Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 772 (1965) (describing common law as "based on reasoning and presupposes . . . that its determinations are justified only when explained or explainable in reason."); Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 875 (1991) ("A century ago, statutes were considered intrusions into the pristine order of the common law"); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 33-35 (1983) (discussing "conservative" position of judges between 1870 to 1940 that "common law private rights were constitutionally

Pound observed that for centuries, Roman law recognized that written text was the default, with common law "a mere makeshift to which men resorted for want of enactment to prevent a failure of justice."[124] According to Pound, judge-made law overtook this tradition in England around the seventeenth century, in large part due to the relative "paucity" of legislation.[125] This, combined with the tradition of judicial review for unconstitutionality in the United States led to a conception of the statute as "something exceptional and more or less foreign to the body of legal rules in which legislation had endeavored to insert it."[126] In Pound's view, if the canon ever was justified, it was when the courts stood between the individual and the Crown and "protected the individual from the state when he required that protection."[127] When deployed against legislation enacted by popularly elected body, however, that justification was less compelling.[128] And to the extent that modern authors have located in the canon a notice-based justification for those who face new standards of liability,[129] it

protected against collective interference unless the legislation could be shown to be closely related to the accepted police power goals of health, safety, or morals.").

124. Pound, *supra* note 19, at 388-89.

125. *Id.* at 389.

126. *Id.* at 390.

127. *Id.* at 403-04.

128. *Id.*; *see also* Ernest Bruncken, *The Common Law and Statutes*, 29 YALE L. J. 516, 520 (1920) (suggesting that Derogation Canon was best understood as a direction that courts should readd statutes as in pari materia with common-law principles).

129. Sinclair, *supra* note 25, at 939,

would be difficult to conclude that state actors were deprived of that notice with passage of the Reconstruction Acts.

Writing decades after Pound, shortly before *Tenney* was decided, Jefferson B. Fordham and J. Russell Leach examined the Derogation Canon anew and came to a similar conclusion as prior commentators.[130] Although Fordham and Leach differed somewhat with Pound as to whether the canon was a uniquely American construct,[131] they shared his view that it was indefensible as a general matter.[132] As they observed, even if some common-law principles might withstand scrutiny better than some statutory innovations, that does not establish common law's presumptive superiority to statutory law.[133] In short, over the course of 150 years, commentators have cast doubt on the utility of the Derogation Canon, particularly as applied to remedial statutes such as Section 1983.

### *B. The Derogation Canon in Nineteenth Century Caselaw*

Critical commentary aside, the Derogation Canon was influential at times in the nineteenth century. The United States Supreme Court first adverted to the canon in 1797 in *Brown v. Barry*,[134] a case in which the defendant argued that a claim on a debt, authorized by a Virginia statute passed in 1748, was not viable

130. Fordham & Leach, *supra* note 20, at 440.

131. *Id.* at 440-41.

132. *Id,* at 441-44 (reviewing and refuting justifications for Derogation Canon).

133. *Id.*

134. 3 U.S. 365, 367–68 (1797).

because the Virginia legislature had subsequently repealed the 1748 act.[135] The Supreme Court's resolution of this issue was complex, but turned in part on its holding that a 1789 Virginia law should be construed strictly inasmuch as it was "in derogation of the common law."[136] The upshot was that, by giving the 1789 statute a limited construction, the Court held that the 1748 statute was still in effect and therefore authorized the plaintiff's claim.[137] Thus, from the outset, the canon was used to amplify common-law *claims*, not common-law defenses.

A review of each and every Supreme Court decision[138] addressing the Canon in the decades after *Brown* shows that the Canon occasionally was relied upon in three categories of cases: (1) those involving novel procedural devices; (2) those involving statutes that arguably interfered with common-law property rights; and (3) those in which, as in *Brown*, a plaintiff sought to bring a common-law *claim* that the defendant argued had been displaced by a statute.[139] But none of the case law leading up to and surrounding Reconstruction would have given

135. *Id.*

136. *Id.* at 367.

137. *Id.*

138. To unearth and synthesize every relevant decision, I searched Westlaw's database of Supreme Court opinions for different formulations of the Derogation Canon, including: (1) derogate! /s "common law"; (2) "common law" /s default /p legislat!; and (3) presum! /s "common law" /p legislat!.

139. During this time period, courts defended common law in the criminal context as well, objecting to a turn towards constitutions and statutes as if they "aboli[shed] . . . every rule of action preceding it, and the commencing life anew, without the benefit of a single practical lesson of wisdom derived from our predecessors, or even from ourselves," *State v. Danforth*, 3 Conn. 112, 114 (1819) (Hosmer, C.J.).

legislators any indication that courts would sub silentio incorporate common-law defenses into a newly created cause of action like Section 1983.

In the early nineteenth century, most cases applying the Canon fell into the first category. For example, lawyers pressed the argument, without success, that statutes authorizing so-called "summary proceedings" should be strictly construed because they were in tension with common-law procedures that provided for a more fulsome hearing.[140] The canon also was implicated in cases concerning the process by which judgment was executed,[141] or the ability to bring joint actions.[142] As procedural rules evolved, the court was confronted with arguments that such rules, whether they be of evidence,[143] discovery,[144] or

140. *See, e.g.*, *Peyton v. Brooke*, 7 U.S. 92, 96 (1805) (argument by counsel that canon applied to procedure of summary proceeding by motion); *Stuart v. Laird*, 5 U.S. 299, 301–02 (1803) (argument by counsel that canon applied to Virginia law providing summary remedy); *Wilson v. Mason*, 5 U.S. 45, 54 (1801) (argument by counsel that statute regarding summary proceeding should be strictly construed).

141. *Mitchell v. St. Maxent's Lessee*, 71 U.S. 237, 243–44 (1866) (applying canon in context of execution of judgment).

142. *Fullerton v. Bank of U.S.*, 26 U.S. 604, 607 (1828) (argument by counsel that canon applied to ability to bring joint action "against several persons, on several distinct and dissimilar contracts").

143. *Moore v. United States*, 91 U.S. 270, 273–74 (1875) (referring to common-law rules of evidence); *Smith v. United States*, 30 U.S. 292, 300 (1831) (applying canon in context of rules of evidence).

144. *Shutte v. Thompson*, 82 U.S. 151, 161 (1872) (applying canon in context of discovery – strictly construing statute regarding formalities necessary to take a deposition); *Harris v. Wall*, 48 U.S. 693, 704 (1849) (same); *Bell v. Morrison*, 26 U.S. 351, 355–56 (1828) (same).

jurisdiction,[145] should be strictly construed when in derogation of common-law rules. In some cases, these arguments held sway and in others they were rejected,[146] but none of these cases concerned common-law defenses. The upshot of these cases was that litigants could claim some legitimate reliance interest in the expectation that common-law procedures would be followed.[147]

Notwithstanding the occasional case in which the Derogation Canon held sway, as statute law proliferated over the course of the nineteenth century, the Supreme Court gave greater consideration to indications that legislators intended

145. *Turner v. Fendall*, 5 U.S. 117, 124 (1801) (argument by counsel regarding application of canon in context of jurisdiction); *Voorhees v. Jackson, ex dem. Bank of U.S.*, 35 U.S. 449, 458–59 (1836) (argument by counsel that exercise of personal jurisdiction by attachment, being in derogation of common law, should be strictly construed).

146. In *Turner*, for example, the Court rejected application of the canon, giving the statute a reasonable construction even though it was "penal" and in derogation of the common law. 5 U.S. at 121. In *Gilpin v. Page*, 85 U.S. 350 (1873), the canon was discussed in the context of service of process, with the Court strictly construing a statute that authorized constructive service by publication in place of personal service, because "every principle of justice exacts a strict and literal [compliance] with the statutory provisions." *Id*. at 369-70.

147 This could carry with it some implicit expectation that legislators will give clear and adequate notice when they mean to displace the common law. *See, e.g.*, Sinclair, *supra* note 25, at 939 (arguing that if Derogation Canon "has any continuing force, it is on its alternative justification, the principle of notice."). Given how sharply the Reconstruction Acts meant to displace existing relationships between state actors and federal power, however, *see infra* notes 225-227, and how broadly legislators understood Section 1983 to apply, *see infra* notes 247-250, state officers had adequate notice that the Civil Rights Act of 1871 required adherence to constitutional norms.

procedural innovation. In *Metro. R. Co. v. Moore*,[148] for example, the Court considered the question whether newly enacted statutes reorganizing the courts of the District of Columbia should be read to abrogate the prior practice in D.C. prohibiting certain appeals from denials of motions to set aside a verdict as against the weight of the evidence. The lower court had held that no appeal could be brought because the practice in D.C. prior to the new act would have been to dismiss for lack of jurisdiction an appeal of a denial of a motion based on "insufficient evidence."[149] The Supreme Court acknowledged that this had been the practice in D.C. and Maryland prior to the reorganization of the D.C. Courts, but found that the canon disapproving interpretations in derogation of common-law principles was inappropriate because (1) Congress had meant to introduce into D.C. a "new organization of its judicial system" modeled on New York's judiciary and (2) therefore Congress meant to adopt the laws of New York with respect to this question, which would permit the appeal.[150] By 1887, then, the Supreme Court accepted that legislatures could innovate in contravention of common law expectations about procedure.

