PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 126 | Issue 3

Spring 2022

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Unqualified Immunity and the Betrayal of *Butz v. Economou:* How the Supreme Court Quietly Granted Federal Officials Absolute Immunity for Constitutional Violations

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ABSTRACT

Qualified immunity has been the subject of well-deserved scorn in recent years as a legal mechanism that shields government officials from constitutional accountability. But its shadow has hidden another mechanism that provides an unqualified immunity from constitutional accountability. That de facto absolute immunity extends to federal officials in all but a vanishingly few contexts where claims are still permitted under the 1971 Supreme Court decision *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. But it was not always that way.

In its 1978 decision *Butz v. Economou,* the Supreme Court permitted *Bivens* claims to proceed against a cabinet-level federal official and others, denying their demands for absolute immunity. *Butz* detailed the historical availability of damages against federal officials in the United States and warned that holding them to a lower constitutional standard than their state counterparts would turn the Founders' constitutional design on its head. In the years that followed, the Court consistently demonstrated its continued commitment to federal-state constitutional parity. Most notably, the availability of *Bivens* claims against federal officials was so well-established and robust in 1982 that the Court created qualified immunity in *Harlow v. Fitzgerald* to ameliorate policy concerns with *Bivens* liability. Citing the need to treat federal and state officials consistently, the Court formally extended qualified immunity to state officials a few years later.

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Over the intervening decades, the Court reversed course and created a two-tier system of constitutional accountability. While it continued to strengthen qualified immunity, often relying on the existence of *Bivens* claims to do so, the Court simultaneously sapped *Bivens* of its power, in effect cabining it to its precise facts. As a result, there is no longer a reliable—let alone broad—source of constitutional accountability for federal officers. Betraying *Butz* and the long history of federal accountability in the United States, the modern Court has ushered in an era of increasingly absolute and unqualified immunity for federal officials.

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INTRODUCTION

In its 1978 decision *Butz v. Economou*, the Supreme Court warned that to create a legal system "in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head."[1] But over the four decades since, the Court has created just such a legal system by dramatically restricting the availability of constitu-

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

tional claims against federal officials.[2] Today, federal officials enjoy de facto absolute immunity in all but three limited situations.[3]

Perhaps nothing better illustrates the Court's inversion of the Founders' constitutional order than its creation of qualified immunity in *Harlow v. Fitzgerald*.[4] There, the Court used the broad availability of constitutional claims against federal officials under *Bivens*[5] to justify its creation of a policy-based qualified immunity to those claims.[6] Relying on the federal-state parity *Butz* identified, the Court then extended qualified immunity to state officials several years later.[7] As it was using decisions that presumed the availability of *Bivens* claims to increase the protections of qualified immunity, the Court was restricting the availability of *Bivens* itself.[8]

Disregarding *Butz*'s proclamation that "[s]urely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers,"[9] the Court now grants absolute immunity to federal officials in most contexts. This allows them to operate in "Constitution-free zones" across the United States.[10] Worse still, while qualified immunity is very much alive and well,[11] the cause of action the Court used to create and expand qualified immunity—*Bivens*—is "practically a dead let-

2. *See infra* Section III.

3. *See infra* Section III.C.

4. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

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

6. *See infra* Section III.A. *See generally* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) (providing comprehensive overview of qualified immunity); Steven I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 NOTRE DAME L. REV. 1869, 1887–89 (2021).

7. *See* Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984).

8. *Compare Harlow*, 457 U.S. at 818–19 (justifying qualified immunity because "a reasonably competent public official should know the law governing his conduct"), *with* Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7–8 (2021) (per curiam) (providing qualified immunity unless a plaintiff can provide, if not "a case directly on point," "existing precedent [from the Supreme Court or relevant circuit court that] . . . place[s] the statutory or constitutional question beyond debate"), *and Bivens*, 403 U.S. at 395 (explaining "it is . . . well settled that where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done") (cleaned up), *with* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (describing the extension of a *Bivens* remedy against federal officials as "'disfavored' judicial activity" that the Court has not engaged in "for the past 30 years"). *See also infra* Section III.

9. Butz v. Economou, 438 U.S. 478, 501 (1978).

10. Byrd v. Lamb, 990 F.3d 879, 884 (5th Cir. 2021) (Willett, J., concurring) ("*Bivens* today is essentially a relic, technically on the books but practically a dead letter, meaning this: If you wear a federal badge, you can inflict excessive force on someone with little fear of liability.").

11. *See, e.g.*, City of Tahlequah v. Bond, 142 S. Ct. 9 (2021) (per curiam).

ter."[12] Along with it, the Court has laid to rest the Founders' understanding of constitutional limits and the judiciary's role in enforcing them.[13]

Section I of this Article describes that understanding and traces America's history of enforcing strict liability against federal officers who exceeded their authority. Section II discusses the Court's comparative treatment of state and federal officers as particularly outlined in *Butz v. Economou* and the central role state-federal parity played in the Court's development of modern immunity doctrines. And Section III discusses the Court's creation of qualified immunity and outlines the development of the law since *Bivens*, *Butz*, and *Harlow* to illustrate how the Court has continuously used *Bivens* to expand qualified immunity while, at the same time, restricting *Bivens* claims to create de facto absolute federal immunity.

I. AT THE FOUNDING, FEDERAL OFFICIALS WERE STRICTLY LIABLE FOR ACTIONS THAT EXCEEDED THEIR AUTHORITY.

From the dawn of the Republic, federal officials were responsible for injuries they caused acting outside their authority. The Supreme Court strictly imposed liability, considering it an essential judicial task required by the separation of powers.

A. By the time America declared independence from Britain, damages remedies against government officials were well established.

Freedom from the abuses of an unaccountable government and its officials animated the American Revolution.[14] Even before American independence, British courts had approved damages actions against government officials as a tool to "make publick officers more careful" and ensure that every right had a corresponding remedy.[15] In *Entick v. Carrington*, for example, an associate of John Wilkes won an award of damages against the King's messengers and Secretary of State, Lord Halifax, for the messengers' search of his home and papers under a general warrant

12. *Byrd*, 990 F.3d at 884 (Willett, J., concurring).
13. *See infra* Section I.
14. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776).
15. Ashby v. White (1703) 92 Eng. Rep. 126, 136–37; 2 Ld. Raym. 938, 953, 956 (Holt, C.J., dissenting).

issued by Halifax.[16] As Lord Chief Justice Holt explained, permitting government officials to evade the limits of their authority would be an impermissible act of judicial policymaking.[17] The Constitution transported that ideal into the newly independent United States.[18]

B. From the beginning, American courts embraced the availability of damages against federal officials.

The Constitution empowered federal courts to award damages, providing that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made."[19] Through that clause, "the [C]onstitution of the United States appeals to, and adopts, the common law to the extent of making it a rule in the pursuit of remedial justice in the courts of the Union."[20] And if the appropriate remedy is damages, "the principles of decision, by which these remedies must be administered, must be derived from the same source"—the common law.[21]

English common law did not merely inspire American judicial processes and jurisdiction.[22] It also informed the substance of con-

16. Entick v. Carrington (1765) 19 How. St. Tri. 1029, 1063–64 (K.B.). Lord Camden's decision in *Entick* expressed the general principle that the government and its agents may do nothing beyond what is expressly authorized by law, while individuals may do anything not expressly forbidden by it. *See id.* at 1065–66. Demanding explicit justification for government action, *Entick* declared: "If it is law, it will be found in our books. If it is not to be found there, it is not law. . . . [I]t is now incumbent upon the defendants to show the law, by which this seizure is warranted. If that cannot be done, it is a trespass." *Id.* at 1066.

17. *Id.* at 1067 ("What would the parliament say, if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation.").

18. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1–2 (1963) ("If the subject was the victim of illegal official action, in many cases he could sue the King's officers for damages. . . . This was the situation in England at the time the American Constitution was drafted."); *id.* at 20.

19. U.S. CONST. art. III, § 2; *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1633 n.1 (1833) (noting that the first draft of section two applied only to cases "arising under the laws passed by the legislature of the United States" but was later expanded to encompass the Constitution).

20. STORY, *supra* note 19, at § 1639.

21. *Id.* (specifying the common law "according to the known distinction in the jurisprudence of England, which our ancestors brought with them upon their emigration, and with which all the American states were familiarly acquainted").

22. *Id.* Justice Story explained that a "case" for purposes of Article III "is a suit in law or equity, instituted according to the regular course of judicial proceedings; and, when it involves any question arising under the constitution, laws, or

stitutional rights. Cases like *Entick* heavily influenced the Bill of Rights.[23] It is unsurprising, then, that the Supreme Court routinely held federal officials liable for actions taken outside their constitutionally conferred authority.[24] This was true regardless of whether the official acted reasonably, in good faith, or with some other claimed justification.[25] "[P]ublic officers bore personal liability for what were termed, in the legal vocabulary of the day, 'positive' torts—affirmative acts, willfully done, which amounted to a trespass or other wrong."[26] In such cases, government officials were responsible to the same extent as private agents.[27] Under "a very plain principle of common sense and common justice . . . no person shall shelter himself from personal liability, who does a wrong, under color of, but without any authority . . . or by a negligent use or abuse of his authority."[28]

The Supreme Court issued a steady series of decisions throughout the 19th and early 20th centuries confirming these foundational concepts of constitutional accountability.[29] If a federal official exceeded his authority and violated individual rights, he was strictly and personally liable for damages.[30] As the Supreme Court de-

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treaties of the United States, it is within the judicial power confided to the Union." *Id.* at § 1640 (citations omitted).

23. Boyd v. United States, 116 U.S. 616, 624–29 (1886) ("[E]very American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom [*Entick v. Carrington*], and considered it as the true and ultimate expression of constitutional law . . . ."); *see also* United States v. Jones, 565 U.S. 400, 404–05 (2012).

24. *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804); Bates v. Clark, 95 U.S. 204, 204–06 (1877).

25. *See, e.g.*, *Little*, 6 U.S. at 170 ("A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law, he is answerable in damages to any person injured in their execution.").

26. David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 16 (1972) (citing STORY, *infra* note 27, at § 320).

27. *See* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 319 (5th ed. 1857).

28. *Id.* at § 320 ("Where a person is clothed with authority, as a public agent, it cannot be presumed, that the government meant to justify or even to excuse his violations of his proper duty, under color of that authority."); *cf.* Monroe v. Pape, 365 U.S. 167, 183–87 (1961) (holding government officials personally liable for actions taken under color of law).

29. *See* Tanzin v. Tanvir, 141 S. Ct. 486, 491 (2020).

30. As the cases discussed in this section illustrate, suits against federal officials indirectly addressed excesses of authority. For example, a plaintiff would sue a federal official in trespass; the official would claim federal authority to justify the trespass; the plaintiff would reply that the trespass exceeded the official's legal authority; and the official's justification defense would be defeated. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506–07 (1987);

clared in *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[31]

In 1804, the Court satisfied that duty in *Little v. Barreme*, approving a damages award against a naval officer who had seized a ship on orders from the President.[32] During the Quasi-War between the United States and France, Congress enacted a statute directing the interception of vessels suspected of sailing *to* French ports, but the President ordered the seizure of vessels sailing to *or from* French ports.[33] Captain George Little executed that order, capturing a Danish brigantine called *Flying Fish* that was suspected of departing *from* a French port in the Caribbean. The vessel's owner sued for her return and damages from Captain Little.[34] The lower courts granted both,[35] and the Supreme Court affirmed.[36] Writing for the Court, Chief Justice Marshall explained that because presidential "instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass . . . Captain Little then must be answerable in damages to the owner of this neutral vessel."[37]

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see also Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1128–29 n.89 (1969) (collecting cases); Engdahl, *supra* note 26, at 17 n.71 (collecting cases). Claims against federal officials were litigated in both federal and state courts, and courts held officials personally liable if their actions lacked an adequate legal basis or contravened the Constitution. *See id.* at 17–18.

31. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). The Court further elaborated, "In Great Britain the king himself is sued . . . and he never fails to comply with the judgment of his court." *Id. Marbury* reaffirmed Lord Chief Justice Holt's pre-Revolution observation that "it is a vain thing to imagine a right without a remedy." Ashby v. White (1703), 92 Eng. Rep. 126, 136; 2 Ld. Raym. 938, 953. Chief Justice Marshall wrote: "It is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury*, 5 U.S. at 163 (paraphrasing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1765)); *see also Ashby*, 92 Eng. Rep. at 137 (noting that if "the plaintiff is obstructed of his right" he "shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions; for if men multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense").

32. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804).

33. *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1877–79 (2010).

34. *See id.* at 1880.

35. *See* Engdahl, *supra* note 26, at 14; *see also* Pfander & Hunt, *supra* note 33, at 1877–81.

36. *See Little*, 6 U.S. at 179.

37. *Id.* Indeed, because he acted outside of his authority, not even the probable cause afforded by the conduct of *Flying-Fish* to suspect her of being an American would excuse Captain Little from damages for having seized her. *Id.*; *see also*

Two years later, the Supreme Court decided *Wise v. Withers* and again affirmed the availability of damages against a federal official who exceeded his authority.[38] There, a District of Columbia justice of the peace sued a fine collector for entering his home and seizing property in satisfaction of an order from a court-martial.[39] Concluding that the justice of the peace was exempt by statute from militia duty, the Supreme Court held that the court-martial lacked jurisdiction and could not protect the officer who executed its order.[40] Both were trespassers and liable for it.[41]

In 1824, Justice Story articulated the separation-of-powers justification for strict liability in *The Apollon*.[42] There, the eponymous ship was seized by an American customs agent.[43] But when the government sought payment of a duty and forfeiture of *The Apollon*'s cargo, a federal court restored the ship and cargo to her owner, who promptly sued for damages.[44] The court granted them, and the Supreme Court affirmed.[45] Justice Story explained that the Court's sole duty was "to administer the law as it finds it." "[T]his Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress."[46] Any other considerations, like those of policy, "belong more properly to another department of the government."[47] Harkening back to Lord Chief Justice Holt's assertion in *Entick* that carving exceptions into the law would invade the power of Parliament,[48] Justice Story explained that American courts "must administer the laws as they exist, without straining

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Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (addressing a similar capture case). In *Little*, Chief Justice Marshall explained that his "first bias" was to excuse the captain from damages for policy reasons. *Little*, 6 U.S. at 179. Chief Justice Marshall's colleagues convinced him, however, that the Court could look only to the law and whether Little violated it. *Id.*

38. Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806).

