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SPEAKERS

Joanna Schwartz, Anya Bidwell, Alex Reinert, Seth Stoughton, Carlos Manuel Vazquez, Anthony Sanders

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A Anthony Sanders 00:25

Hello, and welcome to Short Circuit, your podcast on the Federal Courts of Appeals. I'm your regular host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. But most of you are probably wondering, Where's Anya Bidwell, you promised us that for this week, we would have Anya, and then we would have the special Short Circuit for a symposium on Professor Joanna Schwartz's book Shielded, Joanna Schwartz from UCLA, and her book about immunities that the police enjoy. And don't worry, we're going to get to that in just a moment. So hang tight, you'll hear from Anya. And the whole event that they had at Georgetown University Law Center, that they co sponsored with the Georgetown Center for the Constitution, just the other day, it was held on Tuesday, May 7. And again, you'll hear that in just a moment. But just a couple things before we bring you to Anya. First, we've mentioned a couple times here on the show, but coming up on March 31, is our conference on the 100th anniversary of Meyer v. Nebraska, the famous unenumerated rights case, if you live in the D.C. area, we'd love to see you in person. And we'll put a link again in our show notes if you'd like to RSVP. And if you can't, if you live anywhere in the universe, other than the Washington D.C. area, you can catch it online. And we will have a link soon enough on our webpage. We have the link to that. So just hang tight, wait for March 31. And also we'll have videos of the event after the fact also. Also, if you live in the Charleston, South Carolina area, I would love to see you. I will be speaking about my upcoming book, baby Ninth Amendments, how Americans embraced unenumerated rights and why it matters. I will be speaking about that. On Thursday, March 16. At noon, in the Charleston County Office Building, it's a CLE for attorneys sponsored very kindly by the Charleston County Bar Association. But if you're not an attorney, and you just want to hear about the book you can come by to is that 101 Meeting streets, room 130, in downtown Charleston, so love to see any Short Circuit listeners again in Charleston, South Carolina who want to come to that, and I'll put a link to the association's calendar in the show notes. Finally, if you're interested in litigating for liberty, and you're an attorney with three plus years experience, then we are hiring. We're hiring both in our office in Arlington, Virginia in the D.C. area, but also in Arlington, Texas. So I'll put a link in the show notes to our jobs page where you can check that out if you're interested. Okay, enough for me. You came to hear from Anya and Professor Schwartz and a number of other experts who are going to talk about her book Shielded, and a few cases. One of them we talked about earlier on the show a few weeks

ago, Edwards v. City of Florissant. I think even if you heard that you want to hear it again for some other takes from the scholars. So stick around. Shielded, number of cases. And you'll hear from Anya in just a minute. Thanks, everybody.

A Anya Bidwell 04:05

Hello, and welcome to a special episode of Short Circuit. We are here at Georgetown Law School celebrating the publication of Joanna Schwarz timely new book on various barriers to accountability for state and local police aptly called Shielded. Thank you to the Georgetown Center for the Constitution for providing us with this amazing space where we are now recording in front of a live audience. We have a packed agenda today, we will first talk to Professor Schwartz about her book. Following this book conversation we will discuss four cases involving some sort of a procedural barrier to a civil rights lawsuit. Most of these barriers are also discussed in Joanna's book each case will be introduced by one of our guests here today. Everyone is a celebrated legal scholar with a ton of experience in the field of government immunity. Our panelists really need no introductions so I will be brief in introducing them. Joanna Schwartz teaches at UCLA School of Law. She is a prolific scholar on qualified immunity and other barriers to lawsuits against individual police officers. In addition to the book on this very topic she just published, she regularly writes for prestigious law review journals, and also for newspapers and magazines such as the Washington Post, New York Times, Politico and the Atlantic. Joanna, thank you for being here.

J Joanna Schwartz 05:27

Thank you for having me.

A Anya Bidwell 05:28

Alex Reinert, who is Joanna's frequent co author teaches at Cardozo Law and direct its Center for Rights and Justice. He published an amazing number of influential articles on accountability for federal police on qualified immunity and on state laws as alternatives to Section 1983 For vindicating civil rights. Alex is also a practicing lawyer, he argued cases in federal courts of appeals and in the Supreme Court, including the famous Ashcroft v. Iqbal. Welcome, Alex.

A Alex Reinert 05:57

Thanks for having me. It's great to be here.

A Anya Bidwell 05:58

Seth Stoughton is as some papers identify him, "a cop turned law professor."

S Seth Stoughton 06:08

I didn't realize that's the introduction.

A Anya Bidwell 06:13

Seth became widely known for being the last witness for the prosecution in Derek Chauvin's criminal trial. When he is not busy testifying. Seth teaches at the University of South Carolina law school publishes impactful law review articles and writes for national papers like the New York Times, Politico and the Atlantic. Prior to his career in the law set served as an officer with the Tallahassee Police Department. Welcome, Seth. Thank you. And Carlos Vasquez needs no introduction to Georgetown. After all, he teaches here in the areas of international law, constitutional law and federal courts and write influential books and academic articles on all of these subjects. My personal favorite is a paper he co authored with Steve Vladek, called state law, the Westfall Act and the nature of the Bivens question, if people want to know why it is impossible to sue federal officials these days, and why that's bonkers. Reading it, we'll have you covered. Welcome, Carlos.

C Carlos Manuel Vazquez 07:16

Thank you. Good to be here.

A Anya Bidwell 07:18

So before we begin discussing the cases, let's talk to Joanna about the book. So let's just get you started with what is this book about? And why did you decide to write it?

J Joanna Schwartz 07:31

So thank you so much, Anya, Alex, and Patrick, and everyone for organizing this and for you all coming today, it really means the world to meet to have you here. Shielded is a book that is the product of more than 20 years of advocacy and research. I first began thinking about some of the questions that form the core of the book, as a civil rights attorney in the early 2000s, when I was bringing a lawsuit along with the firm I was working with against the New York City Department of Corrections. And as I was looking at the personnel files of the officers that I was going to depose, I was surprised to see that there was no mention of of lawsuits or lawsuit history in the personnel files. And then when I questioned the officers, it became clear that the officers did not know whether they had been sued, how often they had been sued, what the allegations were in the cases, whether they won or lost, and how much money was paid. And as someone who was dedicating my career to bringing these cases with the hope of making a difference. It was pretty discouraging to see that these officers and their supervisors and people at the highest level of the agency did not know the first thing about the lawsuits brought against their officers. That experience and others from my practice, have really informed and jumpstarted my research agenda when I became a law professor at UCLA, and I've spent the past 15 years or so working on empirical studies that examine how civil rights litigation works on the ground. And I publish those findings in law review articles. But following the murder of George Floyd in May 2020. I thought it was really important to write a book that described these barriers to relief. Describe them in a way that people who don't read law review articles

for fun on Saturday afternoons would find illuminating and understandable and accessible. And my goal was to show that people whose constitutional rights are violated often only have civil lawsuits as a mechanism of justice to either get compensation or perhaps forward looking reform, but that the Supreme Court and state and local governments across the country have created so many barriers to relief in these cases, that justice is extremely, extremely difficult to find. And also at the end of the book, in addition to describing all of these failures, it offers a possible path forward ways in which changes to policies and laws at the federal and state and local level could get us to a better system, if not a perfect one.