The second category of cases in which the Derogation Canon played a role implicated reliance interests more directly: those involving common-law property rights and their interaction with statutory innovations. One of the first cases to rely on the canon in this way was the 1812 decision in *Fairfax's Devisee*

148. 121 U.S. 558 (1887).

149. *Id.* at 564.

150. *Id*. at 570-72.

*v. Hunter's Lessee*,[151] in which the Court held that a Virginia statute should not be read to extinguish a common-law claim to title in real property. The most odious of these cases is *Prigg v. Pennsylvania*, in which the Court held unconstitutional a Pennsylvania law prohibiting enslaved people from being taken out of the state and returned into slavery.[152] Although the opinion focused on the effect of the Fugitive Slave Act of 1793 and the Constitution's Fugitive Slave Clause, the Court also adverted to the common-law right of a slaveowner to seek a remedy for the "wrongful[]" detention of enslaved people.[153] But even in less significant cases, counsel argued that statutes implicating property rights should be strictly construed.[154]

These first two categories of cases were the ones that occupied the field for the vast majority of the nineteenth century. Prior to Reconstruction, the Court also invoked the canon, though rarely, in a third kind of case which also implicated reliance interests: those in which a statute interfaced with common-

151. 11 U.S. 603, 622–23 (1812).

152. 41 U.S. 539 (1842).

153. *Id.* at 613. It is noteworthy that Pennsylvania's Attorney General argued in vain that the slave states' summary proceedings authorizing recapture of enslaved people should be strictly construed as in derogation of the common law. *Id.* at 600 (argument by counsel).

154. *McCool v. Smith*, 66 U.S. 459, 470–71 (1861) (applying canon in context of validity of title necessary for commencement of ejectment action); *Wheaton v. Peters*, 33 U.S. 591, 599 (1834) (argument by counsel that constitutional provision which takes away a "private right" or property should be strictly construed); *Clarke's Lessee v. Courtney*, 30 U.S. 319, 329–30 (1831) (argument by counsel that canon should apply to statute regarding relinquishing title to land to the commonwealth).

law rights of action. During this time the Court never even hinted, let alone held, that common-law defenses are incorporated into statutory causes of action absent express legislative direction to the contrary. Indeed, though not concerning an affirmative defense, *United States v. Stansbury*[155] is an early example of the Court declining to incorporate a common-law barrier to relief even where Congress was silent on the issue. The case involved an action of debt brought by the United States against the debtor and his two sureties. The United States had agreed to release the debtor from prison pursuant to a statute that authorized the Treasury to discharge a debtor from imprisonment upon receiving a conveyance of the debtor's estate for the benefit of the United States.[156] At common law, the voluntary release of a debtor from custody constituted a release of the judgment itself, meaning that a creditor could not seek a remedy from the surety of the released debtor.[157] The sureties in *Stansbury* argued that, given that the United States had voluntarily released the creditor from custody, as a matter of common law the government was barred from proceeding against the sureties.[158] The Court rejected that argument because the statute's language made clear that its purpose was to discharge the debtor from custody, with the judgment against the debtor to remain valid and capable of being satisfied in the future.[159] That the

155. 26 U.S. 573 (1828).

156. *Id.* at 575.

157. *Id.*

158. *Id.*

159. *Id.* at 575-76.

statute was silent as to the common law's treatment of sureties was of no moment, especially because the common-law rule was "occasioned by a technical rule, originating in remote ages; which has never been applied to a statutory discharge of the person."[160]

While one can find stray comments in the Court's decisions about not presuming that a statute makes "any alteration in the common law, further or otherwise, than the act expressly declares," these did not arise in the context of common-law defenses but in the context of claims or rights that existed at common law. The Supreme Court's 1834 decision in *Wheaton v. Peters*,[161] is to this effect, in which the Court rejected the argument that a statute had any discernable impact on a common-law *right*. This is the context in which its general language that "[s]tatutes are not presumed to make any alteration in the common law, further or otherwise, than the act expressly declares."[162] The Court was unwilling to read a statute to "restrain" a "thing" (which the Court described interchangeably as a right) that exists at common law absent express language.[163] This rationale lines up with the case law of the time, in that it recognized the reliance interests implicated when a statute interferes with a *res*, be it property

160. *Id.* at 575.

161. 33 U.S. 591, 692 (1834).

162. *Id.*

163. *Id.*

or a cause of action.[164] Defenses, by contrast, were not conceived of as "rights" deserving of protection from derogation.[165]

In late nineteenth century cases, arising both during and after Reconstruction, the Supreme Court's Derogation Canon cases increasingly arose in this third setting: those involving the relationship between statutes and common-law rights of action. The issue usually presented in either of two forms: cases in which a defendant alleged that a statute had operated to displace a common-law claim; or cases in which the parties were grappling with how to interpret statutes that created remedies and rights of action.

As to the first, the Court relied on the canon to generally preserve common law claims for relief, in the absence of express words to the contrary in the statute.[166] Illustrative of the approach to common-law rights is *Meister v.*

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164. Modern due process cases are consistent with this insight, inasmuch as the Court has explicitly recognized that a "cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (*citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

165. *See*, e.g., Shearman & Redfield, *supra* note 114, §300, at 367-68 (arguing that wrongful death statutes which provided a remedy for instantaneous death did not run afoul of derogation canon because they were not in derogation of a claim, even though at common law the immediacy of death would have been a defense against the claim); *Murphy v. New York & N.H.R. Co.*, 30 Conn. 184, 188 (1861).

166. *The Main v. Williams*, 152 U.S. 122, 132–33 (1894) (holding that statutes should be construed to derogate the rights of claimants as little as possible and holding that, in the absence of express words to the contrary, statute would not be construed to limit shipowner's right to damages).

*Moore*,[167] where the Court held that a marriage was valid even though it was not solemnized before a minister or magistrate, as provided by Michigan law. The Court noted that at common law, marriage is a contract that can be formed "*per verba de prasenti*,"[168] and that if a statute is to "take away a common-law right," it must do by plain expression.[169] On the Court's view, a statute that merely directs marriages to be performed in the presence of certain people should not be construed to be a declaration that no marriage is valid unless performed in this way.[170]

In 1879, the Supreme Court applied the canon along the same lines in the context of the rights against misappropriation of personal property, other than money.[171] In *Shaw*, the statute in question had made bills of lading negotiable in the same manner as bills of exchange. One of the parties maintained that this abrogated common-law rights of action for misappropriation of personal property, such that a purchaser of a bill of lading for cotton had a right to the cotton even if the purchaser had reason to believe that the seller of the bill of lading did not have a right to sell it (in the actual case, the bill of lading had been

167. 96 U.S. 76 (1877).

168. Loosely translated as by means of "words of present assent." *Id.* at 79.

169. *Id.* at 78-79.

170. *Id.* ("A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses.").

171. *Shaw v. Merchants' Nat. Bank*, 101 U.S. 557, 565–66 (1879).

stolen from the bank which was the legitimate holder of the bill of lading).[172] But the Court rejected that contention based on the canon, holding that simply because the statute treated bills of exchange the same as bills of lading for the purposes of being negotiable in a similar manner, that does not mean that it meant they were to be treated the same for all other purposes (namely rights that arose out of misappropriation).[173]

Cases like *Shaw* and *Meister* are consistent with the pre-1871 case law involving statutory displacement of common-law rights or property interests. While they signify the Supreme Court's concern that statutes not unduly undermine preexisting rights, they do not speak to the Derogation Canon's relevance to common-law defenses, which did not implicate reliance interests. As the Supreme Court explained in 1885, when it held that a statute of limitations defense was not a "property" right protected by the Fourteenth Amendment, even if the "most liberal extension" of the meaning of property could include "choses in action" or "incorporeal rights," it could not encompass a defense to pay a judgment.[174]

Cases of the second sort, involving the relationship between statutes and the common law where a statute created a new type of right for enforcement, initially vacillated between the canon that remedial statutes should be broadly

172. *Id.* at 560-61 (summarizing argument of counsel)

173. *Id.*

174. *Campbell v. Holt*, 115 U.S. 620, 629 (1885) ("We are unable to see how a man can be said to have *property* in the bar of the statute as a defense to his promise to pay.") (emphasis in original).

construed and the canon that statutes that enforce a right unknown at common law should be "followed with strictness."[175] An example of such strict construction can be found in *Ross v. Jones*.[176] There the Court applied the canon in the context of remedies against indorsers of a negotiable instrument, noting that "Remedies of a statutory character, where the right to be enforced was unknown at the common law, are to be followed with strictness, both as to the methods to be pursued and the cases to which they are to be applied."[177] *Ross's* logic could arguably apply to Section 1983, given that it created a right unknown at common law, but nothing in *Ross* suggested that strictly construing a statutory right encompasses incorporating common-law defenses. Fifteen years after Ross, however, the Court adopted a more liberal frame in interpreting remedial statutes, stating the "rule [that] though it may be in derogation of the common law, . . . everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it."[178]

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175. *Ross v. Jones*, 89 U.S. 576, 591(1874); *Prather v. Reeve*, 23 Kan. 627, 629 (1880)("When a statute creates a liability, and gives a right not known to the common law, such statute at the same time giving a specific mode for the assertion of the right, as a rule that mode, and that alone must be pursued."); *Lease v. Vance*, 28 Iowa 509, 511 (1870) (interpreting statute concerning obligations to erect maintain or contribute to a partition fence). For a discussion of the tension between the Derogation Canon and the canon that remedial statutes should be broadly construed, *see* sources cited at *supra* note 25.