39. *Id.* at 335.

40. *Id.* at 337.

41. *Id.*

42. The Apollon, 22 U.S. (9 Wheat.) 362 (1824).

43. *Id.* at 363.

44. *Id.* at 363–65.

45. *Id.* at 366, 380.

46. *Id.* at 367; *see also supra* note 31.

47. *The Apollon*, 22 U.S. at 366. In the Court's recent decision in *Tanzin v. Tanvir*, JUSTICE THOMAS echoed Justice Story's words, rejecting the government's policy-based demands for immunity from damages under a federal statute: "[T]here may be policy reasons why Congress may wish to shield Government employees from personal liability, and Congress is free to do so[,]" but the Court is "not at liberty to do so. . . . Our task is simply to interpret the law as an ordinary person would." 141 S. Ct. 486, 493 (2020).

48. Entick v. Carrington (1765) 19 How. St. Tri. 1029, 1067 (K.B.).

them to reach public mischiefs" or else the judiciary would invade the power of Congress.[49]

The Court confirmed federal-official liability yet again in 1851.[50] In *Mitchell v. Harmony*, a merchant named Manuel Harmony sued a military officer for the seizure of property in Mexico.[51] Harmony had been following the American army as it traveled from Missouri toward Chihuahua, Mexico, when the Mexican–American war broke out.[52] Harmony eventually decided to leave the expedition, but Colonel David Mitchell, on orders, forced Harmony to accompany the army into a warzone.[53] During the Battle of Sacramento River, Harmony lost his property—the last of it seized and confiscated by Mexican authorities.[54] Harmony sued Colonel Mitchell and received an award of damages.[55] Among other justifications, Mitchell argued that he had merely acted in obedience to the order of his commanding officer.[56] That justification, the Court held, "may be disposed of in a few words."[57] Those

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49. *The Apollon*, 22 U.S. at 366. Justice Story also explained that the cost of even a *justified* violation of the law must fall on the government, not the individual whose rights were violated:

> It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent and irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken under justifiable circumstances, the legislature will doubtlessly apply a proper indemnity [to the liable official].

Id. at 366–67. Under this conception of the separation of powers, an executive branch official could act outside his legal authority in emergency circumstances, but the victims of his actions were still entitled to a legal remedy *from the official*. If the executive actions were justified, Congress addressed any policy concerns arising out of individual liability by indemnifying the official, as it commonly did. *See* Pfander & Hunt, *supra* note 33, at 1868–69 ("[P]erhaps as early as 1804, when the Marshall Court decided *Little* and *Murray*, and certainly by 1836, the Supreme Court simply assumed that indemnity was routinely available to take the sting out of any official liability.").

50. Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1851).

51. *Id.* at 128.

52. *Id.* at 128–29.

53. *Id.* at 129.

54. *Id.* at 130.

55. *Id.* at 130, 132.

56. *Id.* at 132.

57. *Id.* at 137. Reinforcing the historical force of official liability, the Court cited Lord Mansfield's discussion of an unnamed precedent in *Mostyn v. Fabrigas*:

> Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law,

words, illustrating the centrality of remedies to the rule of law and the judicial role,[58] were: "[T]he order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed."[59]

C. The creation of a federal damages action against state and local officials did not diminish the availability of damages against their federal counterparts.

Between 1861 and 1865, America fought a civil war. With the Union's victory over the Confederacy came the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.[60] The Fourteenth Amendment subjected the states and their officials to the restrictions of the Bill of Rights for the first time.[61] This new amendment empowered Congress "to enforce, by appropriate legislation, the provisions of this article."[62] Congress did so by passing a statute placing state and local officials on a liability footing much like their federal counterparts.

> and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed.

Id. at 135–36 (citing Mostyn v. Fabrigas (1774) 98 Eng. Rep. 1021, 1032; 1 Cowp. 161, 180). The Court then explained that the case "shows how carefully the rights of private property are guarded by the laws in England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States." *Id.* at 136.

58. *See supra* note 49 (discussing Justice Story's reliance on indemnity to address the policy implications in situations where the guilty official was following illegal orders like those given in *Little, Murray, Wise*, *The Apollon*, and *Mitchell*).

59. *Mitchell*, 45 U.S. at 137.

60. *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 37 (1872) ("[T]he main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery.").

61. "When ratified in 1791, the Bill of Rights applied only to the Federal Government . . . [T]he Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States." Timbs v. Indiana, 139 S. Ct. 682, 687 (2019); *see* U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.").

62. U.S. CONST. amend XIV, § 5.

1. The enactment of Section 1983 opened state and local officers to the sort of liability already available against federal officers.

In the wake of the Civil War, the Ku Klux Klan waged a campaign of terror and deadly violence against blacks and Union sympathizers.[63] On March 23, 1871, President Ulysses S. Grant sent a message to Congress requesting legislation to stem the violence.[64] Congress responded by passing the Civil Rights Act of 1871, also known as the Ku Klux Klan Act, which included a provision now commonly called "Section 1983" for its codification at 42 U.S.C. § 1983.[65]

As enacted, Section 1 of the Act created a private cause of action against "any person who, under color of any law of any State shall subject any person to the deprivation of any rights, privileges, or immunities secured by the Constitution."[66] That provision "was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others."[67] Section 1983 was an effort "to afford a federal right in federal court because, by reason of

63. District of Columbia v. Carter, 409 U.S. 418, 425–26 (1973); *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 425–44 (2014) (cataloguing Klan violence and formation).

64. *See Carter*, 409 U.S. at 426.

65. Ku Klux Klan Act, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983). Congress also created the Department of Justice in 1870 for similar reasons. *See* Robert K. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L.J. 155, 157–58 (1995).

66. 17 Stat. at 13 (abridged). Unabridged, the Act provided:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Id.; *see also* Monroe v. Pape, 365 U.S. 167, 181 n.27 (1961) (reproducing the statutory text as originally introduced). The Act's expansive language confirmed the Supreme Court's consistent refusal to excuse officials for liability when following orders, *see supra* Section I.B, and went a step further. The Act guaranteed that the liability created in Section 1983 would apply "any such law, statute, ordinance, regulation, custom, or usage of the State *to the contrary notwithstanding*." Ku Klux Klan Act at 13 (emphasis added). The Supreme Court would, nevertheless, later create and enforce immunities based on the justification that officials were relying on unconstitutional laws. *See infra* Sections II–III.B (discussing the creation and expansion of good-faith immunity and qualified immunity), *infra* note 87 (specifically addressing the incompatibility of the Ku Klux Klan Act and the immunity the Supreme Court created in *Pierson v. Ray*, 386 U.S. 547 (1967)).

67. *Carter*, 409 U.S. at 426.

prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[68] There was no similar worry with regard to federal officials subject to claims in state courts, where they were not met with such indulgence.[69] Thus, after Congress's passage of Section 1983, both state and federal officials were liable for damages in both state and federal courts.[70]

2. The Supreme Court continued to enforce strict liability against government officials until the middle of the 20th century.

As the Supreme Court's 1877 decision in *Bates v. Clark* demonstrates, the passage of Section 1983 did not change the Court's approach to strict liability for federal officials. In *Bates,* an army captain and his lieutenant seized whiskey from merchants in the Dakota Territory, incorrectly believing they were in "Indian country"—where Congress had forbidden alcohol.[71] Even though the officers eventually returned the whiskey, the merchants sued them and recovered damages.[72] The Dakota Territory Supreme Court approved the judgment, explaining, "[h]owever good the intentions and purposes of the defendants . . . they committed against the plaintiffs a willful and unlawful act from which flowed all the damages they sustained."[73] The Supreme Court affirmed. It applied a

68. *Monroe*, 365 U.S. at 180 (discussing, also, the "long and extensive debates" over the issues in the post-war South). The problem Section 1983 aimed to solve was partly a jurisdictional one. "At the time this Act was adopted . . . there existed no general federal-question jurisdiction in the lower federal courts." *Carter*, 409 U.S. at 427. "During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws." Zwickler v. Koota, 389 U.S. 241, 245 (1967). On the heels of Section 1983, however, Congress invested "the federal judiciary with enormously increased powers" through the provision of federal-question jurisdiction. *Id.* at 246–47 (citing Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331)). Section 1331 gave the district courts original jurisdiction, "concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . five hundred dollars, and arising under the Constitution of the laws of the United States." § 1, 18 Stat. at 470. Later cases permitting direct constitutional claims against federal officials would rely in part on this jurisdictional grant. *See infra* Section II.B.1; *accord supra* note 22.

69. *See, e.g.*, Milligan v. Hovey, 17 F. Cas. 380 (C.C.D. Ind. 1871) (No. 9,605).

70. *See* Butz v. Economou, 438 U.S. 478, 504 (1978) (noting that the passage of Section 1983 was "hardly a reason for excusing their federal counterparts for the identical constitutional transgressions").

71. Bates v. Clark, 95 U.S. 204, 204–06 (1877).

72. *Id.* at 209–10.

73. Clark v. Bates, 46 N.W. 510, 512 (Dakota 1874).

similar analysis, writing that the officers "were utterly without any authority in the premises; and their honest belief that they had is no defense in their case more than in any other, where a party mistaking his rights commits a trespass by forcibly seizing and taking away another man's property."[74]

Thus, throughout the 19th century, the rule in the United States was that federal officials were strictly liable for actions taken outside their authority.[75] At bottom, "No officer of the law may set that law at defiance with impunity. All of the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it."[76] Even Congress could not authorize unconstitutional conduct,[77] and, "[s]ince an unconstitutional act, even if

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74. *Bates*, 95 U.S. at 209.

75. *See* Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446, 452 (1883) ("To make out his defense he must show that his authority was sufficient in law to protect him."); Belknap v. Schild, 161 U.S. 10, 18 (1896) ("[T]he exception of the United States from judicial process does not protect their officers and agents . . . from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States."); *see also* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 123 n.28 (2009) (collecting cases illustrating the diverse actions available against federal officials).

76. United States v. Lee, 106 U.S. 196, 220 (1882). *Lee*, like *The Apollon* and *Mitchell v. Harmony*, clarified the central role judicially-applied remedies played in ensuring the government does not trample individual rights:

> Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government, and the docket of this court is crowded with controversies of the latter class. Shall it be said . . . that the courts cannot give remedy when the citizen has been deprived of his property by force . . . because the president has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

Id. at 220–21.

77. Mitchell v. Clark, 110 U.S. 633, 640 (1884) ("That an act passed after the event, which, in effect, ratifies what has been done, and declares that no suit shall be sustained against the party acting under color of authority, is valid, *so far as congress could have conferred such authority* before, admits of no reasonable doubt.") (emphasis added); *see also id.* at 649; 4 S. Ct. 312, 313–14 (Field, J., dissenting) (reported separately); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866); Griffin v. Wilcox, 21 Ind. 370, 373 (1863) ("The question here arises, then, can Congress enact that the citizen shall have no redress for a violation of his rights, secured to him by the . . . Constitution . . . . These sections prohibit the passage of a law by Congress, authorizing the arrest of the citizen, without just cause, because such arrest deprives him of his liberty.").

authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense."[78]

The Supreme Court would change that.

II. IN THE MID-20TH CENTURY, THE COURT CREATED LIMITED IMMUNITIES AND CONSISTENTLY REJECTED DEMANDS FROM FEDERAL OFFICIALS FOR ABSOLUTE IMMUNITY.

In 1967, the Supreme Court announced a general "defense of good faith and probable cause" that shielded state and local police from liability under Section 1983.[79] The Court soon extended that good-faith immunity to federal officials in *Butz v. Economou*.[80] In so doing, however, the Court rejected demands for absolute immunity from federal officials, observing the historical availability of such damages and the absurdity of holding federal officials to a lower standard than state officials when enforcing the *federal* Constitution.[81]

A. In 1967, the Court announced a good-faith immunity to constitutional claims against state officials.

The shift away from accountability began with *Pierson v. Ray*, when the Court created a good-faith immunity to constitutional claims. In *Pierson*, Mississippi police relying on an unconstitutional breach-of-the-peace ordinance arrested a group of black clergymen for their attempted use of segregated facilities at an Alabama bus station.[82] After charges against the clergymen were dropped, they sued the officers under Section 1983.[83]

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78. Butz v. Economou, 438 U.S. 478, 490–91, 491 n.15–16 (1978) (citing, among others, *Lee*, 106 U.S. at 218–23; Poindexter v. Greenhow, 114 U.S. 269, 286–92 (1885)); *see also id.* at 489–90 ("A federal official who acted outside of his federal statutory authority would be held strictly liable for his trespassory acts.").

79. Pierson v. Ray, 386 U.S. 547, 556–57 (1967). The defense announced in *Pierson* has confusingly been called "qualified immunity" by the Court. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974). But *Pierson* never used that phrase. Instead, it merely explained that "[t]he common law has never granted police officers an absolute and *unqualified immunity*." *Pierson*, 386 U.S. at 555. For the sake of clarity, this Article calls the *Pierson* defense "good-faith immunity." Any reference to "qualified immunity" means the doctrine announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *see infra* Section III.A, and still in effect today. *See, e.g.*, City of Tahlequah v. Bond, 142 S. Ct. 9, 142 S. Ct. 9 (2021) (per curiam).

80. *See Butz*, 438 U.S. at 503–04.

81. *See id.* at 500–01.

82. *Pierson*, 386 U.S. at 548–49.

83. *Id.* at 550.

Pointing to the elements of common-law false arrest, the Court announced that "a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved."[84] The Court explained that a "policemen's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted with damages if he does."[85] From that, the Court deduced that police should be excused from liability whenever they act with statutory justification.[86] If officers reasonably believed in good faith an arrest was constitutional, the officers were immune from liability "even though the arrest was in

84. *Id.* at 555.