A Anya Bidwell 10:38

You open the first chapter of your book with this case called Monroe v. Pape, and you continuously come back to it. So could you tell us about the case? Why is it so important for your book and also how does Monroe v. Pape, talk to what's happening today, with cases like Terry Nichols and George Floyd and so many others?

J Joanna Schwartz 11:04

Well, it's really an honor and a pleasure to be able to talk about Monroe v. Pape in this particular audience because Mr. Houston Stevens, who is one of the plaintiffs in that case, is here with us today. Monroe v. Pape is a case that arose from an incident that happened in late October of 1958. James Monroe and his wife Flossie, and their children were asleep in their apartment in Chicago, when a Chicago police detective admiringly called Chicago's toughest cop. By thereporters at the time, he apparently liked to take photographs of himself with bodies of people he had killed, and a bunch of other Chicago officers broke into the Monroe's home in the middle of the night, without a warrant. They broke into the home because a white woman had picked a photo of James Monroe out of a group of photos and pointed him out as the the man who had killed her husband. Well, it turned out that James Monroe had nothing to do with the murder of her husband. Her lover, and she had decided together to have him killed so that she could collect in on his insurance money. But the the officers, Pape, and the other detectives broke into the Monroe's home, got Flossie and James out of bed at gunpoint. They were in the living room of their home without their clothes on. Frank Pape was assaulting James Monroe hitting him interrogating him about the murder, while the while using odious racial slurs, and the other officers were assaulting the Monroe's children as they came in to the living room to find out what was going on. It was Houston, Steven 17th birthday that day. And when he reflected back on that day, it was his view that the kids screaming and calling out to their neighbors was what kept James Monroe alive. They ultimately took James Monroe to the station house held him for 10 hours didn't let him see a judge or an attorney. And ultimately he was released when the woman couldn't pick Mr. Monroe out of a lineup. So James Monroe and his family found a lawyer from the ACLU in Chicago who had been very focused on unlawful detentions in Chicago by the police department and all sorts of other abuses that the department was engaged in. And they decided to try to bring a lawsuit under a statute called Section 1983. This was a statute back enacted in 1871, during the Reconstruction following the Civil War, and it was intended to provide a federal court forum for people whose constitutional rights had been violated. But the Supreme Court had quickly interpreted that statute and a number of other statutes as well as the 14th Amendment in ways that made it essentially impossible to bring claims under that statute. And no one had really tried or certainly not with any success until the 50s when there was an idea that maybe this was a claim that could be

brought, and it was brought in Monroe v. Pape, the lower courts dismissed the claim saying, you can't use section 1983 for this purpose. But the Supreme Court reversed and so 90 years after this statute was first state enacted with the case of Monroe v. Pape, the Supreme Court first recognized the right to sue for constitutional violations. And this is why it is such an important case in the book. And in the story of civil rights protections in our country. It also reflects on you on your ask how does this relate to what we see today. And it's important to take note that, and I tried to explain in the book that Monroe v. Pape and is in many ways a high point of civil rights protections, this recognition of the importance of this right. But in the years and decades following Monroe v. Pape, the Supreme Court has backtracked in many ways on those on that protection on the goal to provide compensation and deterrence to people when their rights have been violated through doctrines like qualified immunity, and limitations on what constitutional protections actually mean, and many other kinds of barriers so that the promise of Monroe v. Pape, in many ways has been under realized in recent years.

A Anya Bidwell 16:18

So this phalanx of shields that you talk about in the book, a lot of them are in response to Monroe v. Pape, right? So kind of closing the courthouse doors through this shield sorry for the mixed metaphor. Because Monroe is such an important case where so many more plaintiffs could actually come to federal courts and bring their claims. Could you give us examples of some of them, and it will set it up really nicely for us to talk about the cases that we have today. Examples of these shields that make accountability so difficult.

J Joanna Schwartz 16:52

Sure. Certainly one of those shields is qualified immunity doctrine, which has been in the news very lot in recent years, which provides that even if an officer has violated someone's constitutional rights, they are entitled to qualified immunity unless there's a prior court decision with nearly identical facts. It's not enough to be able to point to a generalized principle in the Supreme Court's view, that, for example, you can't use force against a person who's not resisting or who is surrendered. Instead, you have to find a prior case with facts particularized, in the courts words to the facts of the case before the court. So you have to show that similar force was used against a person who was demonstrating that they had surrendered or were not resisting in a similar way. And we certainly have an examples of that case that we'll talk about today. But I think it's important to recognize that there are many other barriers as well, that the court has created barriers that make it difficult to find a lawyer barriers that make it difficult to plead a complaint that make it difficult to prove a constitutional violation. And standards for holding local governments responsible are as difficult to my view to get past as qualified immunity. I think of that as it's a municipal immunity. And then of course, we will also as we will also talk about on this panel, if you're talking about federal officers, there is a whole separate set of protections for those officers, which is in I think your your words on your federal immunity, we can think about all of these protections as immunities.

A Anya Bidwell 18:40

And one last question that we'll also set up one of the cases here. James Monroe could have brought his case in state court. Why didn't he do that?

J Joanna Schwartz 18:53

The lawyer for the Monroe's was of the view, and he talked about this after the case was successful, that if a state court was not going to a state court was not going to be sympathetic to this claim, brought by a powerful are brought against a powerful and well connected white police officer by a Black family in the city of Chicago. He was of the view, and I think others felt at the time, the reason that they that there was this push to try to bring section 1983 cases in federal court, and why Monroe v. Pape had such an important impact was that there was the view that state courts were going to be hostile to this kind of claim. Local judges and local juries were going to be far more likely to find in favor of the defendant in the case. And so getting a federal forum was considered really the only kind of possible way to vindicate these rights.

A Anya Bidwell 19:58

Yes, and today, Alex, will talk about it at the end of the recording we have States courts sometimes providing better alternatives to civil rights cases in federal courts because of doctrines like qualified immunity.

J Joanna Schwartz 20:12

Well, and just one one point about that it's an irony that Congress created section 1983, back in 1871, to create a federal forum because state courts were considered hostile. Now, today, the federal system is incredibly hostile because of protections like qualified immunity. So practitioners and their clients are more often going to the States to seek protections, the kinds of protections that they had the promise through cases like Monroe to bring in federal court.

A Anya Bidwell 20:49

Yeah, that's an excellent point. So thank you, Joanna. Let's now get to the cases. And we'll start with Seth, a case on municipal level municipal immunity really, and also another barrier that Joanna talks about in her book. And that's what you have to actually plead in the complaints themselves.

S Seth Stoughton 21:08

Yeah, thank you. Good morning, everyone. I'm can't tell you how thrilled I am to be up here. It's especially with Joanna at the at one end of the table, and she has been incredibly helpful and mentoring to me in my career as a legal scholar, and it's just really thrilling. It's really thrilling to be up here at a table and talking about this incredibly important topic with her. So in the aftermath of George Floyd's death at the hands of Minnesota police officers, there were a number of protests around the country and around the world. Some of those protests occurred in the city of Florissant. I think that's the way it's pronounced. I want to call it fluorescent. But I don't think that's right. Florissant, Missouri, a suburb about 20 miles northwest of St. Louis, with a population of just over 50,000 people. So we're talking about a relatively small suburban city.