176. 89 U.S. 576 (1874),

177. *Id.* at 591-92.

178. *White v. Cotzhausen*, 129 U.S. 329, 341–42 (1889) (construing statute concerning assignment of property to creditors) (*quoting Railroad Co. v. Dunn*, 52 Ill. 260, 263 (Ill. 1869)).

Section 1983 would appear to be secure in its status as a "remedial" statute, meant to be construed broadly. As Sinclair summarized the relevant jurisprudence, "[i]f the statute is seen not as imposing a restriction or right or duty on the common law, but as fixing it to cover a new situation or an otherwise unforeseen problem, then it is remedial."[179] Construing remedial statutes liberally meant, in Sutherland's words, "to give effect to it according to the intention of the law-maker, as indicated by its terms and purposes."[180] Section 1983 was enacted as part of a transformative moment in the United States, hardly an example of reinscribing common-law principles.[181]

To sum up, the Supreme Court's use of the Derogation Canon up until and contemporaneously with the Reconstruction Congress betrayed no suggestion that common-law defenses would be incorporated into new statutory causes of action, absent express legislative direction to the contrary. If we take seriously the Court's declaration that its interpretation of Section 1983 is guided by the

179. Sinclair, *supra* note 25, at 943.

180. Sutherland, *supra* note 117, § 415, at 531; *Gibson v. Jenney*, 15 Mass. 205, 206 (1818) (adverting to Derogation Canon but deciding that purpose of the statute--to protect the very poor by allowing a family one cow and one swine exempt from process--would not be served if the family could not eat their slaughtered pig).

181. Sinclair, *supra* note 25, at 946: "whether a judge applies Thrust #2 [derogation canon] or Parry #2 [remedial canon] depends very greatly on whether the judge sees the statute as solving a problem in the common law or imposing legislatively upon it."

understanding of the Reconstruction Congress when it enacted the statute,[182] it follows that legislators at the time would not have expected the Derogation Canon to apply to Section 1983.

### *C. The Derogation Canon from the Twentieth Century to the Present*

Even after Reconstruction, the Derogation Canon has rarely worked to limit the reach of statutory causes of action, other than in the context of Section 1983. Carrying through nineteenth century principles, the Court has expressed particular reluctance to rely on the canon in cases involving remedial statutes like Section 1983.[183] In the context of legislation in aid of seamen, for example, the Court referenced the canon but then said that remedial legislation should be interpreted so as to "effect its purpose . . . to improve the lot of seamen."[184] The Court struck a similar tone in broadly interpreting a statute providing remedies to a railway worker, arguably in derogation of the common law, because the

182. Writing in dissent, Justice Rehnquist explained that the Court had looked to state court decisions at the time Section 1983 was enacted because "[m]embers of the 42d Congress were lawyers, familiar with the law of their time. In resolving ambiguities in the enactments of that Congress, as with other Congresses, it is useful to consider the legal principles and rules that shaped the thinking of its Members." *Smith v. Wade*, 461 U.S. 30, 65–66 (1983) (Rehnquist, J., dissenting).

183. Justice Douglas made reference to this principle when he dissented in *Pierson*. *Pierson v. Ray*, 386 U.S. 547, 561 & n.1 (1967) (Douglas, J., dissenting)

184. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782–84 (1952); *see also Aguilar v. Standard Oil Co.*, 318 U.S. 724, 728-29 (1943) ("The legislation therefore gives no ground for making inferences adverse to the seaman or restrictive of his rights.").

statute indicated an intent by Congress to change existing law and it was remedial in nature and therefore entitled to a broad construction.[185]

Of course, the Court has sometimes had to resolve tension between the Derogation Canon and the need to effectuate legislative intent to change policy, but in line with nineteenth century case law this has arisen in the context of concerns about abrogating common-law claims, not defenses. Thus, the canon has been applied to salvage common-law rights of action in a broad range of claims, from eminent domain,[186] to agent liability,[187] negligence,[188] and excessive charges.[189]

The Court also has had occasion to decide a slightly different question: namely whether to interpret a statute to create a cause of action that had been

185. *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 16-19 (1904); *see also Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930) ("The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure.").

186. *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35–36 (1983) (applying canon to determining whether statute had displaced common-law elements of eminent domain claim).

187. *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304–09 (1959) (rejecting the argument that two federal statutes should be interpreted to limit the common-law right of action against an agent for his negligence).

188. *Norfolk S. R. Co. v. Chatman*, 244 U.S. 276, 279-81 (1917) (summarizing "settled rule of policy" in favor of common-law negligence action).

189. *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 436–37 (1907) (invoking canon to preserve cause of action for excessive charges for cotton seed).

expressly rejected under the common law. Here, too, the Court has taken a similar approach to the question of whether statutes should be read to abrogate common-law rights: read the statute closely for an indication whether the legislature intended to create a new right of action. In *City of Detroit v. Osborne*,[190] the court confronted a case in which the plaintiff argued that there was a right of action against Detroit for failure to properly maintain a sidewalk. No common-law right had ever been recognized in Michigan for any liability arising from the government's failure to properly maintain streets and the like, but in 1879, an act was passed which permitted claims for damages for defective highways, streets, bridges, crosswalks, and culverts. The plaintiff argued that this statute should be construed to permit a cause of action for defective *sidewalks*, but the Court held that "a statutory liability created in derogation to common law cannot be enlarged by construction."[191] The Court also noted that because the act omitted sidewalks, it "left the law in respect to sidewalks not in repair as it was before."[192] The Court took a similar approach in interpreting a statute

190. 135 U.S. 492, 495–96 (1890).

191. *Id.* at 495-96 (cleaned up).

192. *Id.*

creating stockholder liability.[193] State courts also made use of the canon in this way.[194]

By contrast, there are very few cases, other than those involving immunities and Section 1983, in which the Court even considered the argument that a common-law defense must be incorporated to be available as part of a new statutory enforcement scheme.[195] And when the Court has taken up the question

193. *Brunswick Terminal Co. v. Nat'l Bank of Baltimore*, 192 U.S. 386, 388–90 (1904) (applying canon to narrowly construe a statute regarding liability of a stockholder); *see also Michigan Cent. R. Co. v. Vreeland*, 227 U.S. 59, 63–74 (1913) (holding that where Congress legislates pursuant to its enumerated power it displaces state limitations on common-law tort liability).

194. *Devers v. City of Scranton*, 161 A. 540 (Pa. 1932) (applying canon in context of claim for damages for negligence in operation of city fire truck).

195. For these purposes, I have omitted discussion of application of the canon in criminal cases, in which the Derogation Canon functions like a cousin to the rule of lenity. *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 450–53 (1905) (describing the "well known rule" that penal statutes are to be strictly construed in favor of the accused); *In re Swan*, 150 U.S. 637, 649 (1893) (in habeas corpus action, describing exercise of authority to seize liquors without a warrant as in derogation of a common-law right, and therefore to be exercised only "where it is clearly authorized by the statute or rule of law which warrants it."). In *United States v. Sanges*, for example, the Court applied it in favor of a defendant in a criminal case, holding that it would not interpret a statute conferring appellate jurisdiction to confer upon the United States the right to appeal a criminal case "after judgment below in favor of the defendant." 144 U.S. 310, 323 (1892) ("It is impossible to presume an intention on the part of congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States."). The Court based its decision on the long common law tradition, both from England and the several states. *Id.* at 311–12. And in *Bell v. State of Maryland*, 378 U.S. 226 (1964), the Court held that there was a "substantial possibility" that Maryland's highest court would apply the common-law presumption

it has not applied a presumption in favor of the common law. In *Isbrandtsen Co. v. Johnson*,[196] for example, decided 15 years prior to *Pierson*, the Court rejected the argument that a common-law set off defense was available against a seaman's claim for earned wages. The defense was not "prescribed, recognized or permitted" by federal maritime legislation which, because it was remedial in nature, had to be construed liberally in favor of the seamen it was designed to protect.[197] In so doing the Court recognized the Derogation Canon but also held that it had no force in remedial legislation.[198]

To the same effect, in *United States v. Gilman*[199] the Court rejected application of common-law indemnification rules in the Federal Tort Claims Act ("FTCA") context. In *Gilman*, the United States sought to recover from its employee liability the Government had paid to a tort victim pursuant to the

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in favor of reversing pending criminal charges upon the legislative abolition of a crime, notwithstanding a general savings clause that might be read in tension with the common-law rule, because of the Derogation Canon. *Id*. at 232-34 (remanding to state's highest court to decide whether common-law presumption should be overcome). That said, even in the criminal context, common law defenses are unavailable where the Court determines that legislation "leave[s] no doubt" that the defense is inapplicable. *See United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 491-95 (2001) (holding that necessity defense is unavailable in prosecution under Controlled Substances Act).

196. 343 U.S. 779 (1952).

197. *Id.* at 781-82.

198. *Id.* at 783 ("Marine legislation, at least since the Shipping Commissioners Act of June 7, 1872, 17 Stat. 262, should be construed to make effective its design to change the general maritime law so as to improve the lot of seamen.").

199. 347 U.S. 507 (1954).