85. *Id.* In and after *Pierson*, the Court justified the creation and extension of immunities as necessary to shield individual officials from financial ruin. *See, e.g.*, Forrester v. White, 484 U.S. 219, 223 (1988). Scholarship has disproven that judicial assumption, showing that both before and after *Pierson* officials held liable for damages were commonly indemnified. Pfander & Hunt, *supra* note 33, at 1904–05 (finding an antebellum indemnity rate of about 60%); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–13 (2014) (finding that government employers paid 99.98% of damages recovered against police). *See generally* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability*, 72 STAN. L. REV. 561 (2020) (finding that in more than 95% of cases against prison officials individual defendants contributed no personal resources to the resolution of claims).

86. Pierson, 386 U.S. at 555.

fact unconstitutional."[87] As an affirmative defense, the burden of establishing good-faith immunity fell to the defendant.[88]

B. In 1971, the Court recognized in Bivens *that the Constitution creates a direct cause of action against federal officials but continued to expand the doctrine of good-faith immunity for state officials.*

The Court continued to grow good-faith immunity in a series of decisions that followed *Pierson.* But before it did, it decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* and officially recognized the existence of a cause of action against federal officials directly under the Constitution.[89] Until this point, constitutional claims against federal officials operated indirectly, defeating official justifications used to defend against common-law claims in both state and federal court.[90]

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87. *Id.* at 557. *Pierson*'s analysis is highly dubious. *See* Baude, *supra* note 6, at 51–61. Besides contravening the many decisions set forth in Section I, *infra*, *Pierson* went against the Court's earlier decision in the strikingly similar case of *Myers v. Anderson*, 238 U.S. 368 (1915). There, the Supreme Court affirmed a Section 1983 judgment against Maryland election officials who prevented three black men from voting under an unconstitutional state statute. *Id.* at 377, 383. The officers argued that they should not be held liable because they believed, in good faith, that the statute was constitutional. Anderson v. Myers, 182 F. 223, 226 (C.C.D. Md. 1910). The circuit court rejected that argument and held—channeling Chief Justice Marshall in *Little v. Barreme*—that anyone enforcing an unconstitutional law "does so at his known peril and is made liable to an action for damages." *Id.* at 230; *see also* Poindexter v. Greenhow, 114 U.S. 269, 292 (1885); Bates v. Clark, 95 U.S. 204, 209 (1877).

Perhaps more consequentially, *Pierson*'s statutory-reliance justification contradicted the original text of Section 1983. As enacted, the act confirmed individual liability for constitutional violations, "any such law, statute, ordinance, regulation, custom, or usage of the State *to the contrary notwithstanding*." Ku Klux Klan Act, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (emphasis added); *see also supra* note 66; Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105, 122 n.118 (2022) (discussing similar issues with *Pierson*'s analysis). The statutory text shows that Congress intended to abrogate defenses or immunities from other sources (including the common law), even if they would have otherwise been folded into Section 1983 as background law.

88. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

89. The Court suggested the availability of direct constitutional causes of action years earlier in *Bell v. Hood* but did not reach the issue in that case. 327 U.S. 678, 683–85 (1946).

90. *See supra* note 30 (illustrating the indirect process).

1. The Court recognized the availability of a direct cause of action against federal officials for constitutional violations.

In *Bivens*, narcotics agents entered Webster Bivens's apartment without a warrant and arrested him without probable cause, using excessive force in the process.[91] The agents handcuffed Bivens in front of his family and searched his apartment before taking him to a federal courthouse, where they interrogated, booked, and strip-searched him.[92] Bivens sued the agents for damages directly under the Constitution, alleging violations of his Fourth Amendment right to be free from unreasonable searches and seizures.[93]

The government moved to dismiss Bivens's claims, arguing that his remedy was in state court through the indirect process described above: Bivens could sue in tort under state law; the agents could defend by asserting that their actions were a valid use of federal power; but if the agents were shown to have violated the Fourth Amendment, that defense would be lost "and they would stand before the state law merely as private individuals."[94] The Supreme Court rejected the idea that state-law remedies were sufficient in Bivens's case, explaining that federal authority, when wielded in violation of the Constitution, "possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."[95]

The Court held that a constitutional remedy was needed.[96] Although the Bill of Rights did not affirmatively provide for its enforcement through damages, the Court explained that the availability of a damages remedy should not be surprising because "[h]istorically, damages have been regarded as the ordinary remedy

91. Bivens v. Six Uknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

92. *Id.*

93. *Id.* at 388–89.

94. *Id.* at 390–91. Although the government argued in *Bivens* that state law provided a "remedy for an unconstitutional invasion of . . . rights by federal agents," *id.* at 390, Congress would later prohibit state claims against federal officers through the Westfall Act, 28 U.S.C. § 2679; *see also infra* notes 205–06.

95. *Bivens*, 403 U.S. at 392. The Court added that relegating constitutional claims to state tort law would effectively subject the Constitution to the state policy considerations underlying the decision to "prohibit or penalize the identical act if engaged in by a private person." *Id.* at 392–95; *see also id.* at 395 n.8 (noting that although no state prohibited the use of reasonable force to resist an unlawful arrest by a private person, two states had outlawed resistance to an unlawful arrest by government officers). Concurring Justice Harlan added, "[T]here is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs." *Id.* at 409 (Harlan, J., concurring).

96. *See id.* at 393–94.

for an invasion of personal interests in liberty."[97] After all, the Court had long held that every right must have a corresponding remedy,[98] and for people like Bivens, that remedy "is damages or nothing."[99]

2. Concurrently, the Court continued to develop the doctrine of good-faith immunity for state officials.

Although it implicitly rejected absolute immunity for federal officials, *Bivens* did not directly address whether federal officials were entitled to some other form of immunity.[100] The Court separately continued to develop good-faith immunity for state officials.

In its 1974 decision in *Scheuer v. Rhodes*, the Court extended *Pierson*'s good-faith immunity to the Governor of Ohio and other state officials to shield them from claims arising from the Kent State Massacre.[101] The Court, citing policy concerns that historically influenced common-law immunity doctrines, homed in on one in particular—that "the public interest requires decisions and action to enforce laws for the protection of the public."[102] Rejecting the

97. *See id.* at 395–96 (citations omitted). As *Bell v. Hood* had explained 25 years earlier, it was "well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* at 396 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)). In *Bivens* (and *Bell* and cases like them) that statute was the federal-question-jurisdiction statute, Section 1331, through which Congress provided the courts "original jurisdiction of all civil actions arising under the Constitution." 28 U.S.C. § 1331; *Bivens*, 403 U.S. at 398–99 (Harlan, J., concurring); *Bell*, 327 U.S. at 680 (citing the statute as previously codified at 28 U.S.C. § 41(1)). Justice Harlan explained, if federal question jurisdiction is "adequate to empower a federal court to grant equitable relief for all areas of subject-matter . . . the same statute is sufficient to employer a federal court to grant a traditional remedy at law." *Bivens*, 403 U.S. at 405 (Harlan, J., concurring) (citations omitted); *see also* Vladeck, *supra* note 6, at 1883.

98. *Bivens*, 403 U.S. at 397 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)); *see also supra* note 31 (discussing the pre-Revolution English origins of this axiom and its immigration to the United States).

99. *Bivens*, 403 U.S. at 409–10 (Harlan, J., concurring). As Justice Harlan pointed out, neither injunctive relief (halting ongoing or prohibiting future violations) nor the exclusionary rule (excluding unconstitutionally gathered evidence from criminal proceedings) could provide any remedy to people like *Bivens*, who were neither subject to ongoing constitutional violations nor criminally tried. *Id*; *see also* James E. Pfander, *The Story of* Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics 13–17 (Nw. L. Sch., Working Paper No. 189, 2009) (discussing the competing narratives related to Bivens's innocence—or guilt—and how they have influenced the understanding of the *Bivens* doctrine).

100. *But see* Butz v. Economou, 438 U.S. 478, 505 (1978) (equating absolute immunity and the absence of a cause of action).

101. Scheuer v. Rhodes, 416 U.S. 232, 233–34 (1974).

102. *Id.* at 240–42. *But see id.* at 246 (justifying some amount of immunity because "officials with a broad range of duties and authority must often act swiftly

officials' calls for *absolute* immunity (a common theme in the Court's decisions extending lesser immunities as an apparent compromise solution[103]), the Court expanded good-faith immunity. Observing that, while police are entitled to a defense of good faith and probable cause,[104] the Court extended *Pierson* to protect officials who acted in good faith and "within the range of discretion permitted the holders of such office under [state] law."[105]

In 1975, the Court extended good-faith immunity to school officials in *Wood v. Strickland*.[106] The Court again cited "public-policy reasons," adding this time to its growing list of concern that, without some form of immunity, candidates for school board might be deterred from seeking office.[107] *Wood* again changed the standard, even if slightly, providing immunity for actions taken "in the good-faith fulfillment of . . . responsibilities . . . within the bounds of reason under all the circumstances."[108] *Wood* clarified that this standard contained both subjective ("good faith") and objective ("reasonableness") elements.[109] Thus, damages were appropriate if school officials acted maliciously or with "disregard of the student's clearly established constitutional rights."[110] But, the Court ex-

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and firmly at the risk that action deferred will be futile or constitute virtual abdication of office"). *Scheuer* contradicted *The Apollon*, 22 U.S. (9 Wheat.) 362, 366–67 (1824), in which the Court had expressly rejected that justification 150 years earlier. *See also supra* note 49.

103. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 808 (1982); *Butz*, 438 U.S. at 485; Procunier v. Navarette, 434 U.S. 555, 560–61 (1978); Wood v. Strickland, 420 U.S. 308, 320 (1975); *Scheuer*, 416 U.S. at 238–39. Along with the Court's consistent reliance on policy to extend immunity to more and more types of government officials, the Court was either acting as a common-law court, *contra* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), or as an activist Court, invading the legislative role, *contra*, *e.g.*, *The Apollon*, 22 U.S. at 366–67. *See also* Jaicomo & Bidwell, *supra* note 87, at 110, 115–18 (explaining that the historical judicial role was focused exclusively on the law, and if it was violated, applying an appropriate remedy, while the historical legislative role focused on policy and adjusting incentives through indemnification); Vladeck, *supra* note 6, at 1887.

104. *Scheur*, 416 U.S. at 246.

105. *Id.* at 251.

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

107. *Id.* at 316–20.

108. *Id.* at 321.

109. *Id.* at 321–22; *see also* O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (providing a good-faith immunity to a hospital superintended who kept a patient committed against his will and without justification).

110. *Wood*, 420 U.S. at 322. Justice Powell objected to the reliance on "clearly established" law, arguing that "[t]his harsh standard, requiring knowledge of what is characterized as 'settled, indisputable law,' leaves little substance to the doctrine of qualified immunity. The Court's decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights." *Id.* at 329 (Powell, J., dissenting in part). *But see infra* note 159. Justice Powell was correct in *Wood* that the Court's assumption was unwar-

plained, any "lesser standard" would prevent the vindication of constitutional rights.[111]

In 1978, the Court finally extended good-faith immunity to all state and local officials sued under Section 1983.[112] In *Procunier v. Navarette*, a California prison inmate sued his jailers for interfering with his mail.[113] Surveying its opinions as well as those of the circuit and district courts, the Court determined that none of them "clearly established" that the officials had violated the Constitution.[114] And because the claims merely alleged negligence, there was no malicious intent.[115] Accordingly, the officials were immune.

C. *In 1978, the Court extended good-faith immunity to federal officials in* Butz*, citing the importance of treating state and federal officials equally under the Constitution.*

Balancing good-faith immunity against the need for federal accountability, the Supreme Court decided *Butz v. Economou* in 1978.[116] Although *Butz* extended good-faith immunity to federal officials, it—much more so than *Bivens*—was a monument to the importance of federal accountability and the constitutional need to ensure that all rights are enforceable under the law, even if, perhaps *especially* if, violated by federal officials.

In *Butz*, business owner Earl Butz sued several Department of Agriculture officials, including the Secretary of Agriculture, a member of the cabinet, alleging that they investigated and proceeded against him in retaliation for his criticism of the agency.[117] The government took the position that federal officials were absolutely im-

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ranted. *See generally* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021) (proving that government officials are not aware of the facts or holdings of specific court opinions that clearly establish the law).

111. *Id.* at 322.

112. *See generally* Procunier v. Navarette, 434 U.S. 555 (1978). Dissenting Justice Stevens explained that *Procunier* "strongly implies that every defendant in a § 1983 action is entitled to assert a qualified immunity from damage liability." *Id.* at 568 (Stevens, J., dissenting). Up to that point, "[a]s the immunity doctrine developed, the Court was careful to limit its holdings to specific officials, and to insist that a considered inquiry into the common law was an essential precondition to the recognition of the proper immunity for any official," Justice Stevens explained, *Procunier* abandoned those limits. *Id.* at 568–69 (citing *Wood*, 420 U.S at 322; Imbler v. Pachtman, 424 U.S 409, 421 (1976) (announcing absolute immunity for prosecutors)).

113. *Id.* at 556–57.

114. *Id.* at 565.

115. *Id.* at 566 (citing RESTATEMENT (SECOND) OF TORTS §§ 8A, 282, 282 cmt. d (AM. L. INST. 1965)).

116. Butz v. Economou, 438 U.S. 478 (1978).

117. *Id.* at 480.

mune from liability even if they violated the Constitution "and even if the violation was knowing and deliberate."[118] The Supreme Court, however, was "quite sure that was unsound and consequently rejected it."[119]

Instead, *Butz* turned to "the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers."[120] Citing many of the cases discussed in Section I. B–C, the Court explained that "a federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law."[121] "Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense."[122] Strangely, *Butz* would permit one anyhow.[123]

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118. *Id.* at 486. For this proposition, the government relied on a plurality opinion in *Barr v. Matteo*, 360 U.S. 564, 564 (1959), where an agency director had been sued for malicious defamation by two employees whose suspensions for misconduct he announced in a press release. Because the director had acted within his lawfully conferred discretion, the plurality found that the director was entitled to "absolute privilege." *Id.* at 569–74. Even so, "*Barr* did not purport to protect an official who has . . . violated those fundamental principles of fairness embodied in the Constitution." *Butz*, 438 U.S. at 495; *see also infra* note 122.

119. *Butz*, 438 U.S. at 485 (cleaned up).