The Florissant Police Department's response to at least some of those protests resulted in the case that I'm going to discuss Edwards v. City of Florissant. I'm going to give you a little bit of background on the case, I'm going to highlight a couple of particularly apt chapters of Joanna's book, I'm going to talk briefly about one of my favorite Thai curry dishes. I'm going to explain how all of that's relevant to what we're actually talking about today, finishing with a couple of observations. First, the background under Missouri law, a police agency can issue a dispersal order to a crowd when there is an unlawful assembly under state criminal law. An unlawful assembly exists when there is a group of at least seven persons who agree to violate any criminal law with force or violence. Seven people agreement to violate criminal law with force or violence that creates unlawful assembly, which means the state can issue a dispersal order which then the refusal to disperse can result in arrest. The plaintiffs in this case allege that the Florissant police department was wrongly declaring unlawful assemblies that is declaring unlawful assemblies when there were peaceful protests when you didn't have seven people who are agreeing to violate criminal law by force or violence. And then after declaring wrongfully unlawful assemblies, the police department would arrest people for failing to disperse this, the plaintiffs alleged violated the First Amendment and due process, the defendants moved to dismiss, arguing that the plaintiffs failed to state a claim upon which relief can be granted under 12b6. In chapter three of her book, Joanna talks about what plaintiffs need to survive a motion to dismiss under 12b6. As a reminder, at this stage, we don't have any hard evidence. We just exist in the world of complaint, right? We have allegations. And prior to 2007 a complaint just had to have some enough facts in there to allege that there was I think the word would be conceivable violations. There's some set of facts that would amount to a violation. It's from a case called Conley. In 2007, the Court adopted a different standard. The Court adopted a different standard holding that instead of having some set of facts upon which relief can be granted, the plaintiff had to allege a plausible violation. We'll talk about what that means in a second. That's from Iqbal. And then in 2009, the Court held that the plaintiff must set out facts, not conclusions to establish a plausible violation on Under Trombley, and sometimes that fact, conclusion line makes sense. The existence of Penang curry, one of my favorite Thai dishes is a fact that exists. But whether it's delicious is a conclusion. It is come at me. Sometimes that fact conclusion line breaks down a little bit. For example, if you're served a coconut milk curry, and you're like, Ha, is this Penang curry, that might be effect, or it might be a conclusion. If I have occurred and I say that's a Penang curry. I'm making both a factual statement and also kind of a conclusory statement there. That fact conclusion distinction, as well as the plausible versus conceivable distinction. We're both critically important in the Edwards case. Penang, curry less so. The reality is that different people can view different sets of facts or can view excuse me the same set of facts in very different ways. For more on this see chapter seven of Joanna's book, the trial court and the appellate court in this case, the appellate majority in this case, understood the plaintiffs argument in Edwards to be basically as follows. state criminal law gives police power to issue dispersal orders. When there's an unlawful assembly. There wasn't an unlawful assembly, so they didn't have the power to issue the dispersal order in this case. The problem with that argument, and the allegation that the department exceeded its authority is that there are other aspects of state law beyond the state criminal unlawful assembly statute that would also allow the plant excuse me allow the police department to issue dispersal orders, as both the district court and the Eighth Circuit majority viewed it. The broader authority to issue the dispersal orders meant that just focusing as the plaintiff did on the unlawful assembly statute couldn't establish a plausible violation, because there might have been another way for the city to issue that dispersal order. For there to be a plausible violation the majority held, the plaintiffs would have to establish the facts alleged that under the facts allege there was no basis for a dispersal order, as opposed to there not being this one basis for dispersal order. As the majority put it, quote, the absence of criminal law violations by the protesters does not establish that a

constitutional injury occurred. Make sense, plaintiffs established that there might have been a violation of the dispersal order thing, but of the unlawful assembly statute. But that's not the only possible route for official action. For example, the trial court and the majority both held that if the protesters were obstructing traffic, that would be a valid basis for a dispersal order. And the trial court read the amended complaint in Edwards to basically concede that the protesters were obstructing traffic. It pointed out that in the complaint, the protesters acknowledged painting Black Lives Matter signs on the street, and that officers pushed protesters out of the street. So although misconduct on the part of the officers for the Eighth Circuit majority was conceivable. The majority held that the mere possibility of misconduct is not enough to lay out a plausible violation. And for that reason, it dismissed the complaint over a dissent. Judge Jane Kelly disagreed, arguing in dissent, the existence of potential alternative legal justifications renders an allegation implausible only when that alternative is concrete and obvious. That is, okay. Maybe the city might have had some other reason for the dispersal order. But that's only going to obviate the allegation that there was a First Amendment and due process violation when it's obvious that there was an alternative. And that wasn't the case in Edwards. She argued for two reasons. First, and this should not be a surprise but seems to be in these cases. Courts are supposed to view the facts in the light that most favors the non moving party. Here, the plaintiffs, the trial court read the complaint to concede that protesters were impeding traffic but let's go back to what they did: painted Black Lives Matter in the street and officers push them out of the street. Is there anything about traffic in that statement? There is not. And she pointed out in her dissent. You can't make up Traffic facts that don't actually exist. And if it's a disputed fact that's supposed to go to the non moving party that's supposed to go to the plaintiff here. Second, the existence of an alternative authority that could justify the dispersal order doesn't actually establish in a concrete and obvious way that the city correctly exercised that authority. As Judge Kelley put it, even if, quote, the city could remove protesters who are blocking traffic, that doesn't mean the plaintiffs theory that they did so arbitrarily is implausible. In other words, even if the city of Florissant had some other reason to do what it did, it wasn't concrete and obvious that it did so legally. The plaintiffs allege that the city had issued dispersal orders when there was no legal authority to do so. Judge Kelly pointed out that perhaps the officers had lawful reason to issue the dispersal orders, and perhaps they did not. But that question should survive a motion to dismiss and set up discovery so that it can be litigated, at least at the summary judgment stage, if not further, one more point. I went back to both the complaint and the amended complaint in this case, it was very easy. My case was like 11 pages long. I got the short case of the of this set here. Joanna's is like 89 pages. So I had time to go back to the complaint and amended complaint. And the Eighth Circuit majorities focus is correct. The the plaintiffs were focused primarily on the state's unlawful assembly statute that I mentioned earlier. But there are at least a few statements in the complaint that I think should have satisfied the trial court and the Eighth Circuit majority, even under the standard that they purportedly applied. Paragraph 44 of the amended complaint, for example, was about the police dispersing peaceful protesters standing in enter in an area marked, "designated protest zone," awfully tough to imagine they were impeding traffic in the designated protest zone. Paragraph 46 was about a plaintiff who was "roughly arrested, despite having committed no crime, and posing no danger." I think a fair reading of that at the motion to dismiss stage would suggest that they weren't committing a crime, like impeding traffic, and they were creating no danger, like impeding traffic. So why didn't the trial court or a circuit majority read these facts as a plausible violation? In chapter seven, Joanna points out that the pleading standards don't exist purely in the abstract. And I think that's a really important point. They're applied by judges. And judges can be skeptical about 1983 claims, or Monell claims or Bivens claims for a whole set of reasons. And they're applying their skeptical maybe standards to a particular case in front of them. As Joanna powerfully points out. And as I think this case

may demonstrate, that skepticism, combined with amorphous pleading standards and other factors can effectively insulate police agencies, not just from liability, but from litigation processes, like discovery that can help lawyers and courts get to the merits of a claim.

A Anya Bidwell 33:26

Yeah, that point about the standards being applied by judges, I think we'll come back to this over and over and over during this event and kind of the discretion that they have when they're applying these standards and what they can do with them. Alex, we were all looking at you when we were talking about Iqbal. So I have to go back to you and ask you for your thoughts on this.