FTCA. The Government argued that at common law, an employer could seek to be indemnified when its employee's wrongdoing leads to tort liability.[200] And because the FTCA makes the Government liable as if it were a private party, the government reasoned, the common-law rule of indemnity should apply the same to the United States as to a private party. The Court rejected this argument, holding that the question implicated fiscal policy, employee morale, and efficiency, counseling in favor of having Congress address the issue explicitly through legislation.[201]

There are a few twentieth century examples in which the Court held that the common law applied to bar a statutory action, but they are not comparable to the importation of common-law defenses into Section 1983. In one the Court was asked to construe a statute that gave married women the right to sue, separately from their husbands, for breach of contract, protection of property, and to recover injuries for torts committed against them, "as fully as if they were unmarried."[202] The question for the Court was whether this statute abrogated the common-law bar against women suing their husbands for assault and battery. The Court reasoned that had the legislature wished to make such a "radical" intrusion on

200. *Id.* at 508-09.

201. *Id*. at 511-12 ("The selection of that policy which is most advantageous to the whole . . . is more appropriately for those who write the laws, rather than for those who interpret them.").

202. *Thompson v. Thompson*, 218 U.S. 611, 615-16 (1910). The statute at issue in *Thompson* was an example of the Married Women's Property Acts that numerous jurisdictions enacted beginning in the middle of the nineteenth century. *See generally* Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L. J. 1359, 1397-1412 (1983) (describing adoption of laws).

the common law it would have been explicit.[203] Even if one reads *Thompson* as relating to a common-law immunity defense,[204] it did not involve interpretation of a statute like Section 1983 that created a new cause of action.[205] Slightly more germane, in the intellectual property context, the Court held that Congress intended to retain the "first sale" defense in copyright statutes based in part on that common-law doctrine's "impeccable historic pedigree." [206] But the Court reached this conclusion after first considering the statute's text and evidence of legislative intent – the common law status of the good faith defense was relied upon only to confirm the Court's reading of the text and legislative history.[207]

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203. *Thompson*, 218 U.S. at 618. State courts addressed the relevance of similar statutes as well, often to different effect. In 1920, the South Carolina Supreme Court, in *Prosser v. Prosser*, 102 S.E. 787 (S.C. 1920), relied primarily on the state's code of civil procedure to provide a battered wife a tort remedy against her husband, but also cited to the Married Women's Property Act. *Id.* at 788. ("More than this, a wife has a right in her person; and a suit for a wrong to her person is a thing in action; and a thing in action is property, and her property.")

204. Carl Tobias has described the *Thompson* decision in this way. *See* Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 399 (1989). But as one contemporaneous treatise suggested, the Married Women's statutes were viewed by many courts as interfering with a husband's common-law property rights. Sutherland, *supra* note 117, § 400, at 511-12.

205. 218 U.S. at 615-16 (describing statute that gave married women the right to sue and be sued).

206. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538-39 (2013).

207. This is consistent with one case referenced in Sutherland's 1891 treatise in which the court held that a common-law defense was not abrogated by statute, but in that case the statute specifically prohibited the defense for an action of trespass on the case but not for a different form of action – the court acknowledged that the defense was not available for the former but declined to interpret the statute

More typical is the Court's decision in *SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, which rejected application of a laches defense to a patent infringement claim brought within the statutory limitations period under the Patent Act.[208] The Court entertained the defendant's argument that some pre-Patent Act cases in lower federal courts recognized, in dictum, the possibility that laches could be a defense against a damages action for infringement.[209] But it rejected the argument because it held that by setting a specific limitations period Congress had made a determination that laches should not apply,[210] and that even assuming *arguendo* that Congress legislated with common law in the background, the weight of common law authority was that laches did not apply to damages claims.[211]

Other recent cases also suggest the Court's misadventure in *Pierson*. The Court has emphasized that if the Derogation Canon has any meaning it is in areas of law where a statute "clearly covers a field formerly governed by the common law."[212] It has held that even where there is overlap between statutory coverage and the common law, say in RICO claims and common-law fraud claims, there is no presumption that common-law limitations should apply to newly created

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as applying to the latter form of action. *Melody v. Reab*, 4 Mass. 471, 473 (1808) (*cited* in Sutherland, *supra* note 117, § 400, at 511 n.2).

208. 137 S. Ct. 954, 965 (2017),

209. *Id*. at 963-65.

210. *Id.* at 961.

211. *Id*. at 966.

212. *Samantar v. Yousuf*, 560 U.S. 305, 320 (2010).

statutory causes of action.[213] The Court has found that Congress's intent, not just its words, can displace common-law doctrines of preclusion.[214] And it has held that the Derogation Canon is most concerned with common-law rights, not defenses.[215] When it has relied on the canon to incorporate common-law doctrine outside of common-law claims, its cases have concerned not defenses but issues

213. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 652 (2008) (holding that RICO plaintiff asserting fraud need not show reliance even though reliance was necessary for common-law fraud claims); *see also Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.,* 552 U.S. 148, 162 (2008) (rejecting the argument that § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), incorporates common-law fraud).

214. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110 (1991) (rejecting application of common law of preclusion for administrative agency determinations because doing so would be inconsistent with Congress' intent).

215. *United States v. Texas*, 507 U.S. 529, 534 (1993) (applying canon to preserve Federal government's common-law right to collect prejudgment interest on debts owed to it by the States); *Midlantic Nat. Bank v. New Jersey Dep't of Env't Prot.*, 474 U.S. 494, 501 (1986) (holding that Congress did not implicitly abrogate common-law limitations on bankruptcy trustee's abandonment power).

such as fee-shifting,[216] equitable tolling,[217] causation,[218] the availability of punitive damages,[219] and the scope of coverage of statutory rights.[220] What these cases have in common is that they all relate to the remedial scope and claim construction of statutory rights.

At the same time, the Court has broadly enforced causes of action when—as with Section 1983 – legislation expressly creates them, even when the action

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216. *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126-27 (2015) (discussing cases applying canon to narrowly construe fee-shifting provision, where common-law default was "American Rule"); *Fogerty v. Fantasy*, 510 U.S. 517 (1994) (same).

217. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10-11 (2014) (Discussing canon in context of equitable tolling and holding that presumption is that Congress intends for ET to apply to federal statutory claims). To be sure, although equitable tolling doctrine is related to a statute of limitations defense, it presents an opportunity for a plaintiff to overcome a statute of limitations bar. *See, e.g.*, *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (describing general requirements for showing entitlement to equitable tolling). As such, like the other areas in which the Derogation Canon has been applied by the Court, it offers a way of preserving a common-law right to seek relief.

218. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020) ("This ancient and simple 'but for' common law causation test, we have held, supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action.")

219. *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 424–25 (2009) (finding that punitive damages are available for general maritime law because they "have long been an accepted remedy under general maritime law, and because nothing in the Jones Act altered this understanding . . . ")

220. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 n.5 (2014) (discussing common-law roots of "zone-of-interest[s]" requirement for bringing claims for negligence for injuries caused by statutory violations).

would not exist at common law. This is how the Court approached the issue in two turn-of-the-century cases concerning the duty of railroads to their employees. The Court recognized that, where Congress was "not satisfied with the common-law duty and its resulting liability," it could prescribe a new duty by statute.[221] With this new statutory duty, the Court stated that it "need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery, and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible" because the statute, making no mention of these limitations, created an absolute liability.[222]

Consistent with this approach to statutory interpretation, the Court has given Section 1983 and other Reconstruction-era law a broad reading in contexts outside of immunity. In *Griffin v. Breckenridge*,[223] the Supreme Court read Section 1985(3) as applying to private persons because of the meaning of the words "[o]n their face," notwithstanding the common understanding that the Fourteenth Amendment reached only state action.[224] In so doing, the Court noted

221. *St. Louis, I.M. & S. Ry. Co. v. Taylor*, 210 U.S. 281, 294 (1908); *see also Chicago, B. & Q. Ry. Co. v. United States*, 220 U.S. 559, 574 (1911).

222. *Taylor*, 210 U.S. at 294 ("There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance."); *Chicago, B & Q. Ry. Co.*, 220 U.S. at 574.

223. 403 U.S. 88 (1971).

224. *Id.* at 96 (noting that "going in disguise" is not typically associated with state actors).

that its approach with other Reconstruction-era civil rights laws had been to "accord them a sweep as broad as their language."[225]

The Court also has made clear that it views Section 1983 as marking a break with prior law. The Court has spoken of Section 1983 as part of "the basic alteration in our federal system wrought in the Reconstruction era" and a "uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution."[226] The Court read the legislative history of Section 1983 as indicating a desire to protect federally created rights against state hostility, including state court hostility.[227] This was the "very purpose" of Section 1983.[228]

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225. *Id.* at 97 (cleaned up); *cf. United States v. Price*, 383 U.S. 787, 803–04 (1966) (broadly construing criminal provisions of Civil Rights Act of 1866).

226. *Mitchum v. Foster*, 407 U.S. 225, 238–39 (1972).

227. *Id.* at 242.