120. *Id.* at 489.

121. *Id.* at 490.

122. *Id.* at 489–91 (citing, among others, Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806); Bates v. Clark, 95 U.S. 204 (1877); United States v. Lee, 106 U.S. 196 (1882)). *Butz* also distinguished those cases from others where the Court had granted immunity because the subject federal officials had acted within their lawful zones of discretion. *Id.* at 491–95 (citing Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845); Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849); Spalding v. Vilas, 161 U.S. 483 (1896)). For demonstration, *Butz* noted that the defendant in *Kendall* had acted through his "normal duties . . . in the exercise of the discretion conferred upon him"; the defendant in *Wilkes* had not "exceeded his jurisdiction"; and the defendant in *Spalding* "did not exceed his authority, nor pass the line of his duty." *Id.* at 491–95 (citations omitted); *see also id.* at 489 ("*Barr* does not control this case" because "[i]t did not address the liability of the acting director had his conduct not been within the outer limits of his duties."). *Butz* explained that none of those cases "purporte[d] to immunize officials who ignore limitations on their authority imposed by law." *Id.* at 494. And, *Butz* noted, since federal officials "are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless . . . violate constitutional rights without fear of liability." *Id.* at 495. Because, of course, an unconstitutional act is necessarily one beyond the limits of any lawful authority. *Id.* at 490–91.

Recent attempts to rehabilitate *Pierson*'s good-faith immunity have cited *Kendall*, *Wilkes*, and *Spalding* for the proposition that at common law "at least qualified immunity applie[d] to executive officials' discretionary acts." Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1360–64, 1383–84 (2021). But those arguments overlook the distinction between discretionary acts done with authority—for which immunity was provided, as in *Kendall v. Stokes*—and acts done without it, like those that violate the Constitu-

Surveying *Pierson* and its progeny, *Butz* extended good-faith immunity to federal officials.[124] Still, the Court went to great lengths to explain that "there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement . . . than is accorded state officials when sued for the identical violation."[125]

To bolster the availability of constitutional claims against federal officials, while still providing them good-faith immunity, the Court's analysis centered on similarity between state and federal officials.[126] The Court reasoned that constitutional injuries suffered at the hands of federal officials were at least as damaging as those suffered at the hands of state officials (if not more so) and that the two groups faced the same pressures and uncertainty. The Court, therefore, saw "no sense in holding a state governor liable [in *Scheuer*] but immunizing the head of a federal department [in *Butz*]."[127] It would be untenable, the Court reasoned, to distinguish between state and federal officials when applying constitutional remedies or immunities.[128]

D. In 1979, the Court confirmed the general availability of constitutional claims against federal officials.

In *Butz*, the Court equated *Bivens* with a rejection of absolute immunity for federal officials[129] and a recognition of the general

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tion—for which officers were held strictly liable, as in *Little v. Barreme*. *Butz*, 438 U.S. at 489–95. *See generally* James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. L. REV. Online 148 (2021) (responding to *Keller*); William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. (forthcoming 2022) (responding to *Keller*).

123. *See Butz*, 438 U.S. at 507 n.34. ("Although, as [*Bivens*] makes clear, traditional doctrine did not accord immunity to officials who transgressed constitutional limits, we believe that federal officials sued by such traditional means should similarly be entitled to a [good-faith] immunity."). And as in all other cases in the *Pierson* line, *Butz* relied on policy to justify its departure from legal history. *Id.* at 503 (weighing the "plaintiff's right to compensation" against "the need to protect the decisionmaking processes of the executive department").

124. *See Butz*, 438 U.S. at 496–501.

125. *Id.* at 500.

126. *See id.* at 504.

127. *Id.* at 500–01.

128. *Id.* at 500, 504.

129. *Id.* at 501 ("[T]he cause of action recognized in *Bivens* would . . . be drained of meaning if federal officials were entitled to absolute immunity for their constitutional transgressions.") (internal quotation marks omitted); *id.* at 505 ("If . . . all [federal] officials . . . were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs."). This general liability scheme was subject only to a small number of absolute immunities the

availability of constitutional claims against them.[130] The Court confirmed that understanding in two cases following shortly after: *Davis v. Passman*[131] and *Carlson v. Green*.[132]

In 1979, *Davis* approved Fifth Amendment due process claims against Congressman Otto Passman for his discriminatory firing of a staffer because she was a woman.[133] *Davis* began from the "well settled" proposition that where legal rights are invaded, "courts may use any available remedy to make good the wrong done."[134] The Court held that damages were, therefore, available against federal officials unless there were "special factors counseling hesitation in the absence of affirmative action by Congress" or an "*explicit* congressional declaration that persons in petitioner's position" injured by unconstitutional acts "may not recover money damages from those responsible for the injury."[135] Both exceptions were narrow. The Court found no "special factors" in *Davis* because, although a suit against a congressman "does raise special concerns counseling hesitation," legislative immunity offsets them.[136] And there was no explicit statutory prohibition against suing members of Congress for damages.[137]

A year later, *Carlson* similarly approved Eighth Amendment claims against prison officials for their failure to provide adequate medical care.[138] *Carlson* also confirmed that *Bivens* had broadly "established that the victims of a constitutional violation by a fed-

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Court had approved for their ostensibly historical availability (*e.g.*, judicial and prosecutorial immunities). *Id.* at 508–17.

130. *Id.* at 504. Indeed, *Butz* itself approved claims against, among other federal officials, the Secretary of Agriculture for First Amendment retaliation—a far cry from the particulars of *Bivens*. *Id.* at 480, 483, 517. So too were the many other contexts in which the Court has implied or permitted claims against federal officials. *See infra* Appendix A (collecting Supreme Court decisions recognizing, implying, or allowing constitutional claims against federal officials to proceed).

131. Davis v. Passman, 442 U.S. 228, 234 (1979) ("Last Term, *Butz* reaffirmed [*Bivens*], stating that the decision in *Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could . . . obtain an award of monetary damages against the responsible federal officer.") (citing *Butz*, 438 U.S. at 504) (internal quotation marks omitted).

132. Carlson v. Green, 446 U.S. 14, 18 (1980) ("*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court . . . .").

133. *See Davis*, 442 U.S. at 230–31.

134. *Id.* at 245 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)).

135. *Id.* at 245–48 (emphasis in original) (citing *Butz*, 438 U.S. at 504; and then citing Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971)). *But see supra* note 77 (citing cases noting that Congress cannot authorize unconstitutional acts).

136. *Id.* at 246.

137. *Id.* at 246–47.

138. Carlson v. Green, 446 U.S. 14, 16–18 (1980).

eral agent have a right to recover damages."[139] But *Carlson* slightly changed the narrow exceptions through which federal defendants could defeat *Bivens*. Defendants had to show either (1), as in *Davis*, "special factors counseling hesitation in the absence of affirmative action by Congress," or (2), slightly different from *Davis*, that Congress provided an alternative remedy explicitly declared to be an equally effective substitute for *Bivens*.[140] *Carlson* confirmed a strict understanding of this two-part test, rejecting both exceptions. Like *Davis*, the Court held that the availability of immunity precluded any special factors that may otherwise exist.[141] And, although Congress had provided a wide-ranging cause of action for torts committed by federal employees, Congress did not *explicitly* declare it was intended to replace *Bivens*.[142]

Through *Davis* and *Carlson*, the Court confirmed the general availability of constitutional claims against federal officials without regard to context. *Bivens* thus entered the 1980s limited only by two very narrow exceptions.

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139. *Id.* at 18.

140. *Id.* at 18–19 (citing *Bivens*, 403 U.S. at 396–97; and then citing Davis v. Passman, 442 U.S. 228, 245–47 (1979)). This Article collectively refers to both elements as the "special-factors test."

141. *See Carlson*, 446 U.S. at 19 (citing *Davis*, 442 U.S. at 246; and then citing Butz v. Economou, 438 U.S. 478 (1978)). While *Davis* relied on legislative immunity, *Carlson* relied on good-faith immunity. *Davis*, 442 U.S. at 230, 232; *Carlson*, 446 U.S. at 21.

142. Congress provided a statutory action through the Federal Tort Claims Act (FTCA). *See* 28 U.S.C. §§ 1346(b), 2671–80 (making the United States vicariously liable for certain torts committed by its employees, subject to a variety of exceptions and restrictions). *Carlson* held, however, that the FTCA does not preempt *Bivens*. *Carlson*, 446 U.S. at 19–23. To the contrary, *Carlson* noted Congress has made it "crystal clear" through its 1974 amendment of the FTCA that the Act and *Bivens* are "parallel, complementary causes of action." *Id.* (quoting S. REP. NO. 93-588, at 3 (1973) (indicating that the FTCA "should be viewed as a *counterpart* to the *Bivens* case and its progen[y]") (emphasis added)).

Although the Court has never addressed the issue directly, *Carlson*'s observation that Congress statutorily confirmed *Bivens* through the FTCA appears to be "affirmative action by Congress" that should logically defeat *Carlson*'s first exception in nearly every (if not in every) *Bivens* case. Put differently, if a defendant is merely permitted to offer "special factors" absent affirmative action by Congress, and the FTCA constitutes affirmative action by Congress, there should be almost no situation in which special factors can override that Congressional action (short of a more specific Congressional enactment). *See also* notes 205–06 *infra* (discussing additional affirmative action by Congress approving *Bivens*).

III. THE COURT CREATED AND EXPANDED QUALIFIED IMMUNITY TO ADDRESS ITS POLICY CONCERNS WITH A BROAD UNDERSTANDING OF *BIVENS* CLAIMS, WHILE SIMULTANEOUSLY CABINING *BIVENS* TO ITS PRECISE FACTS.

Building on *Bivens*, *Butz*, *Davis,* and *Carlson*, the Court in 1982 again rejected claims for absolute immunity from federal officials in *Harlow v. Fitzgerald*.[143] Instead, to assuage the Court's policy concerns about holding federal officials liable for damages, *Harlow* crafted a new form of immunity called "qualified immunity." Divorced from the common-law justifications of *Pierson*'s good-faith immunity, qualified immunity removed good faith from the equation and provided a more potent form of immunity for all government officials—federal, state, and local.

Despite the Court's reliance on the general availability of *Bivens* claims as the reason to create qualified immunity and then expand the doctrine over the next four decades, the Court simultaneously cabined *Bivens* to its particular facts. Today, the Court provides federal officials with a de facto absolute federal immunity in all but a vanishingly small number of contexts.

A. In 1982, the broad availability of constitutional claims against federal officials was so well established that the Court created qualified immunity to limit perceived policy concerns with federal liability.

As in *Butz*, the Supreme Court in *Harlow v. Fitzgerald* confronted First Amendment retaliation claims against high-level federal officials and their demand for absolute immunity.[144] And like it had in *Butz*, the Court permitted those claims to move forward, subject to a lesser immunity. But *Harlow* demolished the good-faith immunity *Butz* applied to federal officials.[145] In its place, the Court erected the doctrine of qualified immunity still in effect today.[146]

In *Harlow*, two White House aides to President Richard Nixon—Bryce Harlow and Alexander Butterfield—were accused of conspiring to have Air Force management analyst A. Ernest Fitzgerald fired.[147] Upset that Fitzgerald had blown the whistle to Con-

143. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

144. *See id.* at 800.

145. *See id.* at 815–18.

146. *Id.* at 809, 818.

147. *Id.* at 802–805. In *Nixon v. Fitzgerald*, Fitzgerald sued former President Nixon for his part in the alleged conspiracy. Nixon v. Fitzgerald, 457 U.S. 731, 733–739 (1982). There, the Court provided absolute immunity because "[t]he Pres-

gress about the Air Force's shoddy purchasing practices, the Nixon Administration ordered a departmental reorganization and reduction in force through which Fitzgerald's job was eliminated.[148]

Ignoring the historical line of cases cited in *Butz* to hold accountable federal officials who strayed beyond their legal authority, the Court started from the premise that it had "consistently held that government officials are entitled to some form of immunity from suit for damages."[149] Between absolute and qualified immunity, *Harlow* explained that "qualified immunity represents the norm."[150] So *Harlow* rejected the defendants' request for absolute immunity.[151] The Court wrote that damages against federal officials are an important mechanism to vindicate the Constitution, especially because "the greater power of high officials . . . affords a greater potential for a regime of lawless conduct."[152]

The Court's analysis, again, rested on policy—not law.[153] The Court noted its concern that liability against the federal defendants in *Harlow*, and those like them, would carry "social costs" because litigating constitutional violations is costly, requires attention, may deter some from accepting office, and could create apprehension that would "dampen the ardor of all but the most resolute, or the most irresponsible."[154] Some form of immunity, *Harlow* determined, would best accommodate the competing values of "protect[ing] the rights of citizens" and shielding federal officials from "insubstantial lawsuits."[155] To balance those concerns, *Harlow* concluded that good-faith immunity "require[d] an adjustment"—and so, qualified immunity was born.[156]

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ident's unique status under the Constitution distinguishes him from other officials." *Id.* at 750.

148. *See id.* at 733–34, 756.

149. *Harlow*, 457 U.S. at 806 (citing *Nixon*, 457 U.S. at 731).

150. *Id.* at 807.

151. *Id.* at 808–09.

152. *Id.* at 809 (cleaned up).

153. *See id.* at 813 ("The resolution of immunity questions requires a balance between the evils inevitable in any available alternative."); *see also, e.g.*, *id.* (finding that the defendants had not shown that "public policy requires" their entitlement to absolute immunity but crediting their argument that "public policy at least mandates an application of . . . qualified immunity"); Crawford-El v. Britton, 523 U.S. 574, 594 n.15 (1998) ("*Harlow* was forthright in revising the immunity defense for policy reasons . . . .").

154. *Harlow*, 457 U.S. at 814, 814 n.22 (citing Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. CT. REV. 281, 324–27 (1980); Gregoire v. Biddle, 177 F.2d 579, 581 (2d. Cir. 1949)).

155. *Id.* at 807, 813–15.

156. *Id.* at 815.