A Alex Reinert 33:45

Yeah, I mean, it's an interesting case. And I think it points to the incoherence, fundamental incoherence of the Twombly and Paul standard, and also the way that standard and can be deployed by judges who are hostile to civil rights claims. So let's talk about the incoherence for a second. Really the case is about this distinction between a claim being merely conceivable versus plausible, versus an alternative explanation being more obviously plausible. And so if we were just sitting here and we went out to talk to someone in the street, we ask them, What is plausible mean to you? conceivable would be one of the things that pops into their head. In other words, if something is possible, it's also probably conceivable, but the Supreme Court told us no actually plausible means something more than conceivable more than merely conceivable. And sometimes it also means that if there's an obvious alternative explanation, it can render an otherwise plausible theory implausible. So there's just this incoherence in language. And then what happens is, courts of appeals don't quite know how to apply that. And so some courts of appeals in fact, most courts of appeals would say, yeah, you can have multiple plausible law as long as one of them is consistent with the plaintiffs theory of relief plaintiff survives. And then there are some courts like the Edwards court that says, Well, no. If we think the defendants theory of why they acted lawfully is more plausible than the plaintiff theory, then we're going to say the plaintiffs theory is implausible. And the fundamental problem with that is, that's essentially asking a court at an early stage to assess said before we really know anything about the case to make a fact determination. And why would we think courts are well positioned to do that it gets to Joanna's point in the book about how much judges have a role to play in the civil rights cases. So it gives judges a cover if they're hostile to Section 1983 claims. It gives them a story they can tell they can dress it up in the Supreme Court's language, although I think the Edwards opinion is inconsistent with actually the framework that the court gave us into on the neck ball. And I've written about this in Iqbal and other contexts. So I think I think the Edwards court is wrong as to what it voluntarily mean, but there are enough courts that have applied that reading, that it can be used in civil rights cases, and it has been used in civil rights cases, more than other cases, back to the fundamental problem in civil rights cases is that in most of those cases, the plaintiffs are at a severe informational disadvantage. Compared to defendants, it's generally not true. Unlike contracts cases, it's not true in a lot of torts cases. It's not true in intellectual property cases, it is very much true in most civil rights cases. And so that's why it's a standard that's both incoherent and ripe for deployment by judges who are hostile to civil rights cases.

A Anya Bidwell 36:43

Joanna, in, in your research in general, you talk about how qualified immunity is actually not used in like as many cases as people think it is used to get rid of cases. Right. And I think this kind of speaks to that a little. So this idea of you can actually, you don't need to get to qualified immunity, you can just get rid of a case based on this Twombly and Iqbal standard and the complaint. Can you speak to that a bit?

J Joanna Schwartz 37:09

Yeah, absolutely. So I did research, as I talked about in the book, more more briefly than in the in the, in the academic research. Having looked at almost 1200 police misconduct cases filed across the country, I found that fewer than 4% of cases were dismissed altogether on qualified immunity grounds. And it's consistent with that's consistent with research that Alex did regarding Bivens claims, where he reached a similar result. And some people have read that and Anya and Patrick and I have spent a lot of time talking about how frustrating this is. But I have read that percentage to think that maybe qualified immunity is not so bad. If only 4% of cases are dismissed, but actually, I think it's it's a different set of conclusions to reach from that data. And one conclusion I think you can draw is that qualified immunity ends up dismissing a relatively small percentage of cases, because there are so many other ways that these cases can be dismissed, including the pleading standard. And just to turn it back to qualified immunity, what that ends up meaning is that qualified immunity comes into play and is dispositive in cases that get past all of those other barriers in cases where you are able to plead plausibly are able to show constitutional violation. And so, in my view, qualified immunity, although it was intended to weed out "insubstantial cases" in the Supreme Court's view is is actually weeding out the most substantial cases that couldn't be kicked out of court in any other way.

A Anya Bidwell 39:03

Well, let's talk about weeding out substantial cases. Joanna your case.

J Joanna Schwartz 39:09

My 89 page Case?

A Anya Bidwell 39:12

You have other things to do? No, never. So this was a case an 11th Circuit. En banc case, so is 11 judges on the 11th Circuit heard this this case. It was brought by the plaintiff David Sosa, who worked in research and development of airplane engines for for a couple of companies. He lived in Florida and Martin County, Florida. And he had been arrested twice. This case is about a time that he was arrested because there was an outstanding warrant in Harris County, Texas for a different David Sosa. And as you can imagine, there are a lot of people in our country who's named who with the name David Sosa in 20, in 2014, sorry, but he was he was falsely arrested. He's actually been falsely arrested twice for the same warrant. The first one was in 2014. He was arrested on this outstanding warrant in Harris County. He made clear that his

date of birth, height, weight, social security number, and tattoo information was different than the David Sosa who had the warrant out for his arrest. That first time in 2014, he was held for three hours before they looked at his fingerprints and released him confirming he was the wrong person. But four years later, David Sosa was stopped again, and arrested again, for that same warrant. And even though he said to the arresting officer, this has already happened to me once before. I am not that David Sosa. And even though he knew his date of birth and height and weight, and all the rest, did not match the David Sosa who had a warrant out against him. They continued to hold him and this time they held him for three days before he was released. So he sued, alleging that his substantive due process rights were violated. It was dismissed because it was not a plausibly pled claim. But when it got to the Court of Appeals, the reason why it's 89 pages is that there's four different decisions in this case. I'll talk about three of them. The majority said Sosa's constitutional rights have not been violated. And they they look, they relied on a case. Baker v. MCollan, which is the Supreme Court case that says the Supreme Court has said detention due to a mistaken identity doesn't violate the constitution when it lasts only three days and is pursuant to a valid warrant. So if there is a warrant, it's a valid warrant. You're falsely arrested, and you're held for three days, that does not violate the 14th Amendment. Just let that sink in for a moment. And so the majority says this Baker case is the beginning and end of our analysis, no constitutional violation. The concurrent one of the concurrences disagrees, they say this is slightl different than Baker, he was held, and there was a valid warrant. But he repeatedly declared his innocence. He repeatedly said, I am not the person you are looking for. And said you've done. You've done this, you've mistaken me for this David Sosa before. So according to the concurrence, they thought there could be a constitutional violation. However, the court said, the officer would be entitled to qualified immunity. And this is this doctrine, and they talk about it in just the way that I mentioned before. They said officers should get qualified immunity because you need prior court cases with very, very close facts, to give them reasonable notice of what's prohibited. And although there was another appeals case called Canon, where officers held someone for seven days, and found that a jury could find that that conduct was unconstitutional, because the officer knew or should have known that they had the wrong person. The concurrent said that prior case, Canon can't control because in Canon, the person was held for seven days. And in the Sosa case, they were held for three days. And so the law is not clearly established. You see what you see how crazy this is? So then there is a dissent. One judge of the 11. dissents and it's it's the longest part of the it's the longest part of the 89 pages. And part of what this dissenting judge is spending time on is the horror and ridiculousness of this circumstance that a person going about their lives. Who has done nothing wrong can be arrested not once not, but twice, on a wrongful warrant, let them know that they have the wrong person and still be held for three days. This cannot be the society that we want to live in. And this cannot be what the Constitution means. In the view of the dissenting judge, this is a constitutional violation. And also looking at these same cases, Baker, and this appellate case Canon says that the rights are clearly established. And while the concurrence was focused on the difference between three days in detention versus seven days in detention, what the dissenting judge said was, that can't be the difference of four days can't be what this case turns on. The point that was made in the Canon case. And it's consistent with the Supreme Court's Case as well, is that you cannot keep holding someone when you have good reason to believe that they are the wrong person. And that's what was true in this case. And it shouldn't matter whether he was held for three days or for seven days. Now, I think that this is an interesting set of decisions opinions in this case. And it goes a bit to points that Seth and Alex were just making about judges discretion, and the ways in which judges can exercise that discretion. If you read the Supreme Court and take the Supreme Court seriously, which is difficult sometimes for me to do. It would seem like qualified immunity is a set standard. It's just interpreted one way, the question is, our officers on notice what every officer know that