228. *Id.* Of course, the Court has not read the Reconstruction Acts broadly in every context. In the 19th Century, the *Slaughterhouse Cases*, 83 U.S. 36 (1873), and the *Civil Rights Cases*, 109 U.S. 3 (1883), undermined the impact of Thirteenth and Fourteenth Amendments as well as the Civil Rights Acts. *See* Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1329 (1994) (contrasting promise of Reconstruction Amendments against limitations imposed by Court's nineteenth century jurisprudence); Marianne L. Engelman Lado, *A Question of A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases*, 70 CHI.-KENT L. REV. 1123, 1124-25 (1995) (describing impact of *Civil Rights Cases*); David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1388 & n.69 (2004) (discussing cases). More recently, along with the immunity doctrine discussed in this Article, the Court has limited Section 1983's application to federal statutory rights by only enforcing federal statutes with

To sum up, the Derogation Canon has always stood on shaky footing. But nothing in the Supreme Court's use of the canon supports the direction taken by *Pierson* and its progeny. Rather than amplifying common-law defenses, the canon has almost always been concerned with protecting common-law claims or rights. Moreover, where statutes explicitly create rights of action unknown at common law, as with Section 1983, the Derogation Canon falls away. Whether viewed through the current understanding of the canon's role, or more importantly, through the lens of a Reconstruction legislator, the fundamental premise of the Supreme Court's qualified immunity jurisprudence has no foundation.

## III.

## THE LOST TEXT OF SECTION 1983

The Supreme Court's Section 1983 immunity jurisprudence has another failing, however. For even if the Derogation Canon is viable and applicable to remedial statutes like Section 1983, it is something of a clear statement rule: common law should not be displaced by statute, *absent explicit command by the Legislature*. But as I will show in this Part, the Civil Rights Act of 1871 did explicitly abrogate common-law immunities. Although the relevant text was never included in the codified version of Section 1983, that was a product of the

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an implied cause of action. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-94 (2002); Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 351 (1996).

first Reviser of the Federal Statutes' unauthorized alteration of positive law when he published the first version of the Revised Statutes in 1874. What's more, accounting for the original text of Section 1983 makes sense of the legislative history and overall framework of the Civil Rights Act of 1871. The Court's flawed immunity jurisprudence only creates conflict with those elements of the law.

### *A. The Civil Rights Act of 1871's Abrogation of Common-Law Defenses*

The version of Section 1983 one finds in the United States Code appears silent as to any common-law defenses:

> 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. . . .[229]

But the Civil Rights Act of 1871 as enacted contained additional significant text, what I call the Notwithstanding Clause. In between the words "shall" and "be liable," it contained the following clause: "*any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*."[230]

229. 42 U.S.C. § 1983.

230. Civil Rights Act of 1871, ch.22, §1, 17 Stat. 13 (1871).

And it is a fair inference that this clause meant to encompass state common-law principles.[231] Senator Thurman, speaking in opposition to Section 1 of the 1871 Act (what is now Section 1983) clearly understood that "custom or usage" was equivalent to "common law."[232] In other words, the 1871 Congress created liability for state actors who violate federal law, *notwithstanding* any state law to the contrary.[233]

Neither the Supreme Court nor its scholarly critics have ever grappled with the significance of the Notwithstanding Clause. Its implications are unambiguous: state law immunity doctrine, however framed, has no place in Section 1983. On its face, this directly undermines *Pierson*, which incorporated a good faith immunity into Section 1983 based solely on Mississippi state law.[234]

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231. This, after all, was the basis for the Court's overruling of *Swift v. Tyson*, 41 U.S. 1 (1842), in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). *See also Western Union Telegraph Co. v. Call Pub. Co.*, 181 U.S. 92, 102 (1901) (citing Black's Law Dictionary for proposition that common law springs from "usages and customs").

232. CONG. GLOBE, 42d Cong., 1st Sess., App. 217 (1871).

233. One also might think the Supremacy Clause would implicate qualified immunity when state law common-law immunities are applied to bar Section 1983 relief. The Supreme Court has addressed the potential conflict by pointing to the "special federal policy considerations" that support qualified immunity. Some scholars, dissatisfied with this explanation, have offered a different account. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 858-61 (1998) (suggesting that Supremacy Clause issues are not raised by qualified immunity because unconstitutional conduct by state officials is not the equivalent of state "law" and thus does not threaten the supremacy of federal law).

234. *Pierson*, 365 U.S. at 557.

*Wood v. Strickland*, which expanded *Pierson*'s qualified immunity to school board officials, also leaned heavily on state common-law immunity doctrine.[235]

This is not to say that every common-law immunity recognized during the nineteenth century was a creature of *state* law. The Court's opinion in *Tenney*, for example, canvassed British tradition as well as federal and state constitutions to conclude that legislative immunity was deeply enshrined in common law.[236] But the vast majority of immunity doctrine, to the extent it existed at all, was sourced in state law, especially for the state actors who would be subjected to Section 1983 liability.[237] To the extent the Reconstruction Congress even contemplated that these defenses would apply to the Civil Rights Act of 1871, the Notwithstanding Clause would have sufficed to assuage those concerns.

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235. *See* 420 U.S. 308, 318-20 & nn.9 & 12 (1975) (collecting state court cases). It summarized those sources as standing for the proposition that absolute immunity was not justified but that a qualified immunity was appropriate. *Id.* at 320.

236. 341 U.S. at 372-76.

237. *See, e.g.*, Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1368-75 (2021) (surveying Supreme Court doctrine, treatises, and state law supposedly establishing qualified immunity). As Jim Pfander has shown, Keller's treatment of the common-law doctrine is significantly flawed, *see* Pfander, *supra* note 85, but even if one accepts Keller's claims at face value, the federal law he identified relates only to the immunity of *federal* officers. *See Wilkes v. Dinsman*, 48 U.S. 89, 129 (1849) (claims against naval commander); *Kendall v. Stokes*, 44 U.S. 87, 98 (1845) (claims against federal Postmaster); *Otis v. Watkins*, 13 U.S. 339, 356 (1815) (concerning claims against federal customs inspector); Keller, *supra*, at 1368-69 (discussing *Otis*, *Kendall*, and *Wilkes*). The remainder of the sources Keller relies on for his claims all are based on state court decisions and treatises summarizing state court decisions. Keller, *supra*, at 1369-75.

Notably, the distinction between Section 1983 as enacted and as reflected in the United States Code is not the product of any positive lawmaking.[238] Rather, the version of the statute we find on the shelves of any law library is the product of a decision by the first Reviser of federal statutes to, for unclear reasons, remove the italicized language when the first edition of the Revised Statutes of the United States was published in 1874.[239] Although the Revised Statutes were supplemented and corrected over time until the first United States Code was published in 1926,[240] the Reviser's error in omitting the

238. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 510 (1939) (stating that Reviser's changes were "not intended to alter the scope" of Section 1983); REVISED STATUTES OF THE UNITED STATES, Preface, at v (1878) (stating that Reviser had no authority to make substantive changes); An act to Provide for the Preparation and Publication of a New Edition of the Revised Statutes of the United States, 19 Stat. 268, ch. 82, §4 (1877), as amended by 20 Stat. 27, ch. 26 (1878) (stating that revised statutes are considered "legal" evidence of laws, but not "conclusive").

239. *See* REVISED STATUTES OF THE UNITED STATES Title XXIV, § 1979, at 348 (1874). Because of complaints about the accuracy of the 1874 Revised Statutes, Congress authorized the appointment of a new Reviser to prepare a second edition of the Revised Statutes, which was published in 1878. *See The Revised Statutes of the United States*, LIBRARY OF CONGRESS, available at https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/ [https://perma.cc/S3ME-KDYV](posted July 2, 2015). The 1878 version of the Revised Statutes contained the same error as the 1874 version with respect to what we now know as Section 1983. *See* REVISED STATUTES OF THE UNITED STATES Title XXIV, § 1979, at 347 (1878).

240. *See The Revised Statutes of the United States*, LIBRARY OF CONGRESS, available at https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/ (posted July 2, 2015).

Notwithstanding Clause from the reported version of the Civil Rights Act of 1871 was never corrected.

The many errors contained in the first version of the Revised Statutes prompted consternation, but they nonetheless constitute "legal evidence" of federal law.[241] Congress made clear that subsequent versions of the Revised Statutes can be taken only as "prima facie" evidence of the law, which can be rebutted by pointing to the originally-enacted version, unless Congress has specifically adopted the codification as part of the laws of the United States.[242] Thus, generally speaking, when there is a conflict between the law as codified and the Statutes at Large, the Statutes at Large control.[243] However, because the

241. *See* Will Tress, *Lost Laws: What We Can't Find in the U.S. Code*, 40 GOLDEN GATE U. L. REV. 129, 135 (2010).

242. *See* 1 U.S.C. § 204(a) ("The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States."). Congress has enacted into positive law some of the Titles in the United States Code, but not Title 42, contained Section 1983. *See* Office of the Law Revision Counsel, United States Code, https://uscode.house.gov/browse.xhtml [https://perma.cc/9R58-N3VL] (last visited July 15, 2021).

243. *See U.S. Nat'l Bank of Oregon v. Indep. Insurance Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) ("Though the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law, it is the Statutes at Large that provides the legal

first Revision, erroneous as it was, is not subject to this limitation, the Notwithstanding Clause is not formally positive law, but still speaks powerfully to Congress's intent that any immunity grounded in state law have no application to the cause of action we now know as Section 1983.