Harlow reiterated that good-faith immunity had both an objective element and a subjective element.[157] The Court concluded that adjudicating the subjective element (*i.e.*, good faith) was too costly because it required factfinding: discovery and trials.[158] *Harlow*, therefore, struck good faith from the immunity calculus and transformed it into qualified immunity, where "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[159] This species of immunity had no basis in common law. It was instead a pure manifestation of the Court's policy preferences.[160]

Although the availability of *Bivens* was not directly before the Court,[161] *Harlow* explained that if a claim could clear the immunity bar, "a person who suffers injury caused by such conduct may have a cause of action."[162] More importantly, just as *Butz* explained that

157. *Id.*

158. *Id.* at 816–17 ("Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues, [which can be] disruptive of effective government.").

159. *Id.* at 818. *Harlow*'s exclusive reliance on "clearly established statutory or constitutional rights" is perplexing because Justice Powell, who authored *Harlow*, had just seven years earlier objected to that standard as a requirement for immunity in *Wood v. Strickland*. Wood v Strickland, 420 U.S. 308, 328 (1975) (Powell, J., dissenting in part). Dissenting in *Wood*, Justice Powell argued that the reliance on "clearly established" law "rest[ed] on an unwarranted assumption as to what lay . . . officials know or can know about the law and constitutional rights." *Id.* at 328–29. He was correct. *See supra* note 110. Yet, less than a decade later, he would make it the law, writing for the majority in *Harlow* and creating the clearly established test that still defines qualified immunity today.

160. *See* Anderson v. Creighton, 483 U.S. 635, 645 (1987) (explaining that *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law"). Though a comprehensive critique of qualified immunity goes beyond the scope of this Article, legal scholars and jurists have consistently criticized its lack of foundation in history, law, or empirical reality. *See generally, e.g.*, Baude, *supra* note 6, at 55–61; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801–20 (2018); Baxter v. Bracey, 140 S. Ct. 1862, 1862–65 (2020) (mem.) (THOMAS, J., dissenting from denial of certiorari); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (per curiam) (SOTOMAYOR, J., dissenting) (joined by Justice Ginsburg); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871–72 (THOMAS, J., concurring); Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (joined by JUSTICE THOMAS); Wyatt v. Cole, 504 U.S. 158, 170–171 (1992) (Kennedy, J., concurring) (joined by Justice Scalia); *Anderson*, 483 U.S. at 647 (Stevens, J., dissenting) (joined by Justices Brennan and Marshall).

161. *See Harlow*, 457 U.S. at 805 n.10, 820 n.36.

162. *Id.* at 819. From context, the Court's use of "may" expressed permission, not possibility. This analysis tracks *Davis*'s and *Carlson*'s use of immunity defenses to preclude "special factors" from defeating *Bivens*. *See supra* note 141.

Bivens's approval of a constitutional cause of action against federal officials could not have contemplated absolute immunity for those same officials,[163] *Harlow* could not have contemplated the absence of a cause of action against federal officials. Indeed, the Court found it necessary to create a new form of immunity to tamp down *Bivens's* perceived policy effects. But for the clear and broad availability of *Bivens*, *Harlow*'s creation of qualified immunity would be absurd.

This observation is critical to understanding the relationship between immunity and *Bivens* claims. Although the Court has explicitly confirmed *Bivens* only in a handful of cases, it erected an entirely new immunity scheme premised on the understanding that *Bivens* permits a broad cause of action against federal officials. Relatedly, the Court has consistently permitted *Bivens* claims to proceed or otherwise acknowledged them in dozens of cases,[164] effectively applying a broad understanding of the constitutional remedy announced in *Bivens* and confirmed in *Butz*.[165]

B. Over the past four decades, the Court has repeatedly used Bivens *to strengthen qualified immunity.*

Following *Harlow*, federal officials were personally liable for constitutional violations, so long as the rights they violated were

163. *See* Butz v. Economou, 438 U.S. 478, 504–05 (1978) ("Our opinion in *Bivens* put aside the immunity question; but we could not have contemplated that immunity would be absolute.").

164. *See infra* Appendix A (listing 31 cases).

165. Relatedly, the Court has indicated in additional ways that qualified-immunity *Bivens* cases reflect the availability of *Bivens* claims, even if *Bivens* is not directly addressed. First, the Court has held that the elements of *Bivens* are so intertwined with qualified immunity that *Bivens* claims share in the procedural benefit of immediate appealability the Court has provided for qualified immunity. *See* Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985); Hartman v. Moore, 547 U.S. 250, 257 n.5 (2006); Wilkie v. Robbins, 551 U.S. 537, 549 n.4 (2007). Second, the Court has explained the *Bivens* issue is "antecedent" to any other issue and courts may address *Bivens* even when it is not directly presented. *Compare, e.g.*, Petition for Certiorari, Hernandez v. Mesa, 2015 WL 4537883, at *i (S. Ct. July 23, 2015) (No. 15-118) (presenting questions about qualified immunity and constitutional merits), *with* Hernandez v. Mesa, 137 S. Ct. 2003, 2006–07 (2017) (per curiam) (remanding the case for consideration of the "antecedent" Bivens question). *See also, e.g.*, Liff v. Office of Inspector Gen., 881 F.3d 912, 917 (D.C. Cir. 2018) ("Because the defense of qualified immunity from a *Bivens* damages action directly implicates the antecedent question whether to recognize that *Bivens* action at all, that question is appropriate for interlocutory appeal.") (cleaned up); Oliva v. Nivar, 973 F.3d 438, 441 (5th Cir. 2020) ("In cases like this one, the Supreme Court has said the *Bivens* question is antecedent to questions of qualified immunity.") (internal quotation marks omitted); *see infra* notes 172–76 (discussing the interlocutory appeals issue).

"clearly established."[166] In announcing that anodyne-sounding standard, *Harlow* assured that qualified immunity provided "no license to lawless conduct."[167] But actions speak louder than words.[168] The Court has been prolific in its consideration of qualified immunity over the past 40 years, deciding 36 cases applying the clearly established test.[169] And the Court's application of qualified immunity has almost always favored immunity over accountability, rejecting immunity on just three occasions.[170]

The Court has also continuously modified qualified immunity, often relying on *Bivens* cases, to raise the hurdle higher and higher for civil rights plaintiffs in several key ways.

First, following the cue from *Butz* that it would be illogical to distinguish between state and federal officials, the Court in *Davis v. Scherer* formally extended qualified immunity to state and local officials.[171] The Court thereby ensured that *all* government officials would have default immunity from constitutional liability.

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166. *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (citing *Harlow*, 457 U.S. at 818).

167. *Harlow*, 457 U.S. at 819.

168. *See, e.g.*, Sampson v. Cnty. of Los Angeles, 974 F.3d 1012, 1025 (9th Cir. 2020) (granting qualified immunity to a social worker who sexually harassed a woman seeking guardianship); Jessop v. City of Fresno, 936 F.3d 937, 939–40, 942 (9th Cir. 2019) (granting qualified immunity to police accused of stealing $225,000 while executing a search warrant). Although *Jessop* recognized that "virtually every human society teaches that theft generally is morally wrong," it explained that axiom had no bearing to the qualified immunity analysis, *Jessop*, 936 F.3d at 941 n.1, and declined to clearly establish the unconstitutionality of the officers' actions for future cases, *id.* at 940.

169. *See infra* Appendix B (showing that the Court has averaged nearly one qualified immunity decision per term since *Harlow* was decided and more than two per term over the past decade). This list excludes cases involving qualified immunity that were decided on grounds not related to the application of the clearly established test. *See, e.g.*, Crawford-El v. Britton 523 U.S. 574, 595–97 (1998) (rejecting a heightened pleading standard for plaintiffs in qualified immunity cases); Sause v. Bauer, 138 S. Ct. 2561, 2563 (2018) (per curiam) (reversing a grant of qualified immunity due to the lower court's failure to properly apply summary judgment standards).

170. *See* Hope v. Pelzer, 536 U.S. 730 (2002); Groh v. Ramirez, 540 U.S. 551 (2004); Taylor v. Riojas, 141 S. Ct. 52 (2020).

171. Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984). Before *Davis*, the Supreme Court strongly insinuated that qualified immunity would apply to state officials by granting, vacating, and reversing pending cases in light of *Harlow* and citing *Butz* for the proposition that it was "untenable to draw a distinction for purposes of immunity law between suits brought against state officials" and suits brought against federal officials. Sanborn v. Wolfel, 458 U.S. 1102, 1102 (1982) (mem.) (citation and internal quotation marks omitted). And lower courts were already applying qualified immunity to state officials before *Davis*. *See, e.g.*, Trejo v. Perez, 693 F.2d 482, 484 n.4 (5th Cir. 1982); Wolfel v. Sanborn, 691 F.2d 270, 272 (6th Cir. 1982). Still, the Court felt it necessary to continue reinforcing that, while *Harlow* created qualified immunity to shield federal officials, the doctrine also

Second, in *Mitchell v. Forsyth*, the Court used *Bivens* claims against the Attorney General to establish that denials of qualified immunity are immediately appealable.[172] Noting that *Harlow* created "an immunity from suit rather than a mere defense to liability," the Court concluded that the policy benefits of qualified immunity—that is, sparing government officials the costs of discovery and trial—would be "lost if a case is erroneously permitted to go to trial."[173] So the Court announced that government officials could immediately appeal denials of qualified immunity.[174] The Court later explained that government defendants had a right to appeal at multiple stages of litigation.[175] This procedural benefit provided government defendants a "potent weapon to use against plaintiffs" that imposed "enormous costs on [them] and on the judicial system as a whole."[176]

Third, and most consequentially, the Court continuously restricted the meaning of "clearly established" law. Here, it again relied on *Bivens*. Beginning with *Bivens* claims against FBI agents in *Anderson v. Creighton*, the Court held that law could not be clearly established at a high level of generality.[177] Courts could not rely on "general rights" (e.g., the right to be free from warrantless

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shielded their state and local equivalents. *See* Malley v. Briggs, 475 U.S. 335, 340 n.2 (1986).

172. *See* Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985).

173. *Id.* at 526 (emphasis omitted).

174. More precisely, the Court held that a denial of qualified immunity was subject to the "collateral order doctrine" announced in *Cohen v. Benefit Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *Mitchell*, 472 U.S at 524–25. *See generally* Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. ONLINE 169 (2019). For purporting to divine an elaborate three-part test from the spare language in 28 U.S.C. § 1291 granting jurisdiction of "appeal[s] only from all final decisions of the district courts," *Cohen*, 337 U.S. at 545–47, the collateral order doctrine itself "is probably the most maligned rule of federal appellate jurisdiction," Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1842 n.180 (2018) (citation omitted). Added to the fact that the Court has since conceded that treating qualified immunity denials as immediately appealable final decisions "may have expanded beyond . . . the strict application of the criteria set out in *Cohen*," Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009), the enormous appellate advantage *Mitchell* provides government defendants is built on sand.

175. Behrens v. Pelletier, 516 U.S. 299, 310–11 (1996) (rejecting the circuit-court-created limitation of defendants to a single interlocutory appeal in qualified immunity cases).

176. *Mitchell*, 472 U.S. at 555 (Brennan, J., concurring in part and dissenting in part); *see also* Solimine, *supra* note 174, at 175. The right to immediate appeal is not guaranteed, however, if Section 1983 claims are brought in state court. In such cases, the availability of appeal is determined by the procedures of the relevant state. *See* Johnson v. Frankell, 520 U.S. 911, 916 (1997).

177. Anderson v. Creighton, 483 U.S. 635, 638–41 (1987).

searches) but needed to undertake a "more particularized" consideration of "the information possessed by the . . . officials" through the lens of the "objective (albeit fact-specific) question of whether a reasonable officer could have believed [the specific actions] to be lawful."[178] To be clearly established, a right had to be "sufficiently clear that a reasonable official would understand that what he is doing violates" it.[179]

The Court, in a *Bivens* case against the Attorney General, further impressed that to satisfy the clearly established test the law needed to be so clear that "every" reasonable official would have to have understood his "particular conduct" was unconstitutional.[180] In another *Bivens* case, this time against federal marshals, the Court explained that only "controlling authority in the [relevant] jurisdiction at the time in question which clearly established the rule" under similar circumstances or "a consensus of cases of persuasive authority" could clearly establish the law.[181] And in a *Bivens* case against Secret Service agents, the Court explained that "existing precedent must have placed the constitutional question beyond debate."[182]

Aside from strengthening the "exacting standard" of the clearly established test,[183] the Court routinely reversed lower court decisions on a summary basis,[184] often correcting errors that would

178. *Id.* at 639–41.

179. *Id.* at 640.

180. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741–42 (2011); *see also* Saucier v. Katz, 533 U.S. 194, at 201 (2001) (overruled on other grounds).

181. Wilson v. Layne, 526 U.S. 603, 617 (1999) (noting that unpublished cases were insufficient). The Court has also repeatedly implied (without ever holding) that its own precedent—not that of the circuits—may be the only source of clearly established law. On at least six occasions, the Court has merely "[a]ssum[ed] arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law." Reichle v. Howards, 566 U.S. 658, 665 (2012); Taylor v. Barkes, 575 U.S. 822, 826 (2015); Carroll v. Carman, 574 U.S. 13, 17 (2014); City & Cnty. of San Francisco v. Sheehan, 575 U.S. 600, 614 (2015); City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021). *But see, e.g.*, United States v. Lanier, 520 U.S. 259, 269 (1997) ("[I]n applying the rule of qualified immunity under 42 U.S.C. § 1983 and *Bivens* . . . we have referred to decisions of the Courts of Appeals when enquiring whether a right was 'clearly established.'").

182. *Reichle*, 566 U.S. at 664 (quoting *al-Kidd*, 563 U.S. at 741); *see also, e.g.*, Hanlon v. Berger, 526 U.S. 808, 810 (1999) (relying on *Wilson*, 526 U.S. 603 for a grant of immunity); Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (holding that conflicting caselaw proves a right is not clearly established); Redding v. Safford Unified Sch. Dist., 557 U.S. 364, 378–79 (2009) (same conclusion).

183. *Sheehan*, 575 U.S. at 611.