what he done was wrong. But you can see in the analysis of the concurrence, and the dissent, that they're viewing these prior cases, in different ways you can look at a prior case and see it in a different way. And to the concurrence, the key factor that made the law not clearly established was the fact that he was held so so was held for three days instead of seven, which meant that the candidate the Canon case didn't apply to the dissenting judge. The question is not number of days held. The question is, did the officer have good reason to believe they had the wrong guy? And looking at it in that way, whether they were held for three days or seven days really shouldn't matter? And this is kind of a question to everybody. There is another concurrence by Judge Newsom. And you know, Joanna just talked about how, you have quite a bit of discretion, judges are applying the law. Right. But Judge Newsom is actually saying, There is nothing we can do. Our hands are completely tied. This is what this is the law is, can somebody speak to that kind of framing of the issue?

S Seth Stoughton 48:10

Yeah. So actually, I don't think I said hi to Patrick, this morning. Good morning. I'm going to disagree with something that you said very early on, but I liked that suit. So Patrick, in his in his opening remarks talked about police being above the law. I think that's the wrong framing here. Right. It's not that they're above the law, because if they were above the law, we would just need to better enforce the laws that we currently have. The problem is, this is perfectly consistent with the law. The law creates the immunities that police enjoy that inhibit accountability as a normative statement. I completely agree we have an above the law issue, but descriptively No, actually, I can see where Judge Newsom is coming from. And one of the observations here is kind of a heads, I win tails, you lose situation, right? If we if we go back to the plausible standard, right? Well, if there's a plausible explanation for what the police did, then then there's no plausible violation so we can dismiss. But when we're talking about the Fourth Amendment and probable cause, like probable cause, that this guy may be that David Sosa the plausible explanation he's not doesn't matter anymore. Right. When we talk about clearly established the plausible idea, the plausible argument that this is clearly established, or at least, that there's a plausible claim to know that you shouldn't be detaining this guy anymore. What's not even getting into three days. Let's talk about the first 45 minutes right Oh, wow. He's a different shape and has a different social security number and tattoos are different. That implausibility breaks down a little bit, we need a very, very close case. Well, that sounds like the opposite side of implausible or or plausible to me.

A Anya Bidwell 50:09

Carlos, I know you wanted to add something.

C Carlos Manuel Vazquez 50:11

On the point that on your raised about judicial humility, this is the law, we just apply the law. We don't make the law. We're humble judges, it's for the legislature to make the law. I think that will be a theme when I talk about the Bivens action in a moment. But I think that's crazy in and belied by the courts, attitude towards other doctrines. For example, qualified immunity

appears in no statute. It is made up by the judges. So the judges have no compunction about making law in certain contexts, but they they claim to be unable to make law in other circumstances.

A Alex Reinert 51:01

Can I make one other point about Judge Newsom? concurrence, which is, he has this discussion of substantive due process, right, and assault on substantive due process. And in the assault, and this is becoming, I'm seeing this more frequently with folks who are attacking substantive process, he trots out this line about Dred Scott, and says, Oh, by the way, if you like substantive due process, see Dred Scott, our first substantive due process case, that a case that said free, black people couldn't be citizens couldn't be US citizens the case that essentially constitutionalized slavery. At the same time, he ignores the fact that Dred Scott is also an originalist decision. And part of his critique of substantive due process is that it does not hew to the original text of the Constitution. And I just feel like, if you're going to use Dred Scott to attack substitute process, then you cannot at the same time, elevate originalism as if somehow it's something to be to be to be treasured, given the Dred Scott is both of those things. So that's also something I'd like to say about Judge Newsom's concurrence, which is not, it is not an example of judicial humility, that's for sure.

A Anya Bidwell 52:16

She uses he has this sentence in his concurrence that says, "not everything that stinks violates the Constitution." Given the horrible facts of this case, including that the warrant was like a 22 year old warrant, right, and that it would have taken the government officials about a minute to actually check the identity of this individual. Can you speak to this idea that not everything that stinks violates the Constitution, and somehow this case is one of those stinky cases? That doesnt.

J Joanna Schwartz 52:55

I think you can use that line of reasoning. You can see in a number of substantive due process cases, which, you know, can get sometimes referred to as sort of a catch all, I think, in his opinion, as well, sort of a catch all, protection of substantive due process. Where something just seems wrong. And, and in the beginning, in the years after Monroe v.Pape, part of courts, concerns. And by the way, there were the same concerns that were raised. In 1871, when the Ku Klux Klan Act, or Section 1983 was first passed, there was this concern that people would go into court with nickel and dime claims, and in fact, they use this sort of this language. A case could be worth only $5 or five cents, but still end up in federal court. If you could try to hang some sort of constitutional violation on the conduct. And the pushback was a concern, I think about frivolous cases, about cases clogging the courts. And this notion that we shouldn't expect the constitution to protect everything. Of course, the Sosa case is not a nickel and dime case being held in jail for three days. On on a on a wrongful arrest. Seems like it is not that kind of that kind of nickel and dime frivolous case. But But I do think that that is some of the animating concerns that have led courts to police the balance of substantive due process.

S Seth Stoughton 54:48

Sometimes I think there's a some tension when the court is talking about well we have to only make sure that really serious stuff gets the benefit of constitutional protections. And that that seems to me to flip the issues in a number of ways. And it's in due process. It's in fourth amendment claims. It's in the use of force context, not every shove, will violate the Fourth Amendment right. But sometimes I think the court and the lower courts get confused about the difference between the importance of being in federal court, and the importance of constitutional protections. If you have a right to not be locked up, then you have a right to not be locked up. Even if you're locked up for five minutes. Shouldn't that violate the Constitution? Why doesn't that shove violate the Constitution? Right? The Constitution in our system limits government authority. So why do we need a huge excessive force claim or something that goes way beyond government authority to get to the point of saying that's a constitutional violation? I think sometimes the reason is not actually looking at the constitutional protections. It's really looking more at well, we want to keep federal court for serious stuff.

A Anya Bidwell 56:10

So far, we talked about cases that were filed under Section 1983. Right, and Monroe versus Pape is the brown groundbreaking case with regard to this amazing civil rights statute. But what about cases where you can't file under Section 1983? Or where you don't want to fall under Section 1983? What about cases where you just want to basically say, Constitution gives me this right, this right was violated. So I want to see directly under the Constitution. The next two cases that we will talk about speaks speaks specifically to that idea of being able to sue directly under the Constitution, whether it's federal constitution or state constitution. We'll start with Carlos and Alex has, a case that very much speaks to that advocate. So let's just get going on this and kind of contrast the two.