### *B. The Notwithstanding Clause and the Civil Rights Act of 1871's History and Structure*

Taking account of the Notwithstanding Clause has another virtue -- it provides a more coherent account of Section 1983 than the Supreme Court's immunity jurisprudence. Starting with legislative history, it is nearly impossible to square the Supreme Court's caselaw with contemporaneous statements made by Reconstruction lawmakers. Even as to absolute judicial immunity, there is overwhelming evidence supporting the view that members of Congress were quite conscious of the fact that both the civil and criminal civil rights statutes

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evidence of laws.") (cleaned up); *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) ("[T]he very meaning of prima facie is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.") (cleaned up); *Stephan v. United States*, 319 U.S. 423, 426 (1943) ("[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent."); *see also Turner v. Glickman*, 207 F.3d 419, 428 (7th Cir. 2000) (according no weight to placement of provision of Statutes at Large in criminal code because decision was made by reviser); *Preston v. Heckler*, 734 F.2d 1359, 1367–69 (9th Cir. 1984) (holding that Office of Law Revision Counsel erred in omitting as obsolete phrase "without regard to civil-service laws" from codification of Indian Preference Act).

would displace any judicial immunity.[244] As the plaintiffs in *Pierson* pointed out, President Andrew Johnson vetoed the Civil Rights Act of 1866 in part because it subjected state judges to criminal liability for civil rights violations; Congress responded by reenacting the Act and specifically stating that judges may be criminally liable.[245] And it is well accepted that the remedies provided in the 1871 Act were meant to work in tandem with the 1866 Act.[246]

Notably, when Congress turned to debating the civil liability components of the 1871 Civil Rights Act, opponents of Section 1983 liability explicitly objected to its imposition of liability on judges and other state officials "for a mere error of judgment."[247] These opponents understood that officers who make

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244. Br. For Petitioner, *Pierson v. Ray*, 23-24 (U.S. Oct. 10, 1966), available at 1966 WL 100720 ("All the members of Congress who spoke on the problem, explicitly stated that the section applied to judges. None disagreed.").

245. *Id*. at 24; Matasar, *supra* note 3, at 778 (noting that debate of 1866 Act explicitly focused on lack of immunity for Civil Rights Act of 1866; proposals to mitigate liability for state officials were rejected); CONG. GLOBE, 39th Cong., 1st Sess., 1679, 1780 (1866). Senator Trumbull, speaking in support of overruling President Johnson's veto of the 1866 Act, specifically stated that the concept of immunity for judges and other officials was "akin to the maxim of the English law that the King can do no wrong" and "is the very doctrine out of which the rebellion was hatched." CONG. GLOBE, 39th Cong., 1st Sess., 1758 (1866); *see also id.* 1778 (statement of Sen. Johnson); *id.* 1783 (statement of Sen. Cowan); *id.* 1837 (Statement of Rep. Lawrence).

246. *See, e.g.*, *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 684-85 (1978) (discussing legislative history of 1871 Act).

247. *See* CONG. GLOBE, 42d Cong., 1st Sess. 365-66 (1871) (statement of Rep. Arthur) ("Hitherto, in all the history of this country and of England, no judge or court has been held liable, civilly

discretionary decisions would be held liable under Section 1983 notwithstanding their good faith; that was precisely why they opposed it.[248] None of the proponents spoke a word of assurance, leaving the implication that opponents had accurately understood the legislation.[249] This history, in combination with the absence of any language in Section 1983 regarding immunity, offers a strong

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or criminally, for judicial acts, and the ministerial agents of the law have been covered by the same aegis of exemption . . . Under the provisions of this section, every judge in the State court and every other officer thereof, great or small, will enter upon and pursue the call of official duty with the sword of Damocles suspended over him by a silken thread. . . ."); *see also* Matasar, *supra* note 3, at 771 ("The Court's assumption becomes even more doubtful, however, when the legislative debates of the Reconstruction Congress are closely reviewed, because far from being silent about immunities, the debates on both section 1983 and its criminal law predecessor are replete with statements of the opponents of civil rights statutes that the legislation was overriding those immunities. Furthermore, nothing in the legislative history is said to assuage the fears of these opponents. Thus, Congress was not silent about immunities; it was only silent about *retaining* immunities.").

248. *See* CONG. GLOBE, 42d Cong., 1st Sess. 385 (1871) (statement of Rep. Lewis) ("By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be; and a ministerial officer is subject to the same pains and penalties, though simply executing the process of a State court, about which he has no discretion, and the legality of which he has no right to question.").

249. Matasar, *supra* note 3, at 772 (stating that major speeches opposing Section 1983 "proceeded on the assumption that it would apply to *all* officials—legislators, judges, and executive officers."); *id.* at 772-75 (reviewing legislative history in which opposition lawmakers pointed out that there was no good faith immunity in statute and no one reassured them).

indication that Congress meant to abrogate all common-law immunities, even without the Notwithstanding Clause.[250]

Additionally, the legislative record is replete with evidence that supporters of the Civil Rights Act did not trust state courts to protect constitutional rights.[251] Some of the very same people who served in the rebel army were also serving as judges in southern states.[252] It would have been passing strange, then, for the very same Congress to permit liability under Section 1983 to be limited by judge-made law created by state court judges. As Seth Kreimer has argued, given the Civil Rights Act's purpose to disarm a Confederate State judiciary hostile to Reconstruction, "it seems unlikely that the local common law elaborated by the very judiciary that the federal courts were designed to supersede was to be given primacy."[253] The Notwithstanding Clause thus both reflects and confirms the 1871 Civil Rights Act's history and purpose.

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250. *Id.* at 781 (looking to Section 1983 as codified and concluding that "Congress in 1871 meant to abrogate all common law immunities and did so by the plain language of section 1983."); *see also* Achtenberg, *supra* note 4, at 502 (pointing out that Section 1983's language does not support immunity and that legislative history suggests that opponents interpreted Section 1983 as abrogating immunity).

251. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 820, 227(1871) (Sen. Sherman referring to "terror and violence" uncontrolled by magistrates); *id.* 394 (Rep. Rainey describing state courts as being "under the control of those who are wholly inimical to the impartial administration of law and equity."); *id.* 429 (Rep. Beatty describing need for remedy because of "prejudiced juries and bribed judges"); *id.* 44 (Rep. Burchard describing denial of equal protection in states "judicial tribunals").

252. Kenneth M. Stampp, THE ERA OF RECONSTRUCTION, 1865-1877, at 76 (1965).

253. Kreimer, *supra* note 85, at 617.

This interpretation of Section 1983 had ample support in the courts, at least for the first half of the 20th century, when it was common for courts to apply Section 1983 free of any state law immunities.[254] Prior to *Pierson* and *Tenney*, even the Supreme Court had affirmed damages awards against state officials on multiple occasions without any mention of common-law immunity doctrine.[255] The Supreme Court's 1961 decision in *Monroe* gave even more support to those who would read Section 1983 as imposing liability notwithstanding any state law

254. *Myers v. Anderson*, 238 U.S. 368, 371, 380 (1915) (upholding damages action under Section 1983 against election officials without any discussion of good faith, although good faith was raised by defendants); *Cobb v. City of Malden*, 202 F.2d 701, 705–06 (1st Cir. 1953) (Magruder, J., concurring) (recognizing Section 1983's "apparently sweeping and unqualified language"); *Burt v. City of New York*, 156 F.2d 791, 793 (2d Cir. 1946) (Hand, J.) (opining that Civil Rights Act did not include an immunity defense and concluding that "so far as we can see, any public officer of a state, or of the United States, will have to defend any action brought in a district court. . . . in which the plaintiff, however irresponsible, is willing to make the necessary allegations."); *Picking v. Pennsylvania R. Co.*, 151 F.2d 240, 250 (3d Cir. 1945), *overruled in part by Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966) ("But the privilege as we have stated was a rule of the common law. Congress possessed the power to wipe it out. We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate the privilege to the extent indicated by that act and in fact did so.").

255. *Smith v. Allwright*, 321 U.S. 649, 650–52 (1944) (claim involving voting rights brought under Section 1983); Lane v. Wilson, 307 U.S. 268, 269 (1939) (Claim for $5,000 damages brought under Section 1983 alleging discriminatory treatment resulting from electoral legislation of Oklahoma); *Nixon v. Herndon*, 273 U.S. 536, 539–41 (1927); *see also* Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 500-10 (1955) (discussing cases permitting Fourth Amendment claims against police officers and noting that officers would not appear to be protected by immunity for those claims).

defenses. After all, as one post-*Monroe* opinion noted, if a state law immunity displaced liability under Section 1983, it would be inconsistent with *Monroe's* basic holding that the availability or unavailability of state law remedies is irrelevant to the relief afforded by federal law.[256]

Excavating the Notwithstanding Clause also sheds additional light on the relevance of 42 U.S.C. § 1988, which authorizes district courts to fills gaps in the Civil Rights Act with state law under certain conditions.[257] Section 1988 provides authority to "look to principles of the common law, as altered by state law, so long as such principles are not inconsistent with the Constitution and laws of the United States."[258] A state law will not be deemed "inconsistent" with Section 1983's broad remedial purpose simply because it interferes with a remedy in a given case; it must be inconsistent in a more "general" way for the Court to find that it is precluded by the exclusionary language of Section 1988.[259]

256. *Cohen v. Norris*, 300 F.2d 24, 33–34 (9th Cir. 1962).

257. 42 U.S.C. 1988; *Robertson v. Wegmann*, 436 U.S. 584, 592 n.11 (1978) ("[W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule.")

258. *Moor v. Alameda County*, 411 U.S. 693, 703 (1973).