184. *See, e.g.*, White v. Pauly, 137 S. Ct. 548, 551 (2017) ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases."). Although the Court's summary decision process is typically re-

not otherwise satisfy the Court's own rules for granting certiorari.[185] Today, "[t]he pages of the *United States Reports* teem with warnings about the difficulty of placing a question beyond debate" under the clearly established test.[186]

Fourth, the Court in *Pearson v. Callahan* held that courts considering qualified immunity could skip over the constitutional merits and decide the issue exclusively on the basis that the violations alleged were not clearly established.[187] As a result, courts often grant qualified immunity because there is no earlier case addressing materially similar claims *while never establishing law for future cases*.[188] The result is a lack of precedent, which yields a lack of clearly established law, which yields a lack of precedent, etc.—"An Escherian Stairwell. Heads the government wins, tails plaintiff loses."[189] Like qualified immunity itself, the Court adopted this rule

served for the rare instances when the lower court is obviously wrong, the Court has regularly decided qualified immunity cases through summary disposition. *See* Baude, *supra* note 6, at 84–87. Indeed, eight of the Court's last ten qualified immunity decisions have been summary, per curiam opinions, and all but one, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017), was decided without oral argument or merits briefing. *See infra* Appendix B.

185. *See, e.g.*, Tolan v. Cotton, 572 U.S. 650, 661 (2014) (per curiam) (ALITO, J., concurring) (citing SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); STEPHEN SHAPIRO, KENNETH GELLER, TIMOTHY BISHOP, EDWARD HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE § 5.12(c)(3) (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.")). The Court has taken this aggressive approach because, in its view, qualified immunity is so important "to society as a whole . . . the Court often corrects lower courts when they wrongly" deny immunity. *Sheehan*, 575 U.S. at 611 n.3 (citations omitted).

186. Morrow v. Meachum, 917 F.3d 870, 874 (5th Cir. 2019).

187. *See* Pearson v. Callahan 555 U.S. 223, 236 (2009). The Supreme Court itself has skipped the constitutional merits in a two-thirds of its decisions granting qualified immunity. *See infra* Appendix B.

188. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 12 (2015) ("[M]any rights potentially might never be clearly established should a court 'skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.' The danger, in short, is one of 'constitutional stagnation.'") (citations and internal quotation marks omitted); *see also* Camreta v. Greene 563 U.S. 692, 706 (2011) (discussing how qualified immunity frustrates the development of constitutional precedent and facilitates lawlessness by officials). *Id.*

189. Zadeh v. Robinson, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part). The Ninth Circuit cases cited *supra* note 168 illustrate the judicial grace that pervades the application of the clearly established test. *Compare* Sampson v. Cnty. of Los Angeles, 947 F.3d 1012, 1025 (9th Cir. 2020) (clearly establishing for future cases that social workers cannot sexually harass women seeking guardianship), *with* Jessop v. City of Fresno, 936 F.3d 937, 940 (9th Cir 2019) (declining to clearly establish for future cases that police cannot steal from property owners while executing search warrants).

for policy reasons: "The procedure [of adjudicating constitutional merits] sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."[190] And the Court later warned in a *Bivens* case that courts "should think carefully before" considering both steps of the qualified immunity test.[191]

Fifth, the Court stealthily shifted the burden of overcoming the clearly established test from defendants to plaintiffs.[192] Unlike most defenses, all a defendant need do is raise qualified immunity. Then, the burden shifts to the plaintiff to prove the relevant law was clearly established.[193]

Among the many cases the Court used to strengthen qualified immunity,[194] it did not distinguish between federal and state officials. Instead, the Court treated the two groups "identical[ly],"[195] consistently using *Bivens* cases to develop the qualified immunity

190. *Pearson*, 555 U.S. at 236–37 (adding that "[d]istrict courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise").

191. Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011). *But see* Mitchell v. Forsyth, 472 U.S. 511, 555–56 (1985) (Brennan, J., concurring in part and dissenting in part) (noting that the Court is taxing judicial resources by permitting interlocutory appeals in qualified immunity cases).

192. The Court has never directly addressed this issue but has repeatedly placed the burden of the clearly established test on plaintiffs. *See, e.g.*, Plumhoff v. Rickard, 572 U.S. 765, 779–80 (2014); Rivas-Villegas v. Cortesluna 142 S. Ct. 4, 8 (2021) ("Cortesluna [plaintiff] must identify a case that put Rivas-Villegas [defendant] on notice that his specific conduct was unlawful."). Before *Plumhoff*, the circuit courts were deeply split on the relevant burdens for assessing qualified immunity. Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. UNIV. L.J. 135, 143–45 (2012). Despite the Court's unexamined application of the burden to plaintiffs, the circuits are still split over the issue. *Compare* Jefferson v. Lias, 21 F.4th 74, 80 (3d Cir. 2021) ("[T]he officer bears the burden of establishing his entitlement to qualified immunity at summary judgment."), *with* Kokesh v. Curlee, 14 F.4th 382, 392 (5th Cir. 2021) ("[P]laintiff has the burden to negate the defense once it is properly raised.") (citation omitted).

193. *See, e.g.*, Joseph v. Bartlett, 981 F.3d 319, 328–31 (5th Cir. 2020) (discussing how qualified immunity "involves significant departures from the norms of civil litigation"). Under the earlier regime of good-faith immunity, the Court explicitly held the defendant bore the burden of establishing his entitlement to immunity. Gomez v. Toledo, 446 U.S 635, 638–41 (1980); *id.* at 640 (citing FED. R. CIV. P. 8(c); 5 CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271 (1969)).

194. Despite the Court's aggressive approach with qualified immunity, there are reasons to be cautiously optimistic that the Court is currently uncomfortable with the doctrine and may be recalibrating, if not reconsidering, it. *See* Jaicomo & Bidwell, *supra* note 87, at 130–40.

195. Wilson v. Layne, 526 U.S. 603, 609 (1999); *see also* Graham v. Connor, 490 U.S. 386, 394 n.9 (1989).

doctrine and make it increasingly difficult to hold *any* government officials accountable.[196]

C. *Over the past four decades, the Court has dramatically weakened* Bivens.

By the time it used *Bivens* to create qualified immunity in *Harlow*, the Supreme Court had approved, permitted, or implied causes of action against federal officials in a variety of contexts.[197] But at the same time the Court was relying on the availability of *Bivens* claims to build up an increasingly sturdy qualified immunity, it was stripping *Bivens* to the studs.

In 1983, the Court in *Bush v. Lucas* held that the existence of "an elaborate, comprehensive scheme" addressing "federal personnel policy" displaced a *Bivens* claim in the same context.[198] On that same day, the Court denied *Bivens* claims to naval-enlisted men for racial discrimination in *Chappell v. Wallace*.[199] There the court relied on "the unique disciplinary structure of the military . . . and Congress' activity in the field" as special factors to disclaim a *Bivens* remedy.[200]

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196. More than one-third of the Court's qualified immunity decisions were entered in *Bivens* cases. *See infra* Appendix B.

197. *See infra* Appendix A (listing nine cases before *Harlow*).

198. Bush v. Lucas, 462 U.S. 367, 380–90 (1983). Like *Harlow*, *Bush* involved a First Amendment employment retaliation claim, though *Bush* did not cite *Harlow*. *See id.* As it would continue to do in restricting *Bivens*, the Court purported to avoid doing policy—declining to "decide whether or not it would be good policy to permit a federal employee to recover damages" for First Amendment violations. *Id.* at 390. But by declining to permit a constitutional cause of action, the Court did the very sort of policy courts historically considered an invasion of the legislative role[:] weighing the costs and benefits of enforcing the law rather than neutrally enforcing it without regard to those costs and benefits. *See, e.g.*, The Apollon, 22 U.S. (9 Wheat.) 362, 366–67 (1824); Entick v. Carrington (1765) 19 How. St. Tri. 1029, 1067 (K.B.); *see also supra* note 49.

199. Chappell v. Wallace, 462 U.S. 296, 297–98 (1983).

200. *Id.* at 304. To highlight the importance of congressional control over the military, the Court relied heavily on its decision in *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, the Court slashed an atextual, policy-based exception into the FTCA, precluding tort claims incident to military service. *Id.* at 138–46. Thus, the Court's basis for concluding that Congress had not taken affirmative action to permit claims incident to military service was an exception *the Court created* to affirmative Congressional action that *did* permit such claims. Noting that the text of the FTCA, "it is said, should persuade us to cast upon Congress . . . the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears," *Feres* rejected Congressional control because, although the FTCA provided for non-combat military claims, "it remains for courts . . . to determine whether any claim is recognizable in law." *Id.* at 139–41. *But see* United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) ("[N]either the three original *Feres* reasons nor the *post hoc* rationalization of military discipline justifies our failure to apply the FTCA as written. *Feres*

Then, in *Schweiker v. Chilicky*, the Court held that *Bivens* claims were unavailable for the denial of Social Security benefits, owing to the size and complexity of the Social Security system.[201] Those three cases dispensed with the requirement of explicit statutory displacement of *Bivens* in *Davis* and *Carlson* and instead implied displacement where a statutory scheme was sufficiently comprehensive or byzantine.[202] Through the special-factors test, the Court cleaved claims implicating federal employment, welfare, and military policy from *Bivens*'s general recognition of constitutional claims against federal officials.

Cautiously shifting the Court's focus from institutional competence toward the separation of powers,[203] *Schweiker* explained "the

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was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.") (citations and internal quotation marks omitted); Kaitlan Price, Comment, *Feres: The "Double-edged Sword,"* 125 DICK. L. REV. 745, 754–56 (2021) (detailing criticisms of the *Feres* doctrine). Moreover, *Chappell*'s premise that Congress's authority in the field of military discipline precludes courts from providing remedies against military officers defies the many early cases in which the Court provided such remedies. *See, e.g.*, Murry v. Schooner Charming Betsy, 6 U.S. 64 (1804); Mitchell v. Harmony, 54 U.S. 115 (1851). *See generally supra* Section I.B–C.

The Court reaffirmed *Chappell* in *United States v. Stanley*, 483 U.S. 669 (1987), by denying a *Bivens* claim to an Army sergeant who was one of 1,000 soldiers secretly drugged with LSD by military intelligence and CIA operatives as part of a covert program in the 1950s. *Accord* WORMWOOD (Netflix 2017) (investigating the mysterious death of American biological warfare scientist Frank Olson, who fell from a hotel window in 1953 after having been surreptitiously dosed with LSD by a CIA agent as part of Project MKUltra). Relying on a "policy judgment" "protective of military concerns," the Court held that *Chappell* precluded *Bivens* claims, observing that the "incident to service" test was easy to administer. *Stanley*, 483 U.S. at 681–83. Incidentally, Justice Scalia, who authored *Stanley*, attempted to justify the apparent conflict between *Stanley* and his dissent in *Johnson* attacking the *Feres* doctrine by noting that, as an alternative to relying on *Feres*, the Constitution authorizes Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." *Stanley*, 483 U.S. at 681–82, 682 n.5 (citing U.S. CONST. art. I, § 8, cl. 14).

201. Schweiker v. Chilicky, 487 U.S. 412, 424, 426–27 (1988) (relying substantially on *Bush v. Lucas*, 462 U.S. 367 (1983)).

202. Moreover, both *Davis* and *Carlson* explained that the availability of an immunity would preclude the existence of "special factors." *See supra* note 141; *see also, e.g.*, Cleavinger v. Saxner, 474 U.S. 193, 207 (1985) (denying federal prison officials absolute immunity for constitutional claims and indicating the breadth of *Bivens* by explaining that qualified immunity "will ensure that federal officials are not harassed by frivolous lawsuits" as it had for the officials in *Butz* (Secretary of Agriculture), *Harlow* (Presidential Aides), and *Mitchell* (Attorney General)). Neither *Bush* nor *Chappell* nor *Schweiker* addressed the effect of immunity on the special-factors test.

203. *Compare Bush*, 462 U.S. at 388–89 (noting that in light of the history and development of civil service remedies Congress was better suited to balance the relevant policy concerns), *with Schweiker*, 487 U.S. at 422 (citing *Chappell* and *Stanley* for the proposition that Congress had explicit constitutional authority in

concept of 'special factors counselling hesitation in the absence of affirmative action by Congress has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent."[204] Thus, when Congress enacted the Westfall Act—just five months after *Schweiker* was decided—and affirmatively approved "civil action[s] against . . . employee[s] of the Government . . . brought for a violation of the Constitution of the United States," while at the same time prohibiting suits against federal officials in state courts,[205] the Court should have halted its erosion of *Bivens*.[206] It did not.

During the 1990s the Court restricted *Bivens*, but only once. In *FDIC v. Meyer*, the Court held that *Bivens* claims could not be asserted against a federal agency.[207] The Court justified its restriction as a protection of *Bivens*, concluding that allowing claims against

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the field of military policy). Even so, *Schweiker* did not generally cite the separation of powers as a basis for denying federal claims but fell back on institutional competencies. 487 U.S. at 423.

204. *Schweiker*, 487 U.S. at 423. The Court's approach to the special-factors test introduced in *Bush* conflicted with *Davis* and *Carlson*, which both required that Congress *explicitly* displace *Bivens* with a competing statutory remedy.

205. 28 U.S.C. § 2679(b)(2). Like the creation of qualified immunity, "the Westfall Act assumes the routine availability of a *Bivens* remedy." Pfander & Baltmanis, *supra* note 75, at 134. Not just through its explicit language, but through its structural implications. By removing the availability of state common law as a mechanism to vindicate constitutional violations, Congress fundamentally changed the remedial scheme in place when *Bivens* was decided and the preceding two centuries. *See supra* Sections I–II.B and note 30.

206. 28 U.S.C. § 2679(b)(2)(A). The Court has since recognized that "[b]y enacting [the Westfall Act], Congress made clear that it was not attempting to abrogate *Bivens*" but that the Act "left *Bivens* where it found it" in 1988. Hernandez v. Mesa, 140 S. Ct. 735, 748 n.9 (2020); *see also* United States v. Smith, 499 U.S. 160, 166–67, 173 (1991) (noting that through the Westfall Act Congress expressly "preserv[ed] employee liability for *Bivens* actions"); *Smith*, 499 U.S. at 182 (Stevens, J., dissenting) (quoting the Department of Justice's explanation that, through the Westfall Act, Congress "ma[d]e explicit what it had assumed all along: that victims of constitutional violations would remain free to pursue a remedy against the individual employee"); James E. Pfander & Neil Aggarwal, Bivens, *The Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. SAINT THOMAS L.J. 417, 474 (2011) ("[T]o the extent Congress has spoken in the succeeding years, its enactments in 1974 and 1988 seek to preserve and accommodate the *Bivens* action rather than displace it."). By 1988, the Court had only carved three limited exceptions via *Bush*, *Chappell*, and *Schweiker* into the general rule from *Bivens* "that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official." Butz v. Economou, 438 U.S. 478, 504 (1978). Thus, the Westfall Act preserved a still-broad form of *Bivens*. *See* Pfander & Baltmanis, *supra* note 75, at 122–24. For a more comprehensive analysis of the Westfall Act and its relationship to the *Bivens* doctrine, see generally *id.*; Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509 (2013).