C Carlos Manuel Vazquez 57:03

Thank you. First of all, I want to congratulate Joanna on a wonderful book. It's a it's really an enjoyable read, and very valuable. And it really brings to life the cases that I've been teaching for so many years, in a much more boring way. So I think my teaching of those cases will change significantly based on my reading of this book. So, as Anya said, this case involves a suit against a federal official, and there's no statute like section 1983 that authorizes remedy against federal officials who violate the constitution. So bad as the situation is of persons who are injured by state officials, I would venture to say that the situation of persons injured by federal officials is even worse, because even though state officials enjoy a qualified immunity, I think as the case that I'll be describing in a moment indicates federal officials have an absolute immunity. Basically, the court doesn't put it that way. But I think the holdings in these cases basically establish that. So how did we get here, so there is no statutory basis for suing and getting damages against federal officials who violate the constitution. For many years, you could sue them under the common law and get damages. But in 1971, the court in the Bivens case Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, the Court recognized that there is a remedy implicit in the Constitution itself. And so you could bring a claim, basically, based upon the Constitution and so Bibbins the facts of Bibbins were very similar to the facts of Monroe v. Pape, Fourth Amendment violation. The federal officials entered his home without a warrant and did many unconstitutional things. The the court held that Bivens could sue directly under the Constitution. And in two later cases, Davis v. Passman.

And Carlson v.. Green, the court expanded this or applied Bibbins to two different contexts. But soon after that, the Court began cutting back on the Bivens remedy to the point where it today the Court has said that recognizing causes of action under the Constitution is a disfavored activity. And, and the court basically, it hasn't overruled Bivens. But I, I would say that it has virtually limited Bivens to its facts, and we'll see how that that operates as applied by by the court in this case, and why has it done this because of the belief that it is up to Congress to establish remedies. This is an act of legislation. The Bivens case the court has indicated, was an improper act of judicial legislation. And that is the courts concern. As I mentioned a moment ago, though, the court doesn't have the same concern about making law that takes away your right to a remedy or limits your right to a remedy such as through doctrines like qualified immunity. So what about this case, the case Pettibone v. Russell also grows out of the protests that occurred after the murder of George Floyd in the summer of 2020. In this case, it was protests in Portland, Oregon. And the plaintiff was a participant in the in those protests other there were other plaintiffs as well as, as well as the Black Millennial Movement and organization and Rossetti justice and other organizations. So there were a number of plaintiffs Pettibone was just the principal one. And their allegation, they sued a number of officials, including among them, an official named Russell, who was the Director of the Federal Protective Services, Northwest region, was an presumably still is.

A Anya Bidwell 1:01:31

Because very rarely does anything happen in terms of employment consequences to these guys.

C Carlos Manuel Vazquez 1:01:38

So the allegations were that Russell, and the other defendants violated the Fourth Amendment through unlawful arrest and excessive force. And specifically, the allegation was that they indiscriminately used violent tactics on unlawful protesters, including by shooting them in the head and body with impact munitions and pepper balls, spraying them directly in the face with pepper spray, shoving them to the ground, hitting and beating them with batons, and firing massive clouds of tear gas at them. So this was the allegation against all the officials and specifically, Russell it was alleged, was aware of that this was going on was closely monitoring the situation, yet did nothing to stop it. So the court in this appellate decision was reviewing a state lower court decision, which recognized that there was a Bivens action for this, and found that the qualified immunity did not protect the officials that this was a violation of law. But the appellate court reversed, it didn't even touch, consider qualified immunity, because it held that there is no Bivens action on these facts. So notice that the decision assumes that these facts are true. It also assumes that these facts violate the constitution that the acts of the defendants violate the Constitution, what the Court held was, even if it violated the Constitution, there is no right of action for damages against these officials. So why, I mean, Bivens did recognize a cause of action of under the Fourth Amendment. That was is based directly on the Constitution. Why was there no cause of action here? Well, the court applied very recent holdings, which basically limit Bivens to its facts. So the courts analysis is two steps. First, does this case presents a new context for Bibbins? In other words, would this be an expansion of Bivens? Beyond the narrow facts of that case, and practically anything will render this a new context, even the most minor differences? So for example, here, the court said, The this is a new context, because the defendant was a higher level higher ranking official. In the

Bivens case, the defendants were street level officials of the Federal Bureau of Narcotics. In this case, it's a supervisory official, so it's a higher level, the and the claim is that they that he failed to do something he didn't actually do the the assaults himself, he just failed to properly supervise them. This was the main difference between the ovens on this case, and that was enough to make this a new context. So if this is a new context, what's the analysis then the analysis then is is there any reason to hesitate to recognize a Bivens action? The this was language that the court did use and lends itself but the court has been applying it more and more stringently. And, and most importantly, the court has been applying this reason for hesitation standard in a way that practically makes makes it always satisfied, because the court is very much of the view that it is improper for the courts to recognize a big transaction, it is a matter for the legislature. And therefore, it views any judicial recognition of a damage remedy to be basically a reason to hesitate. I mean, this is this may be going too far in the court in this case, did find reasons for hesitation that were that were beyond simply that it's an improper, you know, an improper thing for the courts to be doing. But the the courts holding shows that there's not much that you need to show to that there's a reason for hesitation.

A Anya Bidwell 1:06:08

What is the alternative remedy that the court set is available.

C Carlos Manuel Vazquez 1:06:12

So one of the reasons for hesitation is that there was an alternative remedy. But the alternative remedy was a grievance procedure within the Department of Homeland Security. But notice that this grievance procedure doesn't entitle you to damages, it, at best leads to an investigation of the conduct. But the court found that even so that's enough of a reason to hesitate. It's an alternative way to get some sort of review of this conduct. And you don't need damages after all.

A Alex Reinert 1:06:55

Well, so it's just you know, so this is just such a classic example of what I think lower courts are doing in response to the Supreme Court's law since 1980. hostility to Bivens actions, which is progressively every single case since 1980, the Supreme Court has refused to find a Bivens remedy in any context, lots of different reasons. And over time, the reason has changed and just gotten more and more hostile. And so I think, but yet the supreme court hasn't overruled Bivens hasn't overruled Carlson has overruled Davis, the three essentially 1970s cases in which the Supreme Court said yes, there's a remedy for a violation of the Fourth Amendment. Yes, there's a violation there for the remedy for a violation of the Eighth Amendment. And yes, there's a remedy for a violation of essentially equal protection. And so on one hand, the Supreme Court's gotten increasingly hostile, and made it very, very difficult. On the other hand, they haven't overruled those decisions. And I think what lower courts are doing are basically acting as if the Supreme Court has overruled Bivens. And they don't have to worry, because they're going to find some reason not to extend a remedy against federal officials who violate the Constitution. And they know the Supreme Court is not going to take cert, it's not going to do anything about it. And just slowly, progressively, they're gonna let the lower courts do all

this work, even though they're not willing to take the step or at least there doesn't yet seem to be enough momentum in the court to take the step to actually formally overrule them. And so I think that's, that's Eggbert.

A Anya Bidwell 1:08:33

Yeah, thats Eggbert. an IJ case in the Fifth Circuit, where essentially, it was nothing other than absolute immunity, but the Supreme Court didn't want to take it.