259. *Robertson*, 436 U.S. at 590–94 ("If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant."). In *Robertson*, the Court found that Louisiana's survivorship rule, under which certain causes of action abated with death, should be applied in a Section 1983 action but cabined off situations "in which the particular application of state

Section 1988 has been applied to determine what measure of damages to use,[260] what rules of survivorship apply,[261] which statutes of limitations to use – in short, it instructs as to the choice of law in actions brought to enforce the substantive provisions of the Civil Rights Act.[262] Some scholars have grappled with whether Section 1988 gives courts authority to rely on a state's common-law

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survivorship law, while it may cause abatement of the action, has no independent adverse effect on the policies underlying § 1983." *Id*. at 594.

260. *Smith v. Wade*, 461 U.S. 30, 38–51 (1983) (canvassing state and federal common law to determine standard for punitive damages under Section 1983 and noting that "Smith has not shown why § 1983 should give higher protection from punitive damages than ordinary tort law."); *see id.* at 53-55 (looking to "ordinary tort law" to conclude that there is no rule that "the threshold for punitive damages must always be higher than that for compensatory liability."); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) (as to measure of damages, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes . . . [T]he rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired."); *see also* William H. Theis, *Shaw v. Garrison: Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681, 686-87 (1976) (arguing that state law resulting in greater damages for Section 1983 cases should be applicable under Section 19888, because "Presumably, on the issue of damages in civil rights cases, more is better.").

261. *Moor*, 411 U.S.at 710 ("Although an injured party's personal claim was extinguished at common law upon the death of either the injured party himself or the alleged wrongdoer, see W. Prosser, Torts 888—891 (4th ed. 1971), it has been held that pursuant to § 1988 state survivorship statutes which reverse the common-law rule may be used in the context of actions brought under s 1983.").

262. *Id.* at 705.

immunity.[263] But the proviso in Section 1983 omitted by the Reviser answers the question more directly – state law which imposes a barrier to Section 1983 liability was not meant to apply under the proviso; state law that makes Section 1983 more effective should be applied under Section 1988.[264] Because the Supreme Court's qualified immunity jurisprudence is and always has been inconsistent with this teaching, it cannot be squared with the text, purpose, or context of the Civil Rights Act of 1871. This is the case whether immunity doctrine is the common-law version announced by the Court in *Pierson* or the form adopted by the current Court, requiring that a plaintiff show a violation of "clearly established law" to establish Section 1983 liability.

263. Theis, *supra* note 260, at 684-86 (1976); *see also* Coleman, *supra* note 6, at 693 (arguing that Section 1988 should provide guidepost for interpreting Section 1983, meaning that federal law should fill any gaps in Section 1983's meaning, with the law of the State serving if there is no applicable or suitable federal law, so long as state law is not inconsistent with Section 1983's purposes). In the context of immunity, Coleman argues that applying Section 1988 would mean that courts would first determine whether any federal law of immunity existed before turning to state law; if state law abrogated immunity this could be applied as consistent with Section 1983; if state law instead provided for absolute immunity, this would be arguably inconsistent with federal law, requiring recourse to federal common law. *Id.* at 733.

264. Kreimer, *supra* note 85, at 632 (arguing that state law that "augment the effectiveness" of Section 1983 should be applied under Section 1988).

## IV.

## IMPLICATIONS AND OBJECTIONS

Putting Section 1983 into interpretive context –thereby minimizing the relevance of the Derogation Canon – and accounting for the enacted text of the Civil Rights Act – thereby putting state law immunities on the sideline where the Reconstruction Congress intended – has many significant implications. First, unlike the scholarship and advocacy that urges the Supreme Court to read Section 1983 as limited by the 1871 understanding of common-law immunities, this Article shows that any such immunities have no place in Section 1983 litigation. This is decisive as to the good-faith immunity that has been transformed into qualified immunity. To the extent that this immunity existed as a creature of *state* law in 1871, the Reconstruction Congress made clear it has no place in federal civil rights claims.[265] Moreover, *Pierson* itself relied only on Mississippi state law to support a good-faith defense to Section 1983.[266] Thus, *Pierson* was and always has been inconsistent with the Civil Rights Act of 1871.

Some might argue that even if state court opinions were the source of the 1871 version of an immunity defense, the "common law" was neither federal nor state, in the era of *Swift v. Tyson.*[267] If so, the argument goes, the Notwithstanding Clause is less relevant, because common-law immunities could exist

265. As to state actors, to the extent any immunity doctrine existed at common law in 1871, the defense was sourced in state law. *See supra* note 239.

266. *Pierson*, 365 U.S. at 557.

267. *Swift v. Tyson*, 41 U.S. 1 (1842), *overruled by Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

independent of whatever state law was abrogated by the Civil Rights Act of 1871. This argument overlooks the fact that even under *Swift*, there was a critical distinction between "general" law, which knew no sovereign, and "local" or customary law, which was considered state law.[268] *Swift*'s "general" law was applied in cases involving commercial relations[269] or in tort cases involving

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268. *See* Caleb Nelson, *A Critical Guide to Erie Railroad v. Tompkins*, 54 Wm. & Mary L. Rev. 921, 944-50 (2013).

269. Up until 1871, almost every case in which the Supreme Court cited to *Swift* involved a commercial dispute. *See Michigan Ins. Bank v. Eldred*, 76 U.S. 544 (1869) (promissory note); *Butz v. City of Muscatine*, 75 U.S. 575 (1869) (bonds); *Bd. of Sup'rs of Marshall Cty. v. Schenck*, 72 U.S. 772, 18 L. Ed. 556 (1866) (bond obligations); *Murray v. Lardner*, 69 U.S. 110 (1864) (commercial paper); *Jefferson Branch Bank v. Skelly*, 66 U.S. 436 (1861) (Contract Clause); *Bank of Pittsburgh v. Neal*, 63 U.S. 96 (1859) (commercial paper); *Goodman v. Simonds*, 61 U.S. 343 (1857) (promissory notes); *Watson v. Tarpley*, 59 U.S. 517 (1855) (bill of exchange); *Brabston v. Gibson*, 50 U.S. 263 (1850) (promissory note); *Prentice v. Zane's Adm'r*, 49 U.S. 470 (1850) (commercial paper); *Nesmith v. Sheldon*, 48 U.S. 812 (1849) (corporate status); *Cook v. Moffat*, 46 U.S. 295 (1847) (contract); *Smyth v. Strader*, 45 U.S. 404 (1846) (promissory note); *Lawrence v. McCalmont*, 43 U.S. 426 (1844) (commercial guarantee). There were two additional pre-1871 cases in which *Swift* was raised, but both involved the construction of a will. *Williamson v. Berry*, 49 U.S. 495 (1850); *Lane v. Vick*, 44 U.S. 464 (1845). From 1871 until the Supreme Court's decision in *Erie*, nearly every case in which *Swift* was raised also involved commercial relations. *People's Sav. Bank v. Bates*, 120 U.S. 556 (1887) (mortgage obligations); *Am. File Co. v. Garrett*, 110 U.S. 288 (1884) (bonds); *Town of Pana v. Bowler*, 107 U.S. 529 (1883) (bonds); *Burgess v. Seligman*, 107 U.S. 20 (1883) (stockholders' obligations); *Brooklyn City & N.R. Co. v. Nat'l Bank of the Republic*, 102 U.S. 14 (1880) (promissory note); *Oates v. First Nat. Bank of Montgomery*, 100 U.S. 239 (1879) (commercial paper); *Brown v. Spofford*, 95 U.S. 474 (1877) (promissory note); *Collins v. Gilbert*, 94 U.S. 753 (1876) (commercial paper); *Townsend v. Todd*, 91 U.S. 452 (1875) (mortgage, but deferring to state law); *Chambers Cty. v. Clews*, 88 U.S. 317 (1874)

interstate commerce (unsurprisingly, these cases all involved railroads and arose in the late nineteenth century).[270] Outside of these areas, state law, whether statutory or judge-made, governed "[q]uestions of public policy as affecting the liability for acts done . . . . within one of the States of the Union," unless controlled by federal law or by considerations requiring national uniformity such as commercial relations.[271] More pointedly, cases involving the tort liability of cities and states involved "local" law, according to the Court, making state court

(bonds); *Sawyer v. Prickett*, 86 U.S. 146 (1873) (stock); *Boyce v. Tabb*, 85 U.S. 546 (1873) (contract); *Olcott v. Fond du Lac Cty.*, 83 U.S. 678 (1872) (contract).

270. I did not locate a single pre-1871 state or federal court decision involving common-law torts in which *Swift* was raised. Even the post-1871 cases involving railroads were not uniform in their treatment of state tort law. *Compare Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 379 (1893) (holding that tort liability rules for railroads are general law because they concern commerce); *with Bucher v. Cheshire R. Co.*, 125 U.S. 555, 584 (1888) (considering Massachusetts law regarding tort liability rule "local" law even though case involved injuries while on railroad).

271. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 175 U.S. 91, 100 (1899); *see also Smith v. Alabama*, 124 U.S. 465, 475–76 (1888) ("It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the state, without regard to their pursuits, is subject to change at the will of the legislature of each state, except as that will may be restrained by the constitution of the United States."); *id.* at 478 (noting that *Swift* applied to the field of "law-merchant" relations, "by reason of its international character."); *Old Colony Tr. Co. v. City of Tacoma*, 230 F. 389, 392 (9th Cir. 1916) (application of "principles of law to local conditions" is controlling even if state court is not construing a state statute); *Blaylock v. Inc. Town of Muskogee*, 117 F. 125, 126 (8th Cir. 1902) (federal courts follow state court decisions involving "powers and liabilities of the political or municipal corporations" in cases that do not involve federal law or "general or commercial law").

decisions on such matters dispositive for the purposes of federal courts.[272] Thus, even in the *Swift* era, the Notwithstanding Clause, along with the legislative history and overall purpose of the Civil Rights Act, should be read to displace "local" common-law immunities.

Even if objectors find a way to minimize the Notwithstanding Clause's displacement of state law immunities, advocates for immunity doctrine would still have to show why the Derogation Canon should be applied in such a novel way as to incorporate common-law defenses into Section 1983, given what any reasonable legislator would have understood about the canon in 1871.[273] As discussed above, by 1871 the Derogation Canon was on insecure footing and had never been relied upon as a basis for incorporating a common-law defense into a statutory cause of action.[274] Nor does post-Reconstruction jurisprudence

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272. *See*, *e.g.*, *City of Detroit v. Osborne*, 135 U.S. 492, 498 (1890) (liability of city for defective sidewalks was matter of "local" law); *see also Brush v. Comm'r of Internal Revenue*, 300 U.S. 352, 364 (1937), *overruled in part on other grounds by Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466 (1939) ("The rule in respect of municipal liability in tort is a local matter; and whether it shall be strict or liberal or denied altogether is for the state which created the municipality alone to decide."); *United States v. City of New York*, 82 F.2d 242, 243 (2d Cir. 1936) (holding that federal courts follow local law for purposes of municipal liability for torts of employees, except when displaced by federal statute); *City of Denver v. Porter*, 126 F. 288, 294 (8th Cir. 1903) (liability of municipalities for negligence is matter of local law); *Powers v. Massachusetts Homoeopathic Hosp.*, 109 F. 294, 296-97 (1st Cir. 1901) (same).

273. Matasar, *supra* note 3, at 767 (arguing that Reconstruction Congress understood governing interpretative methodologies).

274. *Supra* Part I.A & B.

regarding the Derogation Canon rehabilitate the Court's Section 1983 immunity doctrine.[275]

To be clear, these insights have implications beyond qualified immunity. The availability of legislative, prosecutorial, and judicial immunity in Section 1983 litigation all are grounded in a flawed application of an already unsound Derogation Canon. To be sure, these implications are uncertain, because there may be independent grounds for retaining some of these immunities. After all, Congress has arguably endorsed judicial immunity through its amendments to Section 1983,[276] and legislative immunity is based on more than simply common-law principles.[277] Prosecutorial immunity, however, has some of the

275. *Supra* Part I.C.

276. By creating an exception concerning injunctive relief sought against judicial officers and also making clear that judicial officers shall not be liable for costs or attorneys' fees except where the officer acted "in excess of such officer's jurisdiction, *see* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 1996 U.S.C.C.A.N. (110 Stat.) 3847 (codified as amended at 42 U.S.C. §§ 1983, 1988), Congress arguably codified judicial immunity. Moreover, the proscription against holding judges civilly liable for "judicial acts existing when there is jurisdiction of the subject-matter" was long-recognized, including in a Supreme Court decision issued the same year that section 1983 was enacted (although not, to be clear, in the Section 1983 context). *Bradley v. Fisher*, 80 U.S. 335, 354 (1871). This immunity could only be overcome through impeachment proceedings "or in such other form as may be specially prescribed." *Id.*

277. *See Tenney*, 341 U.S. at 372-76 (describing basis for legislative immunity).

same failings as qualified immunity doctrine – it is premised on common-law doctrine, principally state law, which has no place in Section 1983.[278]

A second implication is that because this Article's interpretation of Section 1983 is one that rests on the Civil Rights Act's enacted text and existing modes of interpretation, effectuating it does not require any action by Congress. Some might object that the current Court would be resistant to reversing longstanding precedent, especially in light of so-called super stare decisis of statutory interpretation.[279] But the Court's misstep here is that it has entirely failed to grapple with the Civil Rights Act's enacted text.

Moreover, notwithstanding the rhetoric that stare decisis is amplified in the area of statutory interpretation, the Court has often disregarded the presumption against overruling, albeit with varying degrees of transparency. By one count, the Court did so 80 times in a span of under 30 years.[280] The Court overruled *Swift v. Tyson* nearly 100 years after it was decided, notwithstanding Congressional silence in the interim.[281] *Monroe v. Pape* was overruled in part 17

278. *See Imbler v. Pachtman*, 424 U.S. 409, 421-22 & n. 19 (1976) (canvassing state court decisions to conclude that the majority of state courts found absolute immunity for prosecutors appropriate).

279. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L. J. 1361, 1362 (1988) (describing the Supreme Court's practice as applying "super-strong presumption of correctness" to statutory precedents).

280. *Id.* at 1363 (identifying cases between 1961 and 1988 in which Court "overruled or materially modified statutory precedents").

281. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

years after it was decided, over the dissenters' criticism that Congress had taken no action calling *Monroe* into question.[282] *Pierson*'s error is at least as egregious as *Swift*'s or *Monroe*'s, and it has spawned an immunity doctrine that has created significant instability and garnered well-founded criticism.[283]

Third, there also are significant practical implications that flow from the arguments presented in this Article. When qualified immunity applies in litigation, it bars all compensation for victims of unconstitutional conduct, no matter how egregious or injurious. These cases run the gamut, from school officials who receive qualified immunity for subjecting teenage girls to invasive strip searches with no reasonable basis,[284] to police officers who receive immunity when they use deadly force against unarmed citizens,[285] to corrections officers who are aware that an incarcerated person is suicidal and watch without intervening as he wraps a phone cord around his neck and dies by suicide.[286] It also has a harmful systemic impact because courts are free to apply qualified immunity without ever considering the underlying merits of a plaintiff's legal claim, making it difficult for constitutional law to change over time.[287] And

282. *See*, *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 714 (1978) (Rehnquist, J., dissenting).

283. *Supra* notes 81**Error! Bookmark not defined.**-87 and accompanying text.

284. *See Safford Unified School District v. Redding*, 557 U.S. 364 (2009).

285. *See Salazar-Limon v. City of Houston, Tex.*, 137 S. Ct. 1277, 1278 (2017) (Sotomayor, J., dissenting from denial of cert.).

286. *Cope v. Cogdill*, 3 F.4th 198, 206 (5th Cir. 2021).

287. *Supra* notes 77-80 and accompanying text.

because it looms over every potential civil rights case, there is good reason to think that it deters injured people from initiating litigation, or interferes with their attempts to obtain representation.[288] Removing qualified immunity would thus result in more compensation for constitutional misconduct, more development of constitutional law, and would probably lead to more civil rights litigation overall.

Not everyone would view these as positive developments. Talk of "floodgates" runs throughout debates about civil litigation in this country.[289] Although much of these concerns lack empirical foundation, it would be fair to presume that removing a defense, even one that does work in a small minority of cases,[290] will result in greater litigation and larger recoveries for plaintiffs. Whether this is a feature or a bug depends on judgments about the role of litigation in fostering law-abiding behavior, what other barriers exist to prevent litigation abuse, the actual costs that would be imposed by changing course, and the costs of maintaining the status quo. There are good reasons, however, to think that eliminating qualified immunity will reduce inequity and improve the administration of justice.[291] And, as this Article has shown, eliminating qualified

288. *Supra* note 2.

289. *See, e.g.,* Alexander A. Reinert, *The Narrative of Costs, the Costs of Narrative*, 49 CARDOZO L. REV. 121, 126-32 (2018) (summarizing and critiquing narrative of litigation and discovery abuse).

290. *See* Schwartz, *supra* note 84, at 44-45.

291. *See* Reinert, Schwartz, & Pfander *supra* note 95, at 795-805.

immunity would be consistent with the actual text enacted by the Reconstruction Congress.

## CONCLUSION

This Article raises a legal version of a popular philosophical question about a tree falling in a forest.[292] If a legislature enacts a statute, but no one bothers to read it, does it still have interpretive force? Section 1983's immunity jurisprudence can only survive if the answer to this question is "no." But for all of the reasons outlined here, Section 1983 should be read and applied in light of its original, enacted text. The Reconstruction Congress intended to create liability notwithstanding contrary state law, meaning that state law immunities have no place in Section 1983. And the Derogation Canon, to the extent it applies at all to the Civil Rights Act of 1871, cannot be the basis for applying some other "common-law" defense of qualified immunity.

If the Supreme Court continues to apply its qualified immunity doctrine to Section 1983 claims, its mistakes go beyond the well-grounded criticisms others have raised. For as this Article shows, the Court's immunity jurisprudence has not just used "free-wheeling" judge-made law to fill a gap left by the legislature.[293] Instead, it has deployed a canon of statutory interpretation, founded in a mistrust of legislatures in favor of supposedly greater judicial

292. *See* 3 THE CHAUTAUQUAN 543-44 (June 1883) (posing question "If a tree were to fall on an island where there were no human beings would there be any sound?").

293. *Supra* note 93.

wisdom, to apply Section 1983 in a way that contradicts text adopted by the Reconstruction Congress. Compounding one grave error with another, the Supreme Court has created an immunity jurisprudence that departs from text, purpose, and context.