207. FDIC v. Meyer, 510 U.S. 471, 486 (1994).

federal agencies would diminish the importance of *Bivens* claims against individual federal officials.[208]

The turn of the 21st century brought a new level of hostility toward *Bivens* from the Court, beginning with *Correctional Services Corp. v. Malesko*.[209] In its outcome, *Malesko* did little more than apply *Meyer* to bar *Bivens* claims against private corporations running federal prisons. The Court's analysis was more pernicious. Although *Bivens* announced a generally available remedy subject to two narrow exceptions (seemingly abrogated by the Westfall Act),[210] Justice Scalia's opinion for the Court in *Malesko* reconceptualized the *Bivens* cause of action as one generally *unavailable*, unless the Court had explicitly granted an extension into a specific "new context."[211] It also reimagined the Court's earlier restriction of *Bivens*, decided on a case-by-case assessment of institutional competencies,[212] as actually resting on "bedrock principles of separation of powers."[213] Separately concurring, Justice Scalia attacked *Bivens* as "a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . by the mere existence of a statutory or constitutional prohibition," suggesting *Bivens* went against the Court's recent refusal to imply statutory remedies in *Alexander v. Sandoval*.[214]

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208. *Id.* at 485 ("If we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. Under Meyer's regime, the deterrent effects of the *Bivens* remedy would be lost.").

209. Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001).

210. *See supra* notes 205–06; *accord supra* note 142. Relatedly, Congress further confirmed the availability of *Bivens* claims—at least those brought by prisoners—by amending the Prison Litigation Reform Act in 1995 to require exhaustion of administrative remedies before *federal* prisoners could pursue constitutional claims. *Accord* Booth v. Churner, 532 U.S. 731, 739–41 (2001).

211. *Malesko*, 534 U.S. at 70, 74. The Court contended in *Malesko* that in the previous 30 years, the Court had "only" extended *Bivens* twice (in *Davis* and *Carlson*) and "consistently" refused to otherwise extend *Bivens* (in *Bush*, *Chappell*, *Schweiker*, *Stanley*, and *Meyer*). *Id.* at 66–69. Setting aside the Court's creative comparative language—that it had "only" explicitly permitted *Bivens* 3 times but "consistently" restricted it 5 times—the Court ignored the 19 other cases in which it had presumed or otherwise permitted *Bivens* claims to go forward. *See infra* Appendix A.

212. *See supra* note 203, *infra* note 230.

213. *Malesko*, 534 U.S. at 69.

214. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). The Court continued to advance this new characterization of *Bivens* in *Wilkie v. Robbins*, where it declined to "devise a new *Bivens* damages action for retaliate[ion] against the exercise of ownership rights" by Bureau of Land Management agents for their death-by-a-thousand-cuts retaliation campaign against a landowner who had refused to grant the government an easement. Wilkie v. Rob-

In 2017, the Court synthesized its modern distaste for *Bivens* in *Ziglar v. Abbasi*.[215] *Abbasi* involved claims against high-level federal officials for policy decisions made in the wake of the September 11, 2001 terrorist attacks.[216] Finding that it was "a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials," the Court held that, absent an act of Congress, "expanding the *Bivens* remedy is now a 'disfavored' judicial activity."[217]

Abbasi's assertion rested—like Justice Scalia's concurrence in *Malesko*—on the Court's jurisprudence concerning statutory, not constitutional, causes of action.[218] And while the Court acknowledged that statutory remedies involved different considerations than constitutional remedies,[219] it treated both identically to justify restricting *Bivens*. *Abbasi* announced that the extension of *Bivens* into a "new context" would be permitted only when there are no "special factors counselling hesitation."[220]

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bins, 551 U.S. 537, 549, 555 (2007). The Court also, citing *Wilkie* and *Malesko*, denied the availability of *Bivens* claims against the individual employees of federal prison contractors—relying mainly on the availability of state tort remedies. Minneci v. Pollard, 565 U.S. 118, 127 (2012).

215. Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017).

216. *Id.* at 1851–54.

217. *Id.* at 1856–57 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)). While the Court has never overruled *Carlson* or *Davis* (and confronted the stare decisis issues necessary to accomplish that), this articulation of the law inverted the special-factors test set out in those cases. It also goes against the Court's recent observation that damages remedies against federal officials have "coexisted with our constitutional system since the dawn of the Republic" and that "there may be policy reasons why Congress may wish to shield Government employees from personal liability, and Congress is free to do so. But there are no constitutional reasons why we must do so in its stead." Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020).

218. *Abbasi*, 137 S. Ct. at 1855–56 (citing, among others, Alexander v. Sandoval, 532 U.S. 275, 286 (2001)).

219. *Id.* at 1856. The Court reasoned:

> When Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action. With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.

Id.; *see also* Davis v. Passman, 442 U.S. 228, 241 (1979) ("[T]he question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution. . . . [T]he judiciary is clearly discernible as the primary means through with [constitutional] rights may be enforced.") (citing McCulloch v. Maryland, 17 U.S. 316, 407 (1819)); Carlos M. Vázquez, Bivens *and the* Ancien Régime, 96 NOTRE DAME L. REV. 1923, 1927–28 (2021).

220. *Abbasi*, 137 S. Ct. at 1857 (quoting Carlson v. Green, 446 U.S. 14, 18 (1980)).

The Court then announced a new two-step test to evaluate the availability of *Bivens* claims. The first step asks whether a case presents a "new context."[221] If the answer is no, the inquiry stops there, and the plaintiff may proceed with the claim.[222] If the answer is yes, the inquiry continues to the second step, which asks whether there are "special factors counselling hesitation" against expanding *Bivens*.[223] If no such factors exist, the claim may proceed. Otherwise, a constitutional remedy is unavailable.[224]

Abbasi explained that a case presents a new context when it is "different in a meaningful way from previous *Bivens* cases decided by this Court"[225]—providing a non-exhaustive list of meaningful differences.[226] Finding that claims against high-level officials for policymaking were unlike the claims in *Bivens*, *Davis*, and *Carlson*, the Court held that the claims presented a new context.[227] For that reason, the Court considered whether there were "special factors counselling hesitation" against permitting a *Bivens* remedy in a new context.[228]

Abbasi wrote that the Court had never defined the phrase "special factors counseling hesitation."[229] But *Abbasi* inferred from earlier cases that "the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages

221. *See id.* at 1859–60.

222. *See id.*

223. *See id.* at 1860.

224. *See id.* at 1859.

225. *Id.* at 1859. The Court cited *Bivens*, *Davis*, and *Carlson* as the only cases in which it had approved a *Bivens* claims. *Id.* at 1860. *But see* cases cited *infra* Appendix A. The first step of the *Abbasi* test embodied the Court's shift of *Bivens* from a generally available remedy, subject only to the narrow exception of the special-factors test before *Malesko*, to a generally prohibited remedy outside of the specific factual contexts of *Bivens*, *Davis*, and *Carlson*. *See Abbasi*, 137 S. Ct. at 1860.

226. *Id.* at 1859. The Court listed as meaningful differences: (1) rank of the officers involved; (2) constitutional right at issue; (3) generality or specificity of the official action; (4) extent of judicial guidance about how an officer should respond to the problem; (5) statutory mandate under which the officer was operating; (6) risk of disruptive intrusion by the Judiciary into the functioning of the other branches; or (7) presence of potential factors previous *Bivens* cases did not consider. *Id.* at 1860.

227. *Id.* at 1860–63. *But see, e.g.*, Butz v. Economou, 438 U.S. 478, 481–83 (1978) (denying absolute immunity to the Secretary of Agriculture, et al., for policy-related actions).

228. *Abbasi*, 137 S. Ct. at 1848. The second step of the *Abbasi* test embodied the Court's transition from using policy to create immunities from constitutional claims, *e.g. Harlow*, to using policy to bar those claims altogether, *e.g. Bush*. *Id.*

229. *Id.* at 1857.

action to proceed" and provided another non-exhaustive list.[230] The Court concluded there were factors counseling hesitation in *Abbasi*, denied a remedy, and provided the federal defendants de facto absolute immunity.[231]

While *Abbasi* maintained that the Court's disfavor of *Bivens* was grounded in the separation of powers,[232] its special-factors analysis is indistinguishable from the Court's earlier policy justifications for creating and extending immunities.[233] The Court continued its reliance on policy concerns several years later to further restrict *Bivens* in *Hernandez v. Mesa*.

In *Hernandez*, the Court applied the *Abbasi* test to deny a *Bivens* remedy to the family of a Mexican child shot and killed over the U.S.-Mexico border by a Customs and Border Protection Agent—leaving the family with no remedy at all.[234] Again purporting to

230. *Id.* at 1857–58. The Court listed as special factors whether extending *Bivens* into a new context would (1) call into question the formulation or implementation of a general policy; (2) interfere with sensitive functions of the Executive Branch, such as national security or military discipline; or (3) overlap with an alternative method of relief. *Id.* at 1858, 1860–61. The focus on whether courts are "well suited" to "weigh the costs and benefits" (*i.e.*, do policy) demonstrates that the test does not reflect concerns over the separation of powers. *See id.* at 1857–58. *Abbasi* does not determine which branch has the constitutional authority to do policy, but instead which branch would be better at it. *See also supra* note 203, *infra* note 233.

231. *Abbasi*, 137 S. Ct. at 1860–63 (citing as special factors that alternative methods of relief were available to the plaintiffs and that their claims would call into question general policies, prevent execute branch officers from devoting the necessary time and effort to properly discharge their duties, interfere in executive functions, and implicate issues of national security).

232. *See, e.g.*, *id.* at 1857 (asserting that the Legislature is in a better position to consider imposing new substantive legal liability). *But see supra* note 235.

233. *See* Westfall v. Erwin, 484 U.S. 292, 296 (1988) (citing Howard v. Lyons, 360 U.S. 593, 597 (1959)). Highlighting policy's central role in court-created immunities, the *Westfall* court provided:

> [T]he scope of absolute official immunity afforded federal employees is a matter of federal law, "to be formulated by the courts in the absence of legislative action by Congress." The purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits.

Id.; *see also id.* at 296 n.3 (observing that the Court's approach to immunities is "functional" and requires the Court to weigh "the benefits of immunity" against the costs); Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982) (using the same policy justification to create qualified immunity); Butz v. Economou, 438 U.S. 478, 503 (1978) (explaining that federal courts were competent "to determine the appropriate level of immunity where a suit is a direct claim under the Federal Constitution against a federal officer").

234. Hernandez v. Mesa, 140 S. Ct. 735, 760 (2020) (Ginsburg, J., dissenting).

honor the separation of powers and avoid doing policy—a power the Court found constitutionally afforded to Congress[235]—the *Hernandez* Court relied on wide-ranging policy considerations to restrict *Bivens*. Using the special-factors analysis, the Court delved deeply into foreign policy, national security, drug policy, border security, immigration policy, and international relations.[236] Citing numerous government reports, the Court weighed, for example, the importance of Executive Branch oversight over officer accountability, the morale of American officials, Mexican criminal process, the role of diplomacy, statistics about the amount of cross-border traffic in people and drugs, appropriate uses and levels of force, and terrorism concerns.[237] It concluded, therefrom, that permitting a *Bivens* claim would invade Congressional policymaking.[238]

Nevertheless, and despite *Abbasi*'s clear statement that *Bivens* continues in force (at least in its original context and the contexts approved in *Davis* and *Carlson*[239]), *Abbasi* and *Hernandez* have been interpreted to limit *Bivens* to its precise facts by scholars and

235. *See id.* at 749–50. *Hernandez* also attributed the Court's hostility toward *Bivens* to "the demise of federal general common law" in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), and, along with it "a federal court's authority to recognize a damages remedy" absent a Congressional statute. *Hernandez*, 140 S. Ct. at 742. The Court's reliance on *Erie* in this context has been called into question. *See* Vladeck, *supra* note 6, at 1887–89.

236. *Hernandez*, 140 S. Ct. at 744–50.

237. *Id.* at 744–46.

238. *Id.* at 750. This understanding of the separation of powers inverted the Constitutional order in existence at the Founding. *See* Entick v. Carrington (1765) 19 How. St. Tri. 1029, 1067 (K.B.). At that time, a substantive right guaranteed a cause of action. *See* Uzuegbunam v. Prezcewski, 141 S. Ct. 792, 799 (citing Ashby v. White (1703) 92 Eng. Rep. 126, 137; 2 Ld. Raym. 938, 953) ("[T]he action on the case is a proper action" because "surely every injury imports a damage. . . ."); *supra* note 31. And the Court's sole focus in such an action was to assess if the law was violated and, if it was, apply an appropriate remedy. The Apollon, 22 U.S. (9 Wheat.) 362, 366 (1824); United States v. Lee, 106 U.S. 196, 220–21 (1882). The early courts were resolute that to consider policy and provide defendants exceptions or immunities would invade the legislative role. *The Apollon*, 22 U.S. at 366; *Lee*, 106 U.S. at 220–21; Mitchell v. Harmony, 54 U.S. (13 How.) 115, 135–36 (1851); *Entick*, 19 How. St. Tr. at 1067. But, as *Abbasi* and *Hernandez* demonstrate, the Court now believes the judicial role is to weigh policy to determine whether constitutional rights should yield to the Court's concerns about the public mischiefs enforcing those rights might permit. *See generally* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Hernandez v. Mesa, 140 S. Ct. 735 (2020).