A Alex Reinert 1:08:43

Even in Minneci v. Pollard it was what 2010? Is that right around there? So even Minneci v. Pollard there was language in the Supreme Court about an alternative remedy for it to suffice, it has to offer comparable prospects of deterrence and comparable prospects of compensation. And then we get to this decision. And an alternative remedy is filing a grievance within DHS offering no prospect of deterrence and no prospect of compensation and zip Minneci, which was a case that was hostile to Bivens. We're just going to ignore it, and the Supreme Court is not going to do anything about it. Does that sound right to you, Carlos?

C Carlos Manuel Vazquez 1:09:25

Absolutely. I think you could probably possibly describe Bivens as a dead case walking in the sense that it's, you know, it's being confined to its facts, as the courts are interpreting and applying the the Supreme Court's more recent cases, and it's obvious that the court has said it wouldn't rule it wouldn't decide Bivens the same way today, right?

A Alex Reinert 1:09:48

Well, it said we might not decide it the same way. Right. And lower courts are taking that and saying it means the Supreme Court wouldn't decide it the same way. So I mean, it's all

A Anya Bidwell 1:09:56

And as a result in the Ninth Circuit, which is considered to be relatively friendly to claims like this. Right?

C Carlos Manuel Vazquez 1:10:03

Yeah, this was a Ninth Circuit case. Let me just say one. One thing, very law professor ething. I just think the idea that this is that the issue of recognizing damages for violation of the Constitution is for Congress, as opposed to the courts is just completely wrong at it. I mean, I think there's a very strong structural reason to prefer the courts as the branch to recognize these remedies. I mean, after all, what is the job of federal officials? It's to enforce the laws that Congress enacts. And what does the Constitution do, it places limits on what the executive

officials can do to enforce the laws that Congress enacts. And so Congress is likely to be very happy with under enforcing the constitutional limits, thus unhampering the federal officials in their enforcement of the laws that Congress passed. So I think there's a there's a reason to be suspicious of Congress's of placing the responsibility on Congress to determine when there should be damaged remedies against federal officials. I think, you know, cases going back to Marbury vs. Madison or support the notion that it is for the courts to protect the Constitution, and I would say that includes recognizing remedies for violation of the Constitution.

A Anya Bidwell 1:11:32

That's well said. And we're going to transition to the case where there is actually a remedy under the Constitution in Nevada. But before we go there, I want one of you to tell me whether plaintiffs in the Ninth Circuit, suing federal officials would have been able to go to state court and tried to do it there. Alex.

A Alex Reinert 1:11:52

So you mean, could they have gone to sue federal officials in state court for violations of the federal constitution? I don't think it would have been any more effective, they could have gone to sue state officials for violations of the state constitution, but I don't think they would have done any better in state court under the federal constitution.

A Anya Bidwell 1:12:10

And I want really to pause on that, because when we're talking about state and local officials, we're talking about lawyers actually choosing where to go under state law or federal law and being able to make that choice. But when we talk about federal officials, including federal police, you can't go to federal courts.

A Alex Reinert 1:12:29

You can't go to federal court can't go to state court.

C Carlos Manuel Vazquez 1:12:31

So on that point, I mean, now, as I mentioned before, Bivens, there was a long history of enforcing the Constitution through the common law. And so at that point, you probably could go to state court to bring a common law action for violation of the Constitution. But Congress enacted a law the Westfall Act, which takes away preempts state causes of action. Under the Constitution. I actually might the article that you mentioned that I co wrote with Steven Vladeck, argues that they meant to preserve common law, common law actions against federal officials who violate the constitution. The statute takes away common law actions against federal officials but preserves suits for enforcement of the Constitution. And that has been interpreted as preserving Bivens claims, and there's no Bivens essentially, but I think the language is consistent with preserving common law claims for violation of the Constitution. But

unfortunately, the Supreme Court has gone in a different direction on that point. So what we have now is arguably worse than before Bivens, right, because Bivens itself has been deprived of its teeth, as has been limited, practically limited to its facts. And now we don't even half state common law remedies for violation of the Constitution. So in a sense, the recent cases take a step back. And finally the the statute preserves Bivens. But yet, the court has been interpreting Bivens more and more narrowly. I think one could interpret the Westfall Act as as a legislative blessing of the transaction, and therefore the courts had stopped cutting back on it but the court has not done that.

A Alex Reinert 1:14:27

That is exactly the argument that Pfander and Baltmanis make and Georgetown Law Review piece.

S Seth Stoughton 1:14:38

When we're talking about federal law enforcement, right, one possible response is well, how concerned about that should we be given that most of policing is state and even more so local, but there are intertwined, almost every agency certainly every agency of size has off officers who are serving on federal task forces who can for the sake of litigation convenience, be designated as Federal Officers and thus, immune potentially to state criminal law. While they're engaged in Task Force operations, the federal law enforcement apparatus is actually far larger than it looks based on the number of full time federal employees. Because of the the number of task forces, there are a on.

A Alex Reinert 1:15:28

So we're talking about Mack, let's do it. Alright. So we saved the good news for last. And I get to deliver it maybe because Anya feels bad that every time she has to introduce me or anytime that I'm introduced at any conference, having anything to do with anything, it has to be mentioned that I argued Ashcroft versus Iqbal for the losing side in a five v. four decision. So this is, you know, some. So there's some I don't know, I'm just not totally retributive completely. So. So this Mack v. Williams is an example, I think, of what can happen in an implied rights of action setting where you start from completely different presumptions, then we start on the Bivens side. So this is a case involving Sonjia Mack, who was went to high desert state prison in Nevada to visit her boyfriend. And she alleges that she was stripped searched there, and without reasonable suspicion. And after the search, they suspended her visiting privileges indefinitely. And, I go to a lot of prisons and jails I have been most of my life as a lawyer, I've represented incarcerated people. And the ability to visit somebody in prison cannot be overstated how important that is to both the family outside and also to the incarcerated person. And so both the strip search and also the indefinite suspension of visiting from a personal perspective, I think, is incredibly important to pause and think about what that means for Ms. Mack and for her her loved one her boyfriend, she brought claims in in federal court under the federal constitution and under Nevada State Constitution. And then the Federal District Court did something I think that's relatively unusual, which is it's certified to Nevada Supreme Court that it it said to the Nevada Supreme Court that There's a question of state law we want you to answer for us before we proceed here. And the question of state law that we

want you to answer for us is four questions. One, does the state constitution create a cause of action under Article One, Section Eight of Nevada's constitution, which is essentially the the analog to the due process clause? Second, does it does the state constitution create a cause of action under Article One, Section 18, which is essentially the analog to the Fourth Amendment search and seizure? If it does, are there any defenses to those causes of action? And if it does, what remedies exist for those causes of action? So the first thing that about Nevada court said is we're actually going to answer the questions we want to answer not the questions you want us to answer. We're not going to answer the due process question because we don't have enough facts. And we don't we think we just would be essentially giving you an advisory opinion. And so we're just going to answer the Article One Section 18 question, which is about search and seizure. And then it says, as to defenses and remedies, we're only going to answer two questions. One is does qualified immunity exist? Because that's the only defense that the defendants have raised. So we're not going to talk about other potential defenses. And as to remedy, we're just going to answer the question as to whether or not there's a damages remedy, because that's all Ms. Mack is seeking. By the way, that's all probably she could seek probably because of other limitations that Joanna talks about in her book regarding our ability to get federal courts to say something in the future about what what future conduct government officials can engage in. So anyway, so they say, Okay, let's, let's answer this question. Let's start with a cause of action. And they actually start in a place that is so different from where we start on the federal side, they say, look, Nevada's constitution, it's self executing, we don't need legislation to enforce the constitutional rights. It gives rise to a cause of action by virtue of its existence, regardless of legislative action. So that's actually that's just the easy answer. We've got a constitution, it gives us rights. It's self executing, there's a cause of action. The remedial question is harder. That is, just because there's a cause of action doesn't mean damages is the remedy. And so for that, the court looked to a few things that ultimately adopts a three step analysis, but at the start, it says Bivens, this federal pressing around Bivens it's sort of rare. event but not really that relevant. There's this. There's this language. Here's the quote. Thus, we do not view the question before us as simply a battle between judicial and legislative competence, which is exactly what Carlos was talking about what was driving Pettibone and all of the Bivens jurisprudence. Accordingly, the Bivens decision and its progeny did not by themselves, resolve whether Mack may have search and seizure rights under our Constitution by a private action for money damages. So they say that Bivens is only so relevant, especially the the worry that federal courts have over judicial versus legislative competence really not relevant for us. And so here's the three steps. One is we look to the text of the Constitution to see if we can see anything discern anything in the text that tells us whether there's a damages action. If that doesn't help us, we go to the second step, which actually looks to this body of law, from Restatement of Torts, looking to whether a damages action would further the purpose of the constitutional provision, and whether it's needed to assure that that provision is effective. And then step three, they say, is a special factors analysis, they actually use the language special factors. And so it looks on its face like it's similar to the given special factors analysis, and it's nothing like it in application. And again, they say, we're going to use special factors, but we're not going to use the Supreme Court's version of special factors. So how it's applied here, they go to the text first, and this language is hilarious to me. Because they have to figure out whether the constitutional provision actually tells us on its text, whether or not there's a there's a damages action. Here's what it says Article One, Section 18, quote, unambiguously does not explicitly authorize a right of action for money damages. However, it unambiguously does not explicitly preclude a right of action for money damages either. In other words, it unambiguously says nothing. It is unambiguously ambiguous. So awesome. And, and also they say, the fact that the legislature hasn't taken action here, it doesn't really tell us much because of legislation. Remember, the Constitution is self executing, the legislation doesn't have to do anything. So the fact that they haven't done

anything, we're not going to infer in the Bivens context, a very different inference is drawn from legislative silence. And by the way, the legislature doesn't even have exclusive power to enforce the Constitution because we still have that power, again, contrast to the federal Bivens jurisprudence. So we learn nothing from step one. So we go to step two. And here, the court says, We've got to decide whether providing a damages remedy furthers the purpose of the provision, is it necessary to effectuate the provision? And so we've got to think about alternative remedies. And so again, they use the language of alternative remedies, which we also use in the Bivens federal context, but they they they mean something so different. They start by saying the legislature hasn't created created any alternative remedies for violations of the Constitution. Like that's what they're looking for an alternative remedy for a violation of the Constitution. Yeah, there's a grievance procedure, not a grievance procedure, not not not an alternative tort claim remedy. Right. Is there something specific the legislature has done to enforce the Constitution the fact that there's equitable relief doesn't work because it doesn't address past wrongs. Contrast that with Bivens, where some courts have said equitable relief is an alternative remedy. The fact that there are state law tort claims that is you can bring state common law tort claims here also doesn't solve the problem because the Constitution protects something special constitution isn't just about private law, tort obligations. It's almost like Bibbins lives, but the 1971 version of Bibbins lives right.

A Anya Bidwell 1:23:57

Except for federal officials.

A Alex Reinert 1:24:05

So applying these restatement factors, monetary relief is important. It's necessary. And then they get to special factors. And they list a bunch of special factors, which look again, a bit like the special factors that federal courts will talk about in the Bivens context. They talk about deference to legislative judgment, avoidance of adverse policy consequences, considerations of the FISC of governmental fiscal, fiscal policy, practical issues and judicial competence. But when they apply it, again, it is so different from what we see in the federal Bivens content. So deference to legislative judgment, there's nothing to defer to the legislature hasn't done anything, so we don't have to defer to them. Okay. No policy consequences, because guess what, the government already has to abide by this constitutional provision. Oh, my God, what a concept. Like we're not doing we're not really doing anything special because there's a constitution that the government has to follow.

C Carlos Manuel Vazquez 1:25:00

Right and contrast that with Pettibone. Where the court says, if we recognize the Bivens action, we will impair the freedom of the executive branch.

A Alex Reinert 1:25:10

To violate the Constitution, right? What's that? You know, no significant fiscal consequences, because there's already liability for torts, which also would be true on the on the federal side of things, and no new burdens on courts. You know, that because courts already are adjudicating

things, and no new burdens on courts. You know, that because courts already are adjudicating the Constitution in equitable claims. And another claim, so if you took this analysis, and you applied it to Pettibone, you'd come out completely the opposite way. And so they do talk about qualified immunity at the end And they say we're disposing of qualified immunity, because the state has already waived its sovereign immunity. And we read that waiver broadly. And there's nothing in that waiver that says anything about qualified immunity, so as to defenses, no qualified immunity. So so it's just I think, at the end of the day, really an example of where you can end up in if you start with completely different presumptions about rule of law about obligations of state officers, to follow the Constitution and about the role of courts to enforce the Constitution.

C Carlos Manuel Vazquez 1:26:15

I think this is a great case. I should say, court cases on on similar issues to Bivens and this decision, the analysis is what I have been arguing in my Bivens scholarship is the right analysis. It even cites Marbury vs. Madison. And just to add one thing is, the court doesn't assume that it's the legislature's responsibility to create remedies. To the contrary, it has a footnote where it explains that if the legislature limits remedies that might be unconstitutional, which I think is significant, and I think should be the case in the federal arena as well.

A Anya Bidwell 1:27:05

Seth, let's go to you, and then we'll wrap up with Joanna.

S Seth Stoughton 1:27:08

I just want to focus on one piece of Mack because there are a bunch of really interesting pieces to it. But for me, I've done a little bit of looking at state tort claims acts and a number of states just view those as establishing causes of action for constitutional torts. And one of the interesting aspects to Mack to me is they reject that approach so hard. The this is on page 23 and 24 of the opinion. They say tort remedies do not provide meaningful recourse for violations of constitutional rights against searches and seizures by government agents. As state tort law ultimately protects and serves different interests than constitutional guarantees, a state actors legal obligation under a state constitution, ,"extends far beyond that of his or her fellow citizens", "under tort law, accordingly, a state actor is not only required to respect the rights of other citizens," a la tort I guess, "but also sworn to protect and defend those rights." And that's so incredibly impactful. Right. It's back to the point about this is not just a right to be free from indignity or right to be free of, you know, being tortuously touched. This is a constitutional right, your protection against the state is meaningfully different than your protection against non state actors. I think that's at the basis of a bunch of what constitutional law should be. And I just found that paragraph like I read that paragraph like nine times.

A Anya Bidwell 1:28:44

I'm getting goosebumps.

S Seth Stoughton 1:28:46

That's a good paragraph. It's one of several, but that's the one I wanted to point out.

A Anya Bidwell 1:28:50

Joanna, and that really goes back to this whole idea of vindication of constitutional rights. That's what you talk about in your book. So can you kind of rub it all off? And by the way, for the record, the audience listening at home will know this, but we have a lot of windows and it was kind of dark, because the word clouds and then all of a sudden Alex started talking about Mack and sun came out and now it's just beautiful blue skies.