239. *Abbasi*, 137 S. Ct. at 1856. While *Abbasi* expressed caution about implied causes of action, the Court was emphatic that its opinion did not "cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Id.* The Court explained: "The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere." *Id.* at 1857.

lower courts.[240] Today, "[t]he *Bivens* doctrine, if not overruled, has certainly been overtaken."[241]

CONCLUSION

Just like it did in *Butz*, the Court today routinely proclaims that state and federal officers are bound by the same Constitution in the same way. When it comes to the Bill of Rights, "there is no daylight between the federal and state conduct it prohibits or requires."[242] But when it comes to holding individual federal officials accountable for their unconstitutional acts, there is.

Even though damages have been available as a remedy against federal officials as long as there have been federal officials,[243] the modern Court has created a legal system where they are almost entirely out of reach. Worse still, the Court relied on the availability of a robust *Bivens* action against federal officials to justify its creation of qualified immunity out of whole cloth. Now, qualified immunity shields state and local officials from constitutional accountability—even when they act maliciously[244] or recklessly[245]—while the Court's restriction of *Bivens* means that federal officials often enjoy

240. *See* Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 882–84 (2019); *see*, *e.g.*, Ahmed v. Weyker, 984 F.3d 564, 568–71 (8th Cir. 2020) (holding that any case that does not "exactly mirror[ ] the facts and legal issues" in *Bivens* presents a new context and that the separation of powers is itself a "special factor" precluding *Bivens* in a new context); Byrd v. Lamb, 990 F.3d 879, 882 (5th Cir. 2021) (holding that "virtually everything" outside of the specific facts of *Bivens* is a new context and that Congress' failure to enact a statutory remedy is a "special factor").

241. *Byrd*, 990 F.3d at 883 (Willett, J., concurring). Notwithstanding this perception, the Court has, including after *Hernandez*, regularly permitted or implied the availability of *Bivens* in dozens of cases. *See infra* Appendix A (citing Supreme Court cases that recognized, implied, or allowed to go forward constitutional claims against federal officers); *accord* Rasul v. Bush, 542 U.S. 466, 500 (2004) (Scalia, J., dissenting) (observing that the Court's permission of Guantanamo Bay detainees to file writs of habeas corpus implies that "*all* United States law applies there—including . . . the federal cause of action recognized in *Bivens*"); Boyle v. United Techs. Corp., 487 U.S. 500, 505 (1988) ("Another area we have found to be of peculiarly federal concern . . . is the civil liability of federal officials for actions taken in the course of their duty.").

242. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

243. *See supra* Section I (tracing the unbroken line of cases from the Founding in which the Supreme Court applied strict liability to federal officials for actions that exceeded their authority).

244. *See*, *e.g.*, *supra* note 168.

245. *See, e.g.*, Corbitt v. Vickers, 929 F.3d 1304, 1308 (11th Cir. 2019) (granting qualified immunity to a police officer who shot a child while trying to kill a nonthreatening family dog); West v. City of Caldwell, 931 F.3d 978, 981–82, 984–85 (9th Cir. 2019) (granting qualified immunity to police who fired gas grenades into a woman's home, despite her providing her keys and permission to enter the home to look for a suspect who was not there).

an unqualified, *absolute* immunity—even if their actions are egregious enough to preclude qualified immunity.[246] The Bill of Rights sometimes still watches over the actions of state and local officials, but the Court has blinded it to their federal peers.

Butz warned that such a legal system would stand American constitutional design on its head.[247] But the Supreme Court has betrayed *Butz*, changing its statement of an obvious and historically unflinching principle of constitutional accountability[248] into a frustrating question:

> Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do state officers?

246. Following *Abbasi*, there has been an alarming trend of lower courts denying qualified immunity to federal officials but shielding them with absolute immunity instead. *See, e.g.*, *Byrd*, 990 F.3d 879 (finding *Bivens* claims unavailable on appeal, despite the district court's denial of qualified immunity); *see also* Ahmed v. Weyker, 984 F.3d 564 (8th Cir. 2020) (same); Oliva v. Nivar, 973 U.S. 438 (5th Cir. 2020) (same); Farah v. Weyker, 926 U.S. 492 (8th Cir. 2019) (same).

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

248. *Id.* at 501.

APPENDIX A SUPREME COURT DECISIONS RECOGNIZING, IMPLYING, OR ALLOWING TO GO FORWARD CONSTITUTIONAL CLAIMS AGAINST FEDERAL OFFICIALS:

Case	Official	Claim
Brownback v. King, 141 S. Ct. 740 (2021)	FBI Agent, Task Force Officers	4th Amendment (Search/Seizure, Excessive Force)
Simmons v. Himmelreich, 578 U.S. 621 (2016)	Prison Officials	8th Amendment (Deliberate Indifference to Safety)
Wood v. Moss, 572 U.S. 744 (2014)	Secret Service Agents	1st Amendment (Viewpoint Discrimination)
Reichle v. Howards, 566 U.S. 658 (2012)	Secret Service Agents	1st & 4th Amendments (Retaliation, Search/Seizure)
Ashcroft v. al-Kidd, 536 U.S. 731 (2011)	Attorney General	4th Amendment (Seizure)
Ashcroft v. Iqbal, 556 U.S. 662 (2009)	Attorney General	1st & 5th Amendments (Discrimination)
Hartman v. Moore, 547 U.S. 250 (2006)	Postal Inspectors	1st Amendment (Retaliation)
Will v. Hallock, 546 U.S. 345 (2006)	Customs Agents	5th Amendment (Due Process)
Groh v. Ramirez, 540 U.S. 551 (2004)	ATF Agent	4th Amendment (Search)
Saucier v. Katz, 533 U.S. 194 (2001)	Military Police Officer	4th Amendment (Excessive Force)
Hanlon v. Berger, 526 U.S. 808 (1999)	Fish & Wildlife Officers	4th Amendment (Search)
Wilson v. Layne, 526 U.S. 603 (1999)	U.S. Marshals	4th Amendment (Search)
Behrens v. Pelletier, 516 U.S. 299 (1996)	Banking Regulator	5th Amendment (Due Process)
Farmer v. Brennan, 511 U.S. 825 (1994)	Prison Officials	8th Amendment (Deliberate Indifference to Safety)
Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993)	Court Reporter	5th Amendment (Due Process)
McCarthy v. Madigan, 503 U.S. 140 (1992)	Prison Officials, Medical Personnel	8th Amendment (Deliberate Indifference to Medical Needs)
Hunter v. Bryant, 502 U.S. 224 (1991)	Secret Service Agents	4th Amendment (Seizure)
Siegert v. Gilley, 500 U.S. 226 (1991)	Hospital Administrator	5th Amendment (Due Process)
Anderson v. Creighton, 483 U.S. 635 (1987)	FBI Agent	4th Amendment (Search)
Cleavinger v. Saxner, 474 U.S. 193 (1985)	Prison Officials	1st, 4th, 5th, 6th & 8th Amendments

Case	Official	Claim
Mitchell v. Forsyth, 472 U.S. 511 (1985)	Attorney General	4th Amendment (Search/Seizure)
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	Presidential Aides	1st Amendment (Retaliation)
Carlson v. Green, 446 U.S. 14 (1980)	Prison Officials	8th Amendment (Deliberate Indifference to Medical Needs)
Davis v. Passman, 442 U.S. 228 (1979)	Congressman	5th Amendment (Due Process)
Butz v. Economou, 438 U.S. 478 (1978)	Department of Agriculture Officials	1st Amendment (Retaliation)
G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977)	IRS Agents	4th Amendment (Search/Seizure)
United States v. Calandra, 414 U.S. 338 (1974)	FBI Agents	4th Amendment (Search/Seizure)
District of Columbia v. Carter, 409 U.S. 418 (1973)	D.C. Police Officer	4th Amendment (Seizure, Excessive Force)
Doe v. McMillan, 412 U.S. 306 (1973)	Congressional Committee Members	4th Amendment (Privacy)
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)	Narcotics Agents	4th Amendment (Search/Seizure, Excessive Force)
Bell v. Hood, 327 U.S. 678 (1946)	FBI Agents	4th Amendment (Search/Seizure)

APPENDIX B
SUPREME COURT APPLICATIONS OF THE QUALIFIED IMMUNITY STANDARD FROM 1982 THROUGH 2021:[249]

Case	Official	Claim	Merits Reached	Lower Court
Rivas-Villegas v. Cortesluna,† 142 S. Ct. 4 (2021)	Local Law Enforcement	4th Amendment (Excessive Force)	No	9th Cir.
City of Tahlequah v. Bond,† 142 S. Ct. 9 (2021)	Local Law Enforcement	4th Amendment (Excessive Force)	No	10th Cir.
***Taylor v. Riojas*,† 141 S. Ct. 52 (2020)**	**State Prison Officials**	**8th Amendment**	**Yes**	**5th Cir.**
City of Escondido v. Emmons,*† 139 S. Ct. 500 (2019)	Local Law Enforcement	4th Amendment (Excessive Force)	No	9th Cir.
Kisela v. Hughes,† 138 S. Ct. 1148 (2018)	Local Law Enforcement	4th Amendment (Excessive Force)	No	9th Cir.
District of Columbia v. Wesby, 138 S. Ct. 577 (2018)	Local Law Enforcement	4th Amendment (Seizure)	Yes	D.C. Cir.
Hernandez v. Mesa,* 137 S. Ct. 2003 (2017)	Federal Law Enforcement (Border Patrol)	5th Amendment (Due Process)	No	5th Cir.
Ziglar v. Abbasi, 137 S. Ct. 1843 (2017)	DOJ and Federal Prison Officials	5th Amendment (Equal Protection)	No	2d Cir.
White v. Pauly,*† 137 S. Ct. 548 (2017)	State Law Enforcement	4th Amendment (Excessive Force)	No	10th Cir.
Mullenix v. Luna,† 577 U.S. 7 (2015)	State Law Enforcement	4th Amendment (Excessive Force)	No	5th Cir.
Taylor v. Barkes,† 575 U.S. 822 (2015)	State Prison Officials	8th Amendment	No	3d Cir.
City and County of San Francisco v. Sheehan, 575 U.S. 600 (2015)	Local Law Enforcement	4th Amendment (Excessive Force)	No	9th Cir.
Carroll v. Carman,† 574 U.S. 13 (2014)	State Law Enforcement	4th Amendment (Search)	No	3d Cir.
Lane v. Franks, 573 U.S. 228 (2014)	State College President	1st Amendment (Retaliation)	Yes	11th Cir.

249. Cases where the Court found no immunity are indicated in bold, cases remanded for further determination of immunity by an asterisk, and summary reversals by a dagger. This table was previously included in Jaicomo & Bidwell, *supra* note 87, at 141–44, and originally adapted from Baude, *supra* note 6, at 88–90.

Case	Official	Claim	Merits Reached	Lower Court
Plumhoff v. Rickard, 572 U.S. 765 (2014)	Local Law Enforcement	4th Amendment (Excessive Force)	Yes	6th Cir.
Wood v. Moss, 572 U.S. 744 (2014)	Federal Law Enforcement (Secret Service)	1st Amendment (Viewpoint Discrimination)	No	9th Cir.
Stanton v. Sims,† 571 U.S. 3 (2013)	Local Law Enforcement	4th Amendment (Illegal Entry)	No	9th Cir.
Reichle v. Howards, 566 U.S. 658 (2012)	Federal Law Enforcement (Secret Service)	1st & 4th Amendments (Retaliation, Search/Seizure)	No	10th Cir.
Filarsky v. Delia, 566 U.S. 377 (2012)	City Outside Counsel	4th Amendment (Search)	No	9th Cir.
Messerschmidt v. Millender, 565 U.S. 535 (2012)	Local Law Enforcement	4th Amendment (Search/Seizure)	No	9th Cir.
Ryburn v. Huff,† 565 U.S. 469 (2012)	Local Law Enforcement	4th Amendment (Search)	Yes	9th Cir.
Ashcroft v. al-Kidd, 563 U.S. 731 (2011)	U.S. Attorney General	4th Amendment (Arrest)	Yes	9th Cir.
Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009)	Local School Officials	4th Amendment (Search)	Yes	9th Cir.
Pearson v. Callahan, 555 U.S. 223 (2009)	State Law Enforcement	4th Amendment (Illegal Entry)	No	10th Cir.
Brosseau v. Haugen,† 543 U.S. 194 (2004)	Local Law Enforcement	4th Amendment (Excessive Force)	No	9th Cir.
***Groh v. Ramirez*, 540 U.S. 551 (2004)**	**Federal Law Enforcement (ATF)**	**4th Amendment (Search)**	**Yes**	**9th Cir.**
***Hope v. Pelzer*, 536 U.S. 730 (2002)**	**State Prison Officials**	**8th Amendment**	**Yes**	**11th Cir.**
Saucier v. Katz, 533 U.S. 194 (2001)	Federal Law Enforcement (Military Police)	4th Amendment (Excessive Force)	No	9th Cir.
Hanlon v. Berger,† 526 U.S. 808 (1999)	Federal Law Enforcement (Fish and Wildlife)	4th Amendment (Search)	Yes	9th Cir.
Wilson v. Layne, 526 U.S. 603 (1999)	State and Federal Law Enforcement (U.S. Marshals)	4th Amendment (Search)	Yes	4th Cir.
Hunter v. Bryant,† 502 U.S. 224 (1991)	Federal Law Enforcement (Secret Service)	4th Amendment (Arrest)	No	9th Cir.

Case	Official	Claim	Merits Reached	Lower Court
Anderson v. Creighton,* 483 U.S. 635 (1987)	Federal Law Enforcement (FBI)	4th Amendment (Search)	No	8th Cir.
Malley v. Briggs,* 475 U.S. 335 (1986)	State Law Enforcement	4th Amendment (Arrest)	No	1st Cir.
Davis v. Scherer, 468 U.S. 183 (1984)	State Law Enforcement	14th Amendment (Due Process)	No	11th Cir.
Mitchell v. Forsyth, 472 U.S. 511 (1985)	U.S. Attorney General	4th Amendment (Search/Seizure)	Yes	3d Cir.
Harlow v. Fitzgerald,* 457 U.S. 800 (1982)	Presidential Aides	1st Amendment (Retaliation)	No	D.C. Cir.